The University of the State of New York

The State Education Department
State Review Officer
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No. 24-188

Application of a STUDENT WITH A DISABILITY, by her 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 Cynthia Sheps, 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 the decision of an impartial hearing officer (IHO) which denied her request that respondent (the district) fund the costs of the special education teacher support services (SETSS) delivered to her daughter by Urban Student Services (Urban) at a specified rate for the 2023-24 school year, and which dismissed her due process complaint notice with prejudice. The appeal must be sustained in part.

II. Overview—Administrative Procedures

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

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

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

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

III. Facts and Procedural History

A CSE convened on April 22, 2020, determined the student was eligible for special education as a student with a speech or language impairment, and developed an IESP with an

implementation date of May 6, 2020 (Parent Ex. B at pp. 1, 7, 10).[1] At the time of the April 2020 CSE meeting, the student was parentally placed at a nonpublic school (id. at p. 10). The April 2020 CSE recommended that the student receive three periods per week of direct, group SETSS in English in a separate location (id. at p. 7).[2] By prior written notice dated April 23, 2020, the district summarized the recommendations of the April 2020 CSE (Dist. Ex. 3 at pp. 1-4).

On May 10, 2023, the parent notified the district that the student would continue to be parentally placed in a nonpublic school for the 2023-24 school year and requested that the district continue to provide special education services for the student (Parent Ex. C). On August 8, 2023, the parent entered into an agreement with Urban for the provision of the student's SETSS at a rate of $195 per hour for the 2023-24 school year (Parent Ex. E at pp. 1-3). By email dated September 11, 2023, the parent provided ten-day written notice to the district with an attached letter also dated September 11, 2023 (Parent Ex. D). The body of the September 11, 2023 email stated that the notice "[wa]s in reference to the 2023-24 school year" (id. at p. 1). In the accompanying letter, the parent wrote to the CSE stating that an April 22, 2020 CSE had recommended SETSS for the student, and that she consented to the district implementing the services (id. at p. 2). The parent also notified the district that she had no way of implementing the recommendations and that she had been unable to locate providers for the SETSS at the district's standard rate (id.). The parent then indicated that she had "no choice but to implement the IESP on [her] own and seek reimbursement or direct payment from the [district]" (id.).

A. Due Process Complaint Notice

By due process complaint notice dated January 23, 2024, the parent alleged that the student had been denied a free appropriate public education (FAPE) for the 2023-24 school year (Parent Ex. A at p. 2). The parent claimed that the student was entitled to pendency based on the April 22, 2020 IESP (id. at p. 2). The parent contended that the student's pendency services consisted of three periods per week of direct, group SETSS in English (id.). The parent alleged that there was a "delay in convening" a CSE meeting to develop an IESP for the 2023-24 school year, and that the April 22, 2020 IESP was "outdated and expired" (id.). The parent further alleged that she was "unable to locate a provider" on her own for the 2023-24 school year (id.). The parent argued that the district had failed to implement its own recommendations and that, "[w]ithout the supports, the parental mainstream placement [wa]s untenable and the failure to either implement the services or provide a placement [wa]s a denial of a FAPE" for the 2023-24 school year (id.). As relief, the parent requested a finding that the district failed to offer a FAPE for the 2023-24 school year because it failed to convene and recommend a placement or services and implement its own recommendations (id. at p. 3). The parent also requested that the district "fund the program outlined" in the April 22, 2020 IESP for the 2023-24 school year at the provider's contracted rate, and that the district fund a bank of compensatory periods of all services to which the student was

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

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

entitled "under pendency for the entire 2023-24 school year - or the parts of which were not serviced" at the provider's contracted rate (id.).

B. Impartial Hearing Officer Decision

The parties convened for an impartial hearing before the Office of Administrative Trials and Hearings (OATH) on March 12, 2024 (Tr. pp. 21-102).[3]

By decision dated April 7, 2024, the IHO found that the district failed to present evidence to counter the parent's allegation that it failed to develop an appropriate IESP and failed to deliver services to the student for the 2023-24 school year (IHO Decision at p. 8). Applying a Burlington/Carter analysis to the parent's claims, the IHO further found that the parent did not meet her burden of demonstrating the appropriateness of the unilaterally obtained SETSS (id. at pp. 8-9). The IHO found that the supervisor from Urban "could not articulate why the [s]tudent's nearly four-year-old IESP created on April 22, 2020 was still an appropriate program, other than to restate that [Urban] implemented whatever services that [the district] mandated in the IESP" (id. at p. 9). The IHO further noted that the supervisor from Urban "could not explain why the goals in the IESP that [the district] developed four years ago were still valid goals for the [s]tudent or, in the alternative, how [Urban] determined that an IESP was outdated and what processes it employed to create an appropriate new program" (id.). For those reasons, the IHO determined that the parent did not establish that the services provided by Urban constituted an appropriate program for the student for the 2023-24 school year (id.). The IHO dismissed the parent's claims with prejudice (id.).

IV. Appeal for State-Level Review

The parent appeals and asserts that she provided sufficient evidence to establish that her unilaterally obtained services were appropriate and that equitable considerations warranted direct funding. The parent argued that the IHO erred in disregarding the progress report from Urban and in faulting the parent for the district's failure to develop an IESP for the 2023-24 school year. The parent further contends that the IHO erred in failing to award compensatory SETSS that were not provided or funded by the district despite agreeing to the student's pendency services. As relief, the parent requests funding for her unilaterally-obtained SETSS for the 2023-24 school year, and a bank of hours of SETSS that the district was required to fund as pendency during the proceedings.

In an answer, the district argues that the IHO correctly determined that the parent did not demonstrate the appropriateness of her unilaterally obtained SETSS services, that equitable considerations do not favor direct funding and that the parent is not entitled to compensatory pendency services.

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

[3] The parties convened for a prehearing conference on February 27, 2024 (Tr. pp. 1-20).

education or related services upon students who are enrolled by their parents in nonpublic schools (see 34 CFR 300.137[a]). Although districts are required by the IDEA to participate in a consultation process for making special education services available to students who are enrolled privately by their parents in nonpublic schools, such students are not individually entitled under the IDEA to receive some or all of the special education and related services they would receive if enrolled in a public school (see 34 CFR 300.134, 300.137[a], [c], 300.138[b]).

However, under State law, parents of a student with a disability who have privately enrolled their child in a nonpublic school may seek to obtain educational "services" for their child by filing a request for such services in the public school district of location where the nonpublic school is located on or before the first day of June preceding the school year for which the request for services is made (Educ. Law § 3602-c[2]).[4] "Boards of education of all school districts of the state shall furnish services to students who are residents of this state and who attend nonpublic schools located in such school districts, upon the written request of the parent" (Educ. Law § 3602-c[2][a]). In such circumstances, the district of location's CSE must review the request for services and "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an [IEP]" (Educ. Law § 3602-c[2][b][1]). The CSE must "assure that special education programs and services are made available to students with disabilities attending nonpublic schools located within the school district on an equitable basis, as compared to special education programs and services provided to other students with disabilities attending public or nonpublic schools located within the school district (id.).[5] Thus, under State law an eligible New York State resident student may be voluntarily enrolled by a parent in a nonpublic school, but at the same time the student is also enrolled in the public school district, that is dually enrolled, for the purpose of receiving special education programming under Education Law § 3602-c, dual 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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[4] State law provides that "services" includes "education for students with disabilities," which means "special educational programs designed to serve persons who meet the definition of children with disabilities set forth in [Education Law § 4401(1)]" (Educ. Law § 3602-c[1][a], [d]).

[5] State guidance explains that providing services on an "equitable basis" means that "special education services are provided to parentally placed nonpublic school students with disabilities in the same manner as compared to other students with disabilities attending public or nonpublic schools located within the school district" ("Chapter 378 of the Laws of 2007–Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the Individuals with Disabilities Education Act (IDEA) 2004 and New York State (NYS) Education Law Section 3602-c," Attachment 1 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. Unilaterally Obtained Services

The district does not appeal from the IHO's decision that the district failed to meet its burden under prong I of a Burlington/Carter analysis of demonstrating that it developed and implemented an IESP for the 2023-24 school year (IHO Decision at p. 8).[6] Accordingly, this determination has become final and binding upon the parties (see 34 CFR 300.514[a]; 8 NYCRR200.5[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]). On appeal, the crux of the dispute between the parties relates to the appropriateness of the SETSS unilaterally obtained by the parent and delivered to the student by Urban during the 2023-24 school year.

Prior to reaching the substance of the parties' arguments, some consideration must be given to the appropriate legal standard to be applied. In this matter, the student has been parentally placed in a nonpublic school and the parent does not seek tuition reimbursement for the cost of the student's attendance there. In her January 23, 2024 due process complaint notice, the parent alleged that the district had not developed an IESP for the 2023-24 school year and as a self-help remedy she unilaterally obtained private services from Urban for the student without the consent of the school district officials, and then commenced due process to obtain remuneration for the costs thereof (Parent Ex. A at p. 2). Accordingly, the issue in this matter is whether the parent is entitled to public funding of the costs of the private SETSS. "Parents who are dissatisfied with their child's education can unilaterally change their child's placement . . . and can, for example, pay for private services, including private schooling. They do so, however, at their own financial risk. They can obtain retroactive reimbursement from the school district after the [IESP] dispute is resolved, if they satisfy a three-part test that has come to be known as the Burlington-Carter test" (Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 526 [2d Cir. 2020] [internal quotations and citations omitted]; see 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"]).[7]

The parent's request for privately obtained services must be assessed under this framework. That is, a board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Carter, 510 U.S. 7; Burlington, 471 U.S. at 369-70; R.E., 694 F.3d at 184-85; T.P. v. Mamaroneck Union Free Sch.

[6] The IHO did not make a specific finding that the district failed to offer the student equitable services or that the district failed to offer the student a FAPE. The IHO applied a Burlington/Carter analysis to the parent's claims (IHO Decision at pp. 6-8). Under the first prong, a district has the burden of demonstrating that it offered the student a FAPE (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; 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., 554 F.3d at 252). The IHO determined that the district failed to meet its burden (IHO Decision at p. 8).

[7] 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 services that the parent obtained from Urban for the student (Educ. Law § 4404[1][c]).

Dist., 554 F.3d 247, 252 [2d Cir. 2009]). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

Turning to a review of the appropriateness of the unilaterally obtained services, the federal standard is instructive. A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998]). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (id. at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 207 [1982]). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether a unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether the placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] ["evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

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

> No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA,

> parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

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

The district argues that the IHO correctly determined that the parent failed to meet her burden of demonstrating that the SETSS provided by Urban were appropriate. The district further asserts that the parent's provider did not receive her State certification until January 2024 and that the hearing record did not explain why Urban deviated from the recommendation for group SETSS and provided individual SETSS to the student. The district contends that the IHO correctly found that the Urban supervisor did not explain why the goals from the April 2020 IESP were still appropriate. The district also alleges that the parent should have provided an updated quarterly progress report as the hearing continued through March 12, 2024. The district further argues that the December 2023 progress report did not provide any details about how the student's SETSS provided by Urban met the student's individual special education needs.

Here, the hearing record included a December 6, 2023 progress report prepared by the special education teacher (SETSS provider) during the 2023-24 school year that reflected the student's assessment results, present level of functioning, and goals to improve her reading, math, and writing (see Parent Ex. G). The hearing record also included an affidavit and in-person testimony from the parent, and an affidavit and in-person testimony from the Urban educational supervisor (Tr. pp. 41-82; Parent Exs. H; I). Additional documentary evidence offered by the parent included a May 10, 2023 request for equitable services from the district, a September 11, 2023 ten-day written notice of the parent's intent to obtain unilateral services and seek public funding, an August 8, 2023 contract with Urban, which demonstrated the parent's financial obligation for the services delivered to the student, and a copy of the SETSS provider's certification, which was effective January 4, 2024 (Parent Exs. C-F).

1. Student Needs

A brief description of the student's special education needs is warranted to resolve the issue on appeal. The evidence in the hearing record regarding the student is generally limited to the information included in the student's most recent April 2020 IESP, for the student's 2020-21 school year (9th grade), and the December 2023 SETSS progress report from the student's 2023-24 school year (12th grade) (Parent Exs. B; G).

The April 2020 IESP indicated that the student had a disability classification of speech or language impairment and reported evaluation results from a September 2013 psychoeducational evaluation that yielded a full-scale intelligence quotient (FSIQ) in the low average range with a standard score of 88 (Parent Ex. B at p. 1). The April 2020 IESP reported that the student had difficulties with receptive and expressive language skills, finding details in written form, answering "wh" questions about material verbally or in written form, formulating sentences

meaningfully, answering questions with age-appropriate vocabulary and syntax, and retelling events in a story (id. at p. 2).

Socially, the IESP reflected reports that the student got along with peers and siblings, and that the parent did not have any concerns regarding the student's social development (Parent Ex. B at p. 3). In the area of physical development, the April 2020 IESP reported information from an April 2015 occupational therapy (OT) progress report (id.). The IESP reported the student, who was in third grade at that time, had low tone, had not yet mastered the tripod writing grasp, and had difficulty with gross motor skills (id.).[8] The IESP provided strategies for addressing the student's management needs that included verbal and visual cues, tasks broken into smaller units, extended time, key words provided for math, previewing vocabulary, and use of graphic organizers (id.). The IESP reported that the student had delays in reading, writing, math and fine motor skills that impacted her ability to make progress in the general education curriculum (id.).

The April 2020 CSE recommended eight annual goals in areas that included solving two-step word problems in mathematics; reading and comprehending text; following verbal and written directions to record ideas in a graphic organizer and edit work; answering questions in written and verbal format by completion of graphic organizers; producing a written response with an introduction, conclusion and three details using a graphic organizer; providing definitions for common objects with three salient features using picture circle maps and cloze paragraphs; copying 85 letters per minute using a dynamic tripod grasp; and improving sitting posture (Parent Ex. B at pp. 4-6). To support the student's needs the April 2020 CSE recommended that the student receive three periods per week of SETSS in a group (id. at p. 7).

The December 2023 SETSS progress report identified that the student, who was in 12th grade, had academic delays and performed at the 10th grade level in areas of reading, writing, and math (Parent Ex. G at p. 1). The SETSS report stated that at times the student became easily frustrated when she did not remember or apply skills independently during classwork, homework or a test (id.). The SETSS progress report identified that the student had poor comprehension skills, was easily distracted, and presented with difficulties recalling events in chapter books, reading and writing summaries and essays (id.). Further, the December 2023 SETSS progress report included assessment scores as follows: on the New York State (NYS) Regents Examination in English Language Arts (ELA) the student received a score of 48 percent in fluency; on the NYS algebra Regents Examination the student received a score of 55 percent; and on a "2016-2018 [b]enchmark [w]riting [a]ssessment for 10th [g]rade – Goleta Union School District" the student received a 10 out of 16 rubric score (id. at pp. 1, 3, 5).

2. Appropriateness of SETSS from Urban

Regarding the 2023-24 school year, the educational supervisor of Urban (Urban supervisor) testified that the agency provided the student with three hours per week of individual SETSS services for the 2023-24 school year beginning in September 2023 (Tr. pp. 38, 44, Parent

[8] The IESP reflected that at the April 2020 CSE meeting, the parent reported that the student was "not receiv[ing] occupational therapy because she d[id] not want to be taken out of class or have other students know that she ha[d] an IESP" (Parent Ex. B at p. 3).

Ex. H ¶ 11).[9, 10] Further, the Urban supervisor testified that the SETSS provider prepared for sessions, created goals, wrote progress reports, and met with teachers and parents, in addition to providing "individualized sessions that include[d] a great deal of specialized instruction" (Parent Ex. H ¶¶ 13-16).

The December 2023 SETSS progress report prepared by the student's SETSS provider identified the student's need areas in reading, mathematics, and writing, and provided information in each of these areas related to assessment results and the student's present level of performance, and included short-term objectives and annual goals as aligned with the common core curriculum (Parent Ex. G at pp. 1-7). Specifically, as related to reading, the progress report indicated that the student performed "on the level of a 10th grader," with reading decoding and comprehension skills below grade level (id. at p. 2). The SETSS provider reported that the student had difficulty remembering new vocabulary and understanding content read, and struggled identifying the main idea and summarizing what she read (id. at pp. 1-2). Additionally, the SETSS provider identified that the student understood material better when it was read to her, and that the student required "constant prompting" to support her in summarizing a passage and identifying the main idea (id. at p. 2). Short-term objectives to improve the student's reading included using context clues to understand new words or phrases, rereading to understand a passage, responding to questions about texts, as well as identifying the main idea of the passage (id.). Annual goals to support the student's reading addressed the student's abilities to choose the correct meaning of a phrase, identify the theme of a story, repeat the pertinent details of text read, and compare and contrast characters in a story (id.).

Regarding mathematics skills, on the algebra Regents exam, the SETSS provider identified that the student struggled with word problems, had difficulty understanding linear equations, and using the correct formulas; however, correctly answered questions on the basic operations in math of addition, subtraction, multiplication, and division (Parent Ex. G at p. 3). The SETSS provider reported that the student had difficulty with complex equations, and often would "freeze and give up" when she did not know how to check answers or determine what formula to use (id.). To support the student's math needs, the SETSS provider provided explicit instruction, extensive practice with algebra tiles, and prompting to use a calculator to check her work (id.). The SETSS provider included short-term objectives to improve the student's math skills that included solving

[9] At the impartial hearing, the Urban supervisor stated the determination to provide SETSS services frequency and duration was based on the 2020 IESP mandate (Tr. pp. 46, 61-62; see Parent Ex. B at p. 7). The Urban supervisor testified that individual SETSS services were provided to the student rather than group as recommended on the student's 2020 IESP as there were no other children to pair with the student (Tr. p. 49).

[10] The parent's testimony regarding the duration and focus of the student's SETSS was somewhat inconsistent throughout the hearing record. According to the parent's affidavit, the student received three hours of SETSS per week for the entire 2023-24 school year starting on September 7, 2023 (Parent Ex. I ¶ 8). During in-person cross-examination, the parent testified that she believed the student received three 30-minute sessions per week in school; however, she further stated that "I know [the student] went longer sometimes," and she could consult the principal "to get more details on that" (Tr. pp. 74-75). The district noted the parent's inconsistencies in describing the student's SETSS sessions in contrast with the agency description of services, as the parent stated the SETSS assisted the student in areas of need that included chemistry and providing the student with support during testing (Tr. pp. 72-74; see generally Parent Ex. G). The parent testified that the student received services mainly in school (Tr. pp. 72, 75).

problems using variables; proportions; mean, medial, mode, and range; and a math theorem (id. at p. 4). Additionally, the SETSS provider identified annual goals to support the student in explaining steps in solving simple equations, simple radical and rational equations, linear equations, and word problems, and identifying the correct operations to conduct (id.).

In the area of writing, the December 2023 SETSS progress report identified that according to results of the writing assessment, the student was performing at a 10th grade level and she exhibited difficulty generating ideas, and writing in a clear, organized and cohesive manner with correct grammar and punctuation (Parent Ex. G at pp. 5-6). The SETSS provider reported providing supports to the student that included direct instruction to plan her writing, assistance to correct spelling, grammar and punctuation at the sentence level, and instruction in pre-writing skills that included having the student write down her initial ideas using a graphic organizer (id.). The SETSS provider identified short-term objectives that addressed writing a short story using proper grammar, capitalization, punctuation and spelling; identifying subject/verb at the sentence level; writing grammatically complete sentences; and using commas before conjunctions (id. at p. 6). Annual goals identified in the December 2023 SETSS progress report included writing using transition words, editing a final copy of a writing assignment, writing a grade-level paragraph, and writing pieces that included an introductory and concluding statement (id.).

3. Progress

It is well settled that a finding of progress is not required for a determination that a student's unilateral placement is adequate (Scarsdale Union Free Sch. Dist. v. R.C., 2013 WL 563377, at *9-*10 [S.D.N.Y. Feb. 4, 2013] [noting that evidence of academic progress is not dispositive in determining whether a unilateral placement is appropriate]; see M.B. v. Minisink Valley Cent. Sch. Dist., 523 Fed. App'x 76, 78 [2d Cir. Mar. 29, 2013]; D.D-S. v. Southold Union Free Sch. Dist., 506 Fed. App'x 80, 81 [2d Cir. Dec. 26, 2012]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 486-87 [S.D.N.Y. 2013]; C.L. v. Scarsdale Union Free Sch. Dist., 913 F. Supp. 2d 26, 34, 39 [S.D.N.Y. 2012]; G.R. v. New York City Dep't of Educ., 2009 WL 2432369, at *3 [S.D.N.Y. Aug. 7, 2009]; Omidian v. Bd. of Educ. of New Hartford Cent. Sch. Dist., 2009 WL 904077, at *22-*23 [N.D.N.Y. Mar. 31, 2009]; see also Frank G., 459 F.3d at 364). However, while not dispositive, a finding of progress is, nevertheless, a relevant factor to be considered in determining whether a unilateral placement is appropriate (Gagliardo, 489 F.3d at 115, citing Berger, 348 F.3d at 522 and Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]).

As related to progress, the hearing record included the December 2023 SETSS progress report from the student's SETSS provider, as well as testimony from the Urban supervisor and the parent (Tr. pp. 57-58, 71-72, 77-78; Parent Exs. G; H ¶ 17-18). The Urban supervisor provided affidavit testimony that the student had made progress that was measured through quarterly assessments, meetings with providers and staff, and observation of the student within the classroom and reported in daily session notes (Parent Ex. H ¶¶ 17-18). During the hearing, the Urban supervisor testified to observing the SETSS provider sessions weekly to support the student's learning process (Tr. p. 54). Additionally, the Urban supervisor testified to the student's progress in increased confidence, use of tools to support break down of passages and chapters, and use of graphic organizers; however, also noted that the student remained below grade level in reading and math (Tr. pp. 57-58). The parent provided statements of progress related to the student's confidence, comprehension, and willingness to try and do more (Tr. pp. 77-78).

Further, the December 2023 SETSS progress report provided information on the student's progress during the 2023-24 school year as related to reading, math, and writing (Parent Ex. G). For example, in the area of math, the SETSS provider reported that the student "ha[d] made progress in her math skills," and when provided with SETSS, the student "now underst[ood] how to apply inverse operations and the property of equality to solve two-step algebraic equations for an unknown variable" (id. at pp. 3-4). The December 2023 SETSS progress report summarized that although the student continued to perform below grade level, the student "[wa]s making incremental progress with the present support of SETSS" and required continued SETSS services to support identified goals (id. at p. 7).

The IHO appeared to fault the parent for the age of the most recently developed IESP, which was dated April 2020 (see IHO Decision at p. 9). The fact that the parent obtained the same number of SETSS recommended in the April 2020 IESP or that the provider may have relied in part on the four year old IESP in determining that the special education service recommended therein would be provided to the student during the 2023-24 school year was due to the district's failure in the first instance to develop a current and timely IESP to identify and address the student's needs. Indeed, a finding that unilaterally-obtained services were inappropriate premised on the parent's inability to provide the same level of detail with respect to the student's needs as a properly conducted and timely district evaluation runs the risk of improperly switching the responsibility for identifying the student's needs from the district to the parent (see A.D. v. Bd. of Educ. of City Sch. Dist. of City of New York, 690 F. Supp. 2d 193, 208 [S.D.N.Y. 2010] [finding that a unilateral placement was appropriate even where the private school reports were alleged by the district to be incomplete or inaccurate and finding that the fault for such inaccuracy or incomplete assessment of the student's needs lies with the district]). Moreover, as detailed above, the SETSS provider assessed the current needs of the student based on some of the student's recent results on academic tests and assessments and her own observations of and experience with the student as detailed in the December 2023 progress report. Relatedly, while the IHO found that the Urban supervisor could not explain why the annual goals on a four year old IESP were "still valid," the supervisor testified that ideally Urban would follow the IESP annual goals for a student; however, if "an IESP [wa]s outdated and new goals needed to be created," Urban would "create goals based on [Urban's] assessment" of the student, which is what occurred in this matter (Tr. pp. 63-64; see Parent Ex. G). Specifically, a review of the hearing record demonstrates that the student's SETSS provider developed her own annual goals and short-term objectives for the student that were different from the annual goals listed in the April 2020 IESP (compare Parent Ex. G at pp. 2, 4, 6, with Parent Ex. B at pp. 3-6).[11]

Additionally, while the district attempted to focus on the SETSS provider's certification taking effect in January 2024, four months after the provider began delivering services to the student, I note that the private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. at 13-14). The evidence in the hearing record shows that in January 2024 the SETSS provider obtained New York State certification to teach students with disabilities and had experience and training to teach literacy and comprehension to school

[11] Also of note, the April 2020 IESP included annual goals for OT and speech-language therapy, however neither of those related services were recommended by the April 2020 CSE, and OT and speech-language therapy are not issues in dispute on appeal (Parent Ex. B at pp. 4-6, 7).

aged children and adolescents (Parent Exs. F; H ¶ 12). During the impartial hearing, the Urban supervisor testified that the SETSS provider was specifically selected for the student based on review of her resume, experience, and by recommendation (Tr. pp. 43-44, 62-63). Additionally, the Urban supervisor testified that the provider had Orton-Gillingham training specific to support the student's reading and writing needs, had experience working with high school students, and was able to work on 12th grade math and therefore was an appropriate match (id.).

Further, once the parent engaged in self-help by obtaining private services, she was under no obligation to attempt to replicate the district's last programming recommendation. The parent's burden under Burlington/Carter was to show that the services she unilaterally obtained provided specially designed instruction to address the student's individual needs, and which were reasonably calculated to enable the student to receive educational benefit. As described above, a parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). 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]).

Given the description in the December 2023 progress report of the student's areas of need, goals, and strategies used by the special education teacher from Urban during the 2023-24 school year, combined with the Urban supervisor's testimony describing what the provider was addressing with the student during the 2023-24 school year, the totality of the evidence in the hearing record supports a finding that the unilaterally obtained SETSS delivered by a special education teacher from Urban during the 2023-24 school year were appropriate. While the evidence of the student's progress is not dispositive, in this instance it lends further support to a finding that, based upon the totality of the circumstances, the SETSS unilaterally obtained by the parent were appropriate for the 2023-24 school year. Based on the foregoing evidence and my independent review of the hearing record, I find that the IHO erred in concluding that Urban did not provide appropriate unilaterally-obtained services to the student.

B. 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. 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"]).

Reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to their removal of the student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger, 348 F.3d at 523-24; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G., 459 F.3d at 376; Voluntown, 226 F.3d at 68).

The district argues in its answer that the parent entered into an agreement with Urban on August 8, 2023 and did not provide the district with ten-day written notice until September 11, 2023. As a result, the district alleges the parent failed to provide timely written notice of her intention to obtain unilateral services and seek public funding.

Having found that the parent's unilaterally obtained services were not appropriate, the IHO did not reach the issue of equitable considerations (IHO Decision at p. 9). While the district correctly notes that the parent entered into an agreement with Urban before providing the district with ten-day written notice, in this instance I do not find the untimely notice to be a bar to reimbursement. The parent's ten-day notice letter was sent after the first day of school, and according to the hearing record, the CSE had not convened to develop an IESP for this student since April 2020. Further, the hearing record included the parent's timely request for equitable services pursuant to §3602-c, which did not prompt the district to convene a CSE prior to the first day of school for the 2023-24 school year. Given that the purpose of the ten-day written notice is to give the district an opportunity, before the child is removed, to convene a CSE and in this instance, to develop an IESP, the district had already failed to convene prior to the first day of school or in response to the parent's May 10, 2023 request for equitable services. In this limited circumstance, it cannot be said that the parent's failure to provide ten-day written notice before engaging a provider of unilateral services interfered with the district's opportunity to remedy the failure to convene a CSE or implement the student's IESP. Based on the foregoing, there is no equitable basis for reducing or denying the parent's request for direct funding of SETSS and the district shall be required to fund the costs of up to three hours per week of SETSS delivered by Urban during the 2023-24 school year.

C. Compensatory Pendency Services

Lastly, the district asserts that the parent requested a bank of compensatory pendency SETSS for the first time in her request for review. The district further argues that the parent is not entitled to compensatory pendency services under the circumstances of this matter because the parent contracted with Urban to provide SETSS, that there was no indication in the hearing record that the district was refusing to pay for pendency, or that the student was at risk of losing her pendency placement due to the district's failure to pay.

At the outset, I note that the parent's due process complaint notice included a request for a bank of compensatory periods of all services which the student was "entitled to under pendency for the entire 2023-24 school year - or the parts of which were not serviced. Such services to be funded at the providers' contracted rate" (Parent Ex. A at p. 3). Therefore, the district's claim that the parent was requesting compensatory missed pendency services for the first time in her request for review is without merit.

With regard to the parent's claims in the request for review, the parent alleges that she "entered into a [p]endency [a]greement on or about February 27[,] 2023 with the [d]istrict where the [d]istrict agreed to provide [the student] with SETSS" (Req. for Rev. at p. 1). The parent filed her due process complaint notice on January 23, 2024 (Parent Ex. A at p. 5). The hearing record included a pendency implementation form, which was signed by a district representative on February 5, 2024. The sections of the pendency implementation form which indicate whether or not the district was funding the parent's private provider or was funding an approved provider via a request for authorization (RSA) form were left blank. The IHO's decision stated that "[t]he parties signed a pendency agreement form, acknowledging the April 22, 2020 IESP as the [s]tudent's operative program" (IHO Decision at p. 4). It is unclear what the parent is referencing as having occurred on February 27, 2023 in the request for review, as no dates related to pendency correspond with February 27, 2023. Although a prehearing conference was held on February 27, 2024, pendency was not discussed (Tr. pp. 1-20). The hearing record demonstrates that the parent signed an agreement with Urban on August 8, 2023 and according to the parent's affidavit, the SETSS provider began servicing the student on September 7, 2023 for the remainder of the 2023-24 school year (Parent Exs. E at p. 3; I at ¶8).[12] As the parent's due process complaint notice was filed some four months after the student began receiving unilaterally obtained SETSS from Urban, it seems unlikely that the district was ever directed to provide the student with pendency services. Rather, the district would have been obligated to fund the student's SETSS as set forth on the April 2020 IESP, beginning on January 23, 2024 through the date of this decision.

The district correctly argues that the parent is not entitled to a bank of compensatory SETSS for unimplemented SETSS under the facts of this matter. The Second Circuit has held that where a district fails to implement a student's pendency placement, students should receive the pendency services to which they were entitled as a compensatory remedy (Doe v. E. Lyme, 790 F.3d 440, 456 [2d Cir. 2015] [directing full reimbursement for unimplemented pendency services awarded because less than complete reimbursement for missed pendency services "would undermine the stay-put provision by giving the agency an incentive to ignore the stay-put obligation"]; see

[12] The Urban supervisor testified that she believed services began on September 11, 2023 (Tr. p. 52).

Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *25, *26 [E.D.N.Y. Oct. 30, 2008] [ordering services that the district failed to implement under pendency awarded as compensatory education services where district "disregarded the 'automatic injunction' and 'absolute rule in favor of the status quo' mandated by the [IDEA] and wrongfully terminated [the student's] at-home services"] [internal citations omitted]).

However, here the district was not required to implement pendency. Recently, the Second Circuit has explained that a parent may not unilaterally move a student to a preferred nonpublic school and still receive pendency funding, since it is the district that is authorized to decide how (and where) a student's pendency services are to be provided as per the text and structure of the IDEA and given that the district is the party responsible for funding the pendency services (Ventura de Paulino, 959 F.3d at 532-35). The Court observed that:

> If a parent disagrees with a school district's decision on how to provide a child's educational program, the parent has at least three options under the IDEA: (1) The parent can argue that the school district's decision unilaterally modifies the student's pendency placement and the parent could invoke the stay-put provision to prevent the school district from doing so; (2) The parent can determine that the agreed-upon educational program would be better provided somewhere else and thus seek to persuade the school district to pay for the program's new services on a pendency basis; or (3) The parent can determine that the program would be better provided somewhere else, enroll the child in a new school, and then seek retroactive reimbursement from the school district after the IEP dispute is resolved

(Ventura de Paulino, 959 F.3d at 534). Here, the parent elected the third option when she rejected the April 2020 IESP and unilaterally obtained private services for the student at her own financial risk. Thus, any gaps in the delivery of the privately obtained services are not attributable to the district, and the student is not entitled to compensatory pendency services for any period during which the district had no obligation to provide pendency services to the student.

VII. Conclusion

The hearing record demonstrates that the parent met her burden to prove that the unilaterally obtained SETSS delivered to the student by Urban were appropriate for the 2023-24 school year and that no equitable considerations warrant a reduction in funding. Thus, the parent is entitled to direct funding for the costs of such services for the 2023-24 school year.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision, dated April 7, 2024, is modified by reversing those portions which found the parent failed to meet her burden to prove that the unilaterally obtained SETSS were appropriate and dismissed the parent's claims with prejudice; and

IT IS FURTHER ORDERED that the district is directed to fund the costs of up to three hours per week of SETSS delivered to the student by Urban during the 2023-24 school year, upon submission of proof of the student's attendance and provider affidavits as to services rendered.

Dated: **Albany, New York**
June 14, 2024

CAROL H. HAUGE
STATE REVIEW OFFICER