The University of the State of New York

The State Education Department
State Review Officer
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No. 24-183

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 Ezra Zonana, 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 ordered respondent (the district) to fund the costs of his son's private services delivered by EdZone, LLC (EdZone) for the 2023-24 school year but without specifying the rate therefor. The district cross-appeals from the IHO's decision to the extent it did not order the district to fund services at the rate proposed by the district and ordered the district to fund private related services. The appeal must be sustained in part. The cross-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). 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 in detail here.

A CSE convened on November 14, 2022, found the student eligible for special education as a student with an other health impairment, and developed an IESP for the student with an implementation date of November 21, 2022 (Dist. Ex. 2 at pp. 1, 16-17, 20). The IESP indicated that the student was then in second grade attending a religious nonpublic school and had received diagnoses of attention deficit hyperactivity disorder (ADHD) and a medical condition that caused involuntary movements and noises (id. at p. 1). The IESP noted that those diagnoses impacted the student's ability to function in the classroom and ability to learn (id.). The CSE recommended that the student receive five periods of group special education teacher support services (SETSS) per week with one 30-minute session of individual counseling per week, one 30-minute session of group counseling per week, and three 30-minute sessions of individual occupational therapy (OT) per week (id. at p. 16-17).

In letter dated May 30, 2023, the parent provided notice to the district of his intent to place the student in a religious nonpublic school for the 2023-24 school year at his own expense (Parent Ex. D). The parent requested that the district provide educational services to the student pursuant to Education Law § 3602-c(c) (id.).

In a prior written notice dated June 6, 2023, the district indicated that it had received a request to re-evaluate the student and that it agreed to the request (Dist. Ex. 3 at p. 1).[1] The district indicated that it would conduct a psychoeducational assessment and a social history update (id. at p. 2).

On July 16, 2023 the parent signed a "payment agreement" with EdZone for the delivery of educational services to the student during the 2023-24 school year (see Parent Ex. E).[2] An addendum to the agreement indicated that the student would receive services for the 2023-24 school year "in accordance with the last agreed upon" program for the student set forth in an individualized education program (IEP), IESP, agreement, or decision, and listed hourly rates for certain services (id. at p. 3).

A CSE convened on July 26, 2023, found the student eligible for special education as a student with a speech or language impairment, and developed an IESP for the student for the 2023-24 school year (Dist. Ex. 4 at pp. 1, 14-16, 19).[3, 4] The IESP reflects that the CSE met to consider the reevaluation of the student and whether the student needed a paraprofessional (id. at p. 1). The CSE recommended that the student receive eight periods of group SETSS per week with one 30-minute session of individual counseling per week, one 30-minute session of group counseling per

[1] According to the prior written notice, the letter requesting a re-evaluation was dated May 31, 2023 (Dist. Ex. 3 at p. 2).

[2] EdZone is a limited liability company and is not approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

[3] The hearing record includes two copies of the July 2023 IESP (compare Parent Ex. B, with Dist. Ex. 4). For purposes of this decision, only the district exhibit is cited.

[4] The student's eligibility for special education as a student with a speech or language impairment for the 2023-24 school year is not in dispute (see 34 CFR 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

week, and three 30-minute sessions of individual OT per week (id. at pp. 14-16). Additionally, the CSE recommended an individual full-time paraprofessional for the student for behavioral support (id. at p. 16).[5]

In a letter dated August 22, 2023, the parent, through Prime Advocacy, informed the district that it had failed to assign a provider to deliver the student his mandated services for the 2023-24 school year (Parent Ex. C). The parent requested that the district fulfill the mandate, but notified the district that, if it failed to do so, the parent "w[ould] be compelled to unilaterally obtain mandated services through a private agency at an enhanced market rate" (id.).

A. Due Process Complaint Notice

In a due process complaint notice dated September 5, 2023, the parent, through an attorney with Prime Advocacy, alleged that the district denied the student a free appropriate public education (FAPE) and/or equitable services under State law for the 2023-24 school year (Parent Ex. A at p. 1).[6] The parent contended that the district failed to convene a CSE prior to the start of the 2023-24 extended school year and failed to supply providers to implement services under the prior IESP (id. at p. 2). The parent alleged that he notified the district of his intention to take unilateral action to implement the necessary services through his own providers, at the enhanced rate (id. at pp. 2-3). For relief, the parent requested a declaration that the district failed to provide the student with a FAPE as well as equitable services and an order requiring the district to fund services delivered by a private "provider/agency" at an enhanced rate (id.). The parent also requested a bank of compensatory education services to make-up for any mandated services not provided by the district (id.).

B. Impartial Hearing Officer Decision

An impartial hearing convened before the Office of Administrative Trials and Hearings (OATH) on January 8, 2024 and concluded on February 28, 2024, after three days of proceedings (see Tr. pp. 1-129).

In a decision dated April 2, 2024, the IHO noted that the district did not oppose the services being requested by the parent and that the only dispute between the parties was the rate for services (IHO Decision at pp. 2, 5). The IHO held that, since the district did not present a "prima facia case," it did not meet its burden to prove that it offered the student a FAPE for the 2023-24 school year (id. at p. 2). Regarding the appropriateness of services, the IHO found that the testimony presented by the parent and parent witness was credible (id. at p. 3). Further, the IHO noted that the district did not disagree with the appropriateness of the program presented by the parents and that the record established that the services provided for the student "were reasonably calculated

[5] In a prior written notice to the parent, dated July 26, 2023, the district summarized the recommendations of the July 2023 CSE (see Dist. Ex. 5).

[6] The parent requested pendency services based on the last agreed upon IESP dated July 26, 2023 (Parent Ex. A at p. 2). The parent asserted pendency services consisted of group SETSS eight times per week, one 30-minute session of individual counseling services per week, one 30-minute session of group counseling services per week, three 30-minute sessions of individual OT per week, and a full-time daily behavior support paraprofessional (id. at p. 3).

to enable him to receive educational benefit and make progress, and met his unique needs" (id.). The IHO held "that the equities favor[ed] the District's responsibility for payment for the services which it was required to provide" (id.).

As to the rate for services, the IHO found that the report conducted by the American Institutes for Research (AIR report) offered into evidence by the district did not support the district's argument the rate sought by the parent should be reduced (IHO Decision at p. 4). The IHO held that she did not receive sufficient evidence from either party to determine the appropriate rate; therefore, she indicated she would rely on the district's implementation unit, which the IHO believed had the means to make such a determination (id.). The IHO ordered the district to fund eight periods of SETSS per week by a duly licensed professional and a daily full-time behavior support paraprofessional, to be directly paid to the providers chosen by the parent for the amount outstanding and/or reimbursed to the parent at reasonable market rate no lower than the highest market rate paid to that provider in the last 12 months (id. at p. 5). Moreover, the IHO ordered that, if the district did not provide the related services of OT and counseling within 30 days of the order, that the parent could find her own providers, which the district would be required to pay at reasonable market rate (id.).

IV. Appeal for State-Level Review

The parent appeals and the district cross-appeals. The parent argues that the IHO erred by failing to order the district to fund the unilaterally-obtained services from EdZone at the contracted rate when the district failed to submit relevant evidence or present a witness. The parent contends that the IHO correctly held that the study presented by the district was irrelevant as it failed to substantiate their claim for a reduction in rate. The parent contends that the IHO gave no reason as to why the market rate was appropriate and that, without relevant evidence from the district, the contract should be adhered to. The parent argues that the IHO erred in stating the parent did not submit sufficient evidence relating to the rate for the providers. The parent asserts that she provided a witness from the agency that was providing services to the student explaining the rates charged. Additionally, the parent contends the contract demonstrates the rate sought and that the parent is financially obligated to pay for those services. The parent argues that the IHO erred in relying on the district's implementation unit because that unit was "uniformly and unjustly" applying $125 per hour for SETSS services.[7] The parent contends that the rate paid by the implementation unit is not market driven. The parent asserts that the SRO has found that an IHO cannot arbitrarily set his or her own rate and the district should be held to the same standard.

[7] The parent submits additional evidence with his request for review (see SRO Exs. A; B). SRO Exhibit B is already in the hearing record as District Exhibit 7. SRO Exhibit A is five pages of emails between the parent's representative and the district's implementation unit dated from March 4, 2024 to April 2, 2024. Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an impartial hearing officer'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 the Dep't of Educ., Appeal No. 08-024; Application of a Student with a Disability, Appeal No. 08-003; Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 06-040; Application of a Child with a Disability, Appeal No. 05-080; Application of a Child with a Disability, Appeal No. 05-068; Application of the Bd. of Educ., Appeal No. 04-068). Here, although the emails were not available at the time of the impartial hearing, for reasons discussed below, they are unnecessary to render a decision in this matter and will not be considered.

Therefore, the parent contends that the IHO's order for the district to fund services at market rate was "extremely prejudicial" to the parent. The parent requests that the SRO order the contract rate for SETSS and paraprofessional services.

In its answer with cross appeal, the district counters that the SRO does not have jurisdiction regarding the parent's arguments on appeal. The district contends that the parent is asserting that the district's implementation unit will not properly implement the IHO's order. The district asserts that, whether the implementation unit will implement the order as written is not a question that is properly brought before an SRO and the parent needs to take the claim to federal court. The district notes that the IHO ordered a reasonable market rate based on a rate "no lower than the highest rate paid" to the provider and that the parent has no reason to believe the implementation unit would fail to implement the order as written. The district cross-appeals the IHO's finding that the AIR report did not demonstrate that the rates charged by EdZone for services were excessive. The district argues that the report was not based solely on district employees and was applicable to SETSS rates. The district contends that the IHO should have credited the report and awarded a rate of $125 per hour for SETSS. The district argues that the report is objective evidence of market rates for SETSS. Moreover, the district notes that the IESP provided for group SETSS and the parent contracted for 1:1 SETSS and argues that, therefore, should the contracted rate be ordered, the amount should be limited to $148, which was the contracted rate for group SETSS.

The district also cross-appeals the IHO's order for funding for related services. The district argues that, at the impartial hearing, the parent made clear that she was seeking related service authorizations (RSAs) for OT and counseling services. In ordering funding for related services at a reasonable market rate, the district argues that the IHO ordered something parent did not request.

V. Applicable Standards

A board of education must offer a FAPE to each student with a disability residing in the school district who requires special education services or programs (20 U.S.C. § 1412[a][1][A]; Educ. Law § 4402[2][a], [b][2]). However, the IDEA confers no individual entitlement to special education or related services upon students who are enrolled by their parents in nonpublic schools (see 34 CFR 300.137[a]). Although districts are required by the IDEA to participate in a consultation process for making special education services available to students who are enrolled privately by their parents in nonpublic schools, such students are not individually entitled under the IDEA to receive some or all of the special education and related services they would receive if enrolled in a public school (see 34 CFR 300.134, 300.137[a], [c], 300.138[b]).

However, under State law, parents of a student with a disability who have privately enrolled their child in a nonpublic school may seek to obtain educational "services" for their child by filing a request for such services in the public school district of location where the nonpublic school is located on or before the first day of June preceding the school year for which the request for services is made (Educ. Law § 3602-c[2]).[8] "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

[8] 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]).

located in such school districts, upon the written request of the parent" (Educ. Law § 3602-c[2][a]). In such circumstances, the district of location's CSE must review the request for services and "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an [IEP]" (Educ. Law § 3602-c[2][b][1]). The CSE must "assure that special education programs and services are made available to students with disabilities attending nonpublic schools located within the school district on an equitable basis, as compared to special education programs and services provided to other students with disabilities attending public or nonpublic schools located within the school district (id.).[9] Thus, under State law an eligible New York State resident student may be voluntarily enrolled by a parent in a nonpublic school, but at the same time the student is also enrolled in the public school district, that is dually enrolled, for the purpose of receiving special education programming under Education Law § 3602-c, dual enrollment services for which a public school district may be held accountable through an impartial hearing.

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E. v. New York City Dep't of Educ., 694 F.3d 167, 184-85 [2d Cir. 2012]).

VI. Discussion

A. Unilaterally-Obtained Services

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 parental placement. 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, he unilaterally obtained private services from EdZone 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

[9] State guidance explains that providing services on an "equitable basis" means that "special education services are provided to parentally placed nonpublic school students with disabilities in the same manner as compared to other students with disabilities attending public or nonpublic schools located within the school district" ("Chapter 378 of the Laws of 2007–Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the Individuals with Disabilities Education Act (IDEA) 2004 and New York State (NYS) Education Law Section 3602-c," Attachment 1 (Questions and Answers), VESID Mem. [Sept. 2007], available at https://www.nysed.gov/special-education/guidance-parentally-placed-nonpublic-elementary-and-secondary-school-students). The guidance document further provides that "parentally placed nonpublic students must be provided services based on need and the same range of services provided by the district of location to its public school students must be made available to nonpublic students, taking into account the student's placement in the nonpublic school program" (id.). The guidance has recently been reorganized on the State's web site and the paginated pdf versions of the documents previously available do not currently appear there, having been updated with web based versions.

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 they obtained for a student 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]).[10] 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).

Neither party appeals the IHO's findings that the district failed to offer the student a FAPE or equitable services for the 2023-24 school year or that the unilaterally obtained services provided by EdZone were appropriate for the student (IHO Decision at pp. 2-3). Accordingly, these findings have become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]). The main issue on appeal is whether the IHO's order regarding the rate for services was correct, which is a question that falls under the rubric of equitable considerations.

Under the federal standard, the final criterion for a reimbursement award is that the parents' 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.

[10] 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 EdZone (Educ. Law § 4404[1][c]).

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"]).

Thus, 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]). An 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).

As to the district's argument directed at EdZone's provision of individual SETSS to the student instead of group SETSS as mandated in the June 2023 IESP (see Tr. pp. 75, 78, 81-83, 107-08; Parent Ex. F at ¶ 8), as noted above, the district has not alleged that the SETSS delivered to the student were inappropriate. To the extent the district's argument is that delivery of individual instead of group SETSS exceeded the level of services that the student required to receive a FAPE, the evidence in the hearing record does not support such a conclusion. While perhaps the student would have received educational benefit from group services instead of individual, the delivery of the service in the different ratio is not a segregable or supplemental service (L.K., 674 Fed. App'x at 101). Moreover, the educational supervisor testified that the student required the services on an individual basis to ensure he received educational benefit, noting that the student was highly distractible and that, in observing the student, one "could tell . . . that he c[ould]n't function in a group" (Tr. pp. 105-06). While the CSE may have disagreed, the district failed to implement that mandate and the evidence in the hearing record does not demonstrate that the delivery of the SETSS individually was so excessive as to warrant a reduction in the award of funding for the costs of the services delivered.

Turning to the hourly rate for the services, the addendum to the parent's contract with EdZone reflected that the company charged $198 per hour for individual SETSS, $148 for group

SETSS, and $95 per hour for paraprofessional services (Parent Ex. E at p. 3). The EdZone educational supervisor testified that the rates charged by the company were "based on rates which are consistent with rates charged by other agencies offering similar services," which the company ascertained by conducting a survey (Tr. p. 102; Parent Ex. F ¶ 15). The educational supervisor indicated that the company paid the student's two SETSS providers hourly rates of $80 and $90, respectively, and the student's two paraprofessionals hourly rates of $35 and $32, respectively, "as well as employer Fringe Benefits" such as "[i]nsurances, disability, paid family leave, paid time off, reimbursement for materials and supplies, continuing education courses," as well as the support of a staff of different professionals (Tr. pp. 102-03; Parent Ex. F ¶ 16).

The district offered into evidence an October 2023 AIR report (see Dist. Ex. 8). The district asserts that the AIR report constitutes objective evidence as to how to properly calculate a reasonable rate based on the providers' salaries, or evidence of rates charged for comparable services by providers within the same geographic area. The district argues that based on the report, a reasonable market rate would be no more than $125 per hour referring to a table on the report as to the inflation-adjusted hourly rate within the district's metro area for services.

Initially, it is noted that the AIR Report does not address paraprofessional services. As there is no evidence in the hearing record that the contract rate for paraprofessional services was excessive, equitable considerations support an order requiring the district to fund the student's private full-time paraprofessional services delivered by EdZone at the contracted rate of $95 per hour.

As to the rate for SETSS, a review of the content and methodology underlying the AIR report is warranted. The AIR study report is dated October 2023 and entitled "Hourly Rates for Independently Contracted Special Education Teachers and Related Services Providers" (Dist. Ex. 8 at p. 1). The district commissioned the report from AIR to "[d]evelop an approach to using data from the [United States Bureau of Labor Statistics (USBLS)] to calculate hourly rates for independently contracted providers" and to "[c]alculate hourly rates for special education teachers in the region that [the district] c[ould] use to determine a fair market rate for its [SETSS] special education teachers" (id. at p. 4). The report describes a five step methodology starting with USBLS' Occupational Employment and Wage Statistics (OEWS) data for occupations that resemble the positions in the district (steps one and two), using the district's collective bargaining agreements to convert the salaries into hourly rates (step 3), and then using adjustments from the district's financial reports to factor in fringe benefits and indirect costs (step 4), and, last, using the consumer price index to address inflation over time (step 5) (id. at pp. 4-6).

The AIR study report offers a secondary adaptation to this methodology for hourly rate adjustments for the district to take into account different combinations of educational attainment ("measured as a combination of degree, earned college credits, and/or other professional development accomplished, such as obtaining a certificate from the National Board for Professional Teaching Standards") and/or experience (number of years teaching within the district) (Dist. Ex. 8 at pp. 6-7, 9-10, 19-24). This adaptation in the methodology was clearly designed to address the fact that the collective bargaining agreement between the district and the United Federation of Teachers that represents the school district's employee teachers contains salary schedules for special education teachers that function similarly in that district employees such as SETSS teachers who have greater educational attainment such as a master's degree versus a

bachelor's degree, additional credits that relate to four differentials depending on the types of credits and other criteria (first, intermediate promotional, and second), and certifications and/or experience are entitled to higher salaries under the labor agreement's salary schedules (Dist. Ex. 8 at pp. 6-8).[11] However, the AIR report does not specifically factor State certifications in describing hourly rate adjustments, likely because it would be violative of State law to employ a teacher in a public school in contravention of the State's certification requirements, thus dispensing with any need to collectively bargain that factor (see generally Dist. Ex. 8).

With respect to fashioning appropriate equitable relief and its relevancy, I find that the AIR report does not suffer from all of the infirmities that the parent claims but, at the same time, not all of the report and its methodologies are strictly applicable to a parent's decision to unilaterally obtain private special education services from a private company like EdZone. First the AIR report draws data published by the United States Bureau of Labor Statistics, a U.S. government agency, and it is well settled that judicial notice may be taken of such tabulations of data published by government agencies (Canadian St. Regis Band of Mohawk Indians v. New York, 2013 WL 3992830 [N.D.N.Y. Jul. 23, 2013]; Mathews v. ADM Milling Co., 2019 WL 2428732, at *4 [W.D.N.Y. June 11, 2019]; Christa McAuliffe Intermediate School PTO, Inc. v. de Blasio, 364 F.Supp.3d 253 [2019]). I find that the wage information contained in the data from the USBLS is relevant to the question of how much special education teachers are paid in the New York City metropolitan region in a given year in which the data is published.[12] It was not inappropriate for the AIR to use such government-published data in its report. The parent's argument that the data from USBLS is dispersed over too wide a geographic area because it is from areas as far away as Pennsylvania is a misreading of the report and does not preclude use of the USBLS data. The data set in the New York, New Jersey and Pennsylvania region can be further limited and refined to the New York City, Newark, and Jersey City metropolitan region. It is reasonable to find that most teachers (public and private) working with special education students in New York City fall within this subset of data that is the greater metropolitan region specified in USBLS data ("May 2022 Metropolitan and Nonmetropolitan Area Occupational Employment and Wage Estimates New York-Newark-Jersey City, NY-NJ-PA," available at https://www.bls.gov/oes/current/oes_35620.htm). Furthermore, the geographic data in this metropolitan subset does not have to be perfect in order to be sufficiently reliable for use when weighing equitable considerations.

The AIR report appears to address a question of what kind of approach "NYC DOE can use to determine a fair market rate for its Special Education Teacher Support Services (SETSS)" (Dist. Ex. 8 at p. 1). If the district were to offer hourly rates that were formulated on a negotiated basis (i.e., to employees paid on an hourly basis), it would understandably try to do so in a similar

[11] The 2022-2027 salary schedules for district teachers from the district-UFT agreement are cited in the report (see Dist. Ex. 8 at p. 5).

[12] The Occupational Employment and Wage Statistics data is published by the USBLS starting in May of each calendar year, and the AIR report in evidence used May 2022 data (Dist. Ex. 8); however, I note that May 2023 data is the most recent annual data published by the USBLS as of the date of this decision (see https://www.bls.gov/oes/tables.htm). While the AIR report presented a snapshot in time, I do not share any concern that the data itself is "fixed in perpetuity" because it is updated annually, which is particularly relevant when considering due process claims under IDEA and Article 89 are almost always related to a specific annual time period.

manner to the way it used its bargaining power in negotiations with both the United Federation of Teachers and other entities for fringe benefits and incidental costs that result in the pay scales for public school employees. However, a parent facing the failure of the district to deliver his or her child's IESP services and who is left searching for a unilaterally selected self-help remedy would be unable to hire teachers already employed by the district (unless a teacher is "moonlighting" and thus dually employed), and the parent facing that situation would therefore not be able to negotiate for private teaching services with the same bargaining power that the district holds. Thus, while the AIR report's reliance on the salary schedules negotiated with the United Federation of Teachers that include provisions for steps, longevity, and criteria for additional experience and education, these provisions serve a different purpose—they are designed to ensure fair treatment among union members who are operating in public employment. But the fair treatment among district employees is of little or no interest to a parent who is trying to contract for services with private schools or companies after the district has failed in its obligations to deliver the services using its employees, and thus the district negotiated provisions are not particularly relevant to equitable considerations in a due process proceeding involving the funding of unilaterally obtained services.

Fortunately, the USBLS data does not indicate that it is limited to district-employed teachers. It covers wages in the entire metropolitan region, which would include teachers from across the spectrum including private schools, charter schools, and district public schools. The USBLS indicated that in May 2023 data annual salaries for "Special Education Teachers, All Other" ranged from $49,000 in the 10th percentile, $63,740 in the 25th percentile, $97,910 in the median, $146,200 in the 75th percentile, to $163,670 in the 90th percentile. In my view this is consistent with the fact that some local and private employers within the metropolitan region pay less than those in the district, and it leaves room for the fact that a few employers may have paid more. As for fringe benefits and incidental costs, private employers who offer benefits and have overhead costs are not necessarily the same as those costs cited in the AIR report, which is premised upon the district's costs, not the parent's costs. Reliance on such costs may be permissible when the district is managing its own operations and negotiating with a labor organization, but it is not relevant to the private situation in a Burlington/Carter unilateral private placement. Again, the USBLS provides data for indirect and fringe benefit costs for civilian, government employees and private industry expressed as a percentage of salary and, for private industry, such educational services costs were 27.7 percent, which tends to show that government benefits are often slightly better (and more expensive) than those offered in private industry (see Employer Costs For Employee Compensation (ECEC) – June 2023, available at https://www.bls.gov/news.release/archives/ecec_09122023.pdf).[13]

The undersigned had little difficulty with the explanation in the AIR report that children must be educated for 180 days per year in this state and that school days are typically between six and seven hours long.[14] When using the USBLS data, a calculation leads to the conclusion that the $195.00 per hour rate falls above the 90th percentile of salary for the metropolitan region in

[13] The ECEC covers the civilian economy, which includes data from both private industry and state and local government.

[14] Using 6.5 hours results in approximately 1170 hours of instruction time.

which the district is located, using indirect and fringe benefit costs of 27.7 percent. I will take this into account when ordering equitable relief.

The $80 and $90 per hour costs for the teacher's hourly wage (see Tr. pp. 102-03; Parent Ex. F ¶ 16) falls within the USBLS data, with $80 falling just below the median and $90 falling between the median and the 75th percentile. However, based on these hourly wages compared to the hourly rates charged for the services, indirect employer costs above the teachers' hourly wages amount to $105 or $115 per hour or approximately 53 or 59 percent of the hourly rate charged by EdZone. This falls far above the 27.7 percent in the USBLS data, and, therefore, the evidence leads me to the conclusion that the costs of Step Ahead were excessive as the district argues and more than what the district should be required to pay. The $80 and $90 per hour when adding indirect costs supported by USBLS data would yield a result of approximately $102 or $115 total per hour. Because the district does not assert that it should be less than $125 per hour based on its own study, I will as a matter of equitable considerations require the district to pay the $125.00 rate.

B. Related Services

Regarding the IHO's order for related services, the parent did not seek an order for the district to fund unilaterally-obtained related services during the impartial hearing, and, instead, requested that the district issue RSAs (see Tr. p. 58).

In a July 29, 2009 guidance document, the Stated Education Department (SED) clarified that a school district does not have the authority "to provide core instructional services through contracts with nonprofit and other entities" ("Clarifying Information [R]elated to Contracts for Instruction," Office of Special Educ. Mem. [July 2009], available at http://www.p12.nysed.gov/resources/contractsforinstruction/documents/contractsforinstruction2009.pdf). In response to several questions from the field, SED issued further guidance ("Q and A related to Contracts for Instruction" Office of Special Educ. Mem. [June 2010], available at http://www.p12.nysed.gov/resources/contractsforinstruction/documents/contractsforinstruction2010covermemo.pdf).[15] As for related services, SED did provide that it is permissible for a school district to contract for the provision of special education related services in limited circumstances and with qualified individuals over whom the district has supervisory control ("Questions and Answers Related to Contracts for Instruction," Office of Special Educ. [June 2010], available at http://www.p12.nysed.gov/resources/contractsforinstruction/qa.html). The State guidance does not speak to the particular mechanism used by the district, i.e., an RSA, which under the circumstances of this case appears to function essentially as a voucher that permits the parent to locate the provider to deliver services to the student (see "Questions and Answers Related to Contracts for Instruction").

[15] The questions and answers guidance draws a distinction between core instruction and instruction that represents a supplemental or additional resource, providing that a district may not contract with private entitles for the former ("Questions and Answers Related to Contracts for Instruction," Office of Special Educ. [June 2010], available at http://www.p12.nysed.gov/resources/contractsforinstruction/qa.html). Additionally, the guidance acknowledges that, in several specified instances, State law and/or regulation authorizes a school district to contract with other entities, including authorizing a district to enter into any contractual or other arrangement necessary to implement approved pre-kindergarten program plans ("Questions and Answers Related to Contracts for Instruction," citing Educ. Law § 3602-e).

The parent's representative explained that RSAs released the parent to get her own OT provider and her own counseling (Tr. p. 58). The hearing record indicates that the student was getting some OT services, two of the three sessions, but that the student had not been receiving the third session for reasons related to the student's mother's desire to have the service provided at a sensory gym (Tr. pp. 84, 87). The mother testified that she was working on "getting the RSA" for that session to be delivered in a sensory gym (Tr. p. 84). The hearing record is not further developed on the question of the student's receipt of related services.

Ultimately, the IHO's award for the district to deliver related services or fund private providers chosen by the parent at market rate does not appear to diverge significantly from the sort of voucher system embodied by the RSA procedure.[16] However, the parent indicated again in the request for review that he sought RSAs for related services (Req. for Rev. at p. 2) and the district cross-appeals the IHO's alternative phrasing. As it appears that the student has been getting at least some of the related services pursuant to RSAs, I find no basis in the hearing record to order the relief in a form different than that sought by the parent and which the district does not oppose.

Based on the foregoing, I will modify the IHO's order to require the district to provide RSAs for the related services mandated in the July 2023 IESP.

VII. Conclusion

The evidence in the hearing record does not support the IHO's order for the district to fund services delivered by EdZone "at reasonable market rate no lower than the highest market rate paid to that provider in the last 12 months" or for the district to pay providers located by the parent "at reasonable market rate." As equitable considerations weigh partially in favor of the parent's requested relief, the district must fund SETSS delivered by EdZone at the reduced hourly rate of $125 and paraprofessional services at the contract hourly rate of $95. The district is also ordered to provide the parent with RSAs for the related services mandated in the July 2023 IESP of counseling and OT.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision, dated April 2, 2024, is modified by reversing those portions which ordered the district to fund SETSS and paraprofessional services delivered by providers chosen by the parent at a reasonable market rate no lower than the highest market rate paid to that provider in the last 12 months, and which ordered, if the district did not deliver the student's related services within 30 days, that the district fund related services of OT and counseling delivered by providers chosen by the parent at reasonable market rates; and

[16] The IHO requested that the parent provide "proposed language" for an order (see Tr. p. 58). There is no document included in the hearing record with proposed language and it is unclear if the parent's representative took advantage of the IHO's invitation. Accordingly, it is equally unclear if the language in the IHO's order was suggested by the parent or if the IHO had alternative reasoning for the language (see IHO Decision at p. 5). The IHO's decision does not offer any analysis of the relief granted pertaining to related services (see generally IHO Decision).

IT IS FURTHER ORDERED that the district shall directly fund the costs of up to eight hours per week of SETSS delivered by EdZone at a rate not to exceed $125 per hour and the costs of full-time paraprofessional services delivered by EdZone at the contracted rate of $95 per hour; and

IT IS FURTHER ORDERED that, to the extent it has not already done so, the district shall provide the parent with RSAs for the related services recommended in the July 2023 IESP of OT and counseling.

Dated: **Albany, New York**
July 8, 2024

SARAH L. HARRINGTON
STATE REVIEW OFFICER