



The University of the State of New York

The State Education Department

State Review Officer

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No. 24-194

Application of a STUDENT WITH A DISABILITY, by his parents, 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:

Thivierge & Rothberg, PC, attorneys for petitioners, by Christina D. Thivierge, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Lindsay R. VanFleet, 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. Petitioners (the parents) appeal from a decision of an impartial hearing officer (IHO) which denied in part their request for funding of unilaterally obtained special education teacher support services (SETSS) for their son delivered by Path 2 Potential for the 2023-24 school year. Respondent (the district) cross-appeals from that portion of the IHO's decision which granted funding in part for Path 2 Potential. The appeal must be sustained in part. The cross-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 programming for students with disabilities under the IDEA (20 U.S.C. §§ 1400-1482), namely a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3,

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

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

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

III. Facts and Procedural History

The parties' familiarity with this matter is presumed and, therefore, the facts and procedural history of the case and the IHO's decision will not be fully recited.

Briefly, as reported by the parents, the student has received diagnoses of attention deficit-hyperactivity disorder (ADHD) combined type, mixed-receptive expressive language disorder, speech sound disorder, developmental coordination disorder, and specific learning disorders in reading, writing, and math (Parent Ex. M at ¶4). The student received services through the Early Intervention Program, followed by special education as part of his preschool program; for kindergarten the student began attending a private religious school and has been parentally placed in the same school through the 2023-24 school year (*id.* at ¶¶5-7; Parent Exs. C at p. 1; G; Dist. Exs. 1 at p. 2; 5). The student has been receiving SETSS from the same agency since the 2021-22 school year (Parent Exs. L at ¶4; M at ¶7) and has also received occupational therapy (OT) and speech-language therapy (Parent Exs. E; F).

A CSE convened on May 9, 2023, determined the student was eligible for special education as a student with a speech or language impairment, and developed an IESP to be implemented beginning on May 23, 2023 (*see* Dist. Ex. 1).¹ The CSE recommended that the student receive 10 periods of direct, group SETSS per week with two 30-minute sessions of individual speech-language therapy per week, one 30-minute session of group speech-language therapy per week, two 30-minute sessions of individual OT per week, and one 30-minute session of group OT per week (*id.* at pp. 18-19). The IESP indicated that the student was in second grade and "attending a parentally placed private [religious] school" (*id.* at p. 2).

The parent sent a letter, dated September 1, 2023, to the district's CSE indicating that they had not yet received a copy of the student's May 2023 IESP and that they believed the student needed 20 hours per week of 1:1 SETSS, speech-language therapy, and OT during the 2023-24 school year (Parent Ex. J).

The parent signed a contract with Path 2 Potential on September 1, 2023 (Parent Ex. H).² The contract indicated that Path 2 Potential would provide SETSS to the student for the 2023-24 school year and should the district "not pay or provide[d] incomplete funding for the services rendered," the parent was responsible for the cost of the services (*id.*). During the 2023-24 school year, at the time of the hearing, the student was receiving 20 hours per week of 1:1 SETSS at the private school he was attending (Parent Ex. K ¶ 5). In October 2023, a licensed psychologist conducted a private neuropsychological evaluation of the student (*see* Parent Ex. C).

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

² Path 2 Potential LLC is a private company that has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (*see* 8 NYCRR 200.1[d], 200.7).

A. Due Process Complaint Notice

In an amended due process complaint notice dated October 27, 2023, the parents asserted that the district failed to offer the student a free appropriate public education (FAPE) for the 2023-24 school year (Parent Ex. B at p. 1).³ The parents argued that the IESP they received in October 2023 was untimely, and failed to make an appropriate recommendation as the student needed 20 hours of 1:1 SETSS per week plus speech-language therapy and OT services (id. at pp. 1, 4). The parents contended that the district delivered an IESP to them in October 2023 and that it was untimely and failed to offer the student an appropriate educational program (id. at p. 4).⁴ The parents asserted that the May 2023 CSE failed to conduct timely evaluations of the student and did not have its own data regarding the student's current functioning (id. at p. 3). The parents made several other claims regarding the CSE and its recommendations; however, the argument most pertinent to the disputed issues in this proceeding was that the CSE recommendation of 10 hours per week of group SETSS was not appropriate for the student and the CSE failed to recommend that the student receive 20 hours of 1:1 SETSS per week (id. at pp. 4-5). The parents asserted that they obtained their own SETSS teacher from Path2Potential to provide the student with 20 hours of 1:1 SETSS per week and sought funding of the unilaterally obtained services at the rate of \$175 per hour (id. at p. 6). The parents also stated that they obtained speech-language therapy and OT services for the student and were seeking funding for those services (id.).

B. Impartial Hearing Officer Decision

An impartial hearing convened before the Office of Administrative Trials and Hearings (OATH) on October 3, 2023 and concluded on January 5, 2024 (see Tr. pp. 1-186).⁵ In a decision dated April 9, 2024,⁶ the IHO found that the district conceded it did not implement the student's May 2023 IESP, and therefore, the district failed to meet its burden that it offered the student a FAPE for the 2023-24 school year (IHO Decision at pp. 12, 21).

Turning to the issue of the appropriateness of the unilaterally obtained SETSS provided to the student by Path 2 Potential, the IHO noted that the issue of funding for the private religious school was not before her (IHO Decision at p. 13). However, the IHO found that the hearing

³ The initial due process complaint notice was dated September 1, 2023, and, at that time, the parents asserted they had not yet received the student's IESP for the 2023-24 school year (see Parent Ex. A).

⁴ The parents also asserted pendency from a November 23, 2022 IHO decision in a prior proceeding, which the parents claimed granted the student 20 hours per week of 1:1 SETSS (Parent Ex. B at p. 2). The hearing record indicated that the issue of the student's pendency was resolved (Tr. pp. 3, 182; IHO Ex. I at p. 2; Sept. 28, 2023 Pendency Implementation Form).

⁵ It is noted that the October 3, 2023 hearing date was a pre-hearing conference, which occurred prior to the due process complaint being amended and that the district was not present for that pre-hearing conference (see Tr. pp. 1-15). The IHO issued a Prehearing Conference and Summary Order on October 3, 2023 (see IHO Ex. I). Moreover, following the second hearing on December 1, 2023, the IHO issued a Status Conference Summary and Order also dated December 1, 2023 (see IHO Ex. II).

⁶ The IHO's decision contained a typographical error in the date and it was issued in April 2024 rather than April 2023 (IHO Decision at p. 21).

record did not demonstrate that the student was functioning on grade level even with the assistance of 20 hours of SETSS, and the evidence did not show that the student progressed during the 2023-24 school year and noted that she could not consider the October 2023 neuropsychological evaluation as it was not available at the time of the May 2023 CSE meeting (*id.* at pp. 13-14). The IHO held that "the "[p]arent's argument that 'this level of services has been found appropriate for [the Student] in a previous impartial hearing,' [was] not evidentiary in nature and has no place in, nor bearing upon, my decisionThe [p]arent's continual referral to a 10.28.23 report that was not before the CSE when it made its determinations on 5.9.23 cannot be considered" (IHO Decision at p. 14).⁷ The IHO found that the parent and SETSS teacher contradicted each other regarding the number of hours of SETSS the student required, and it was not clear how many hours of instruction the student received in reading, writing, and math (IHO Decision at pp. 14-15). The IHO found that the district's argument that the SETSS the student received were inadequate was "meritorious" and that even if the IHO accepted the parents' contention that the student needed support during core academic subject instruction, there was "no evidence in the record as to how many hours each day that entail[ed]" (*id.* at p. 15). Therefore, the IHO held that the parents failed to demonstrate how 20 hours of SETSS pushed into the private school was an appropriate educational placement for the student during the 2023-24 school year (*id.* at p. 16). Specifically, the IHO held that there was "no showing that it [could] meet [the student's] academic, communication, behavioral, social, self-management, and emotional needs" (*id.*).⁸ Despite the finding that the parent failed to establish that the 20 hours of SETSS per week from Path 2 Potential were appropriate, the IHO ruled that "[n]otwithstanding, the 10 hours of SETSS recommended in the IESP stands" (*id.*).

Next, the IHO addressed equitable considerations (IHO Decision at pp. 17-20). The IHO noted that the contract in evidence was not signed by the agency providing services and did not state the number of hours per week the student received SETSS, and therefore, the IHO found that the contract lacked an essential term (*id.* at p. 19). The IHO also noted that there were no progress reports for the 2023-24 school year (*id.*). The IHO reduced the amount of the requested award of \$175 per hour for SETSS "by 5% for vagueness concerning how the rate was established, no consideration of the marketplace, and the percentage paid to" the provider (*id.* at p. 20). The IHO also reduced the award by 5 percent because the contract was not signed by the provider agency and reduced the rate by an additional 5 percent as the parent testified that he chose the SETSS teacher because he wanted someone who loved the student, rather than for the provider's abilities (*id.*). Based on these reductions, totaling 15 percent, the IHO awarded a rate of \$148.75 per hour for 10 hours of SETSS per week (*id.*).

⁷ A neuropsychological assessment of the student was conducted on October 28, 2023 and the CEO of Path 2 Potential conducted an observation of the student in October 2023 (Parent Exs. C, L).

⁸ Further, the IHO noted that the parents, at the hearing, stated that they were not seeking speech-language therapy and OT as the district was providing those services; the IHO held that the parent was bound by those representations and the request for private related services was "misplaced" (IHO Decision at pp. 16-17). It is noted that the hearing record demonstrates that the district was providing student's related services of speech-language therapy and OT (Tr. pp. 54; IHO Decision at p. 6).

IV. Appeal for State-Level Review

The parents appeal. The parents argue that the IHO erred by failing to apply appropriate legal standards in finding that they did not meet their burden to prove that the 20 hours of 1:1 SETSS they obtained from Path 2 Potential was appropriate for the student. The parents argue that the IHO demonstrated bias during the impartial hearing as she previously worked for the district.⁹ The parents further assert the IHO engaged in extensive questioning of the parents' witnesses and overruled the parents' objections without justification. The parents contend that the IHO's questions on cross-examination were more in depth than the district's and that the IHO badgered witnesses.

The parents allege that the IHO's "[r]einstatement of the [10 hour per week] recommendation in an admittedly deficient and inappropriate IESP is erroneous. The parents contend that the IHO failed to explain how the student could benefit from group SETSS or how the student could benefit educationally with just 10 hours of group SETSS as recommended in the IESP. According to the parents, the IHO excessively questioned the witnesses and disregarded credible testimony that the student progressed during the 2023-24 school year. The parents also argue that the IHO improperly disregarded the October 2023 evaluation, and its recommendation of 20 hours of 1:1 SETSS, which should have been given due weight.

Regarding equitable considerations, the parents argue that they support the request for full funding. The parents contend that they were cooperative, and the district did not put forth any evidence as to a market rate for SETSS. The parents assert that the IHO erred by reducing funding for the lack of a signature, as there was no basis to find this was an essential term; asserting the contract was valid and enforceable. The parents also argue that the provider was qualified and the IHO erred in finding this warranted a reduction. The parents request 20 hours of 1:1 SETSS per week at the rate of \$175.

The district submits an answer and cross-appeal. As part of its answer, the district contends that the IHO was correct in denying the parents the full 20 hours of SETSS per week they requested and as for its cross-appeal argues that the IHO erred in finding that it was responsible for the 10 hours per week of SETSS recommended in the May 2023 IESP. The district asserts that the parents were not entitled to funding for any requested services. The district argues that the services obtained by Path 2 Potential were a unilateral placement that required analysis under the Burlington/Carter standard and the hearing record does not support finding that the Path 2 Potential services were an appropriate unilateral placement for the student. The district contends that the record does not present any convincing evidence or testimony as to how the SETSS were implemented, what deficits they addressed, or how they were specially designed to meet the student's unique needs. The district asserts that there was no evidence of progress from the school year in question and the letter from the school year in question only makes broad statements about the usage of the SETSS teacher without specifics. The district contends that there was no evidence regarding the student's goals. According to the district, the parents failed to meet their burden that

⁹ The parents submitted a copy of her resume as additional evidence with the request for review.

the services were specially designed to meet the student's needs and the IHO's award of 10 hours of SETSS per week should be vacated.¹⁰

Regarding equitable considerations, the district argues that the IHO was correct in reducing the rate of the awarded SETSS but erred in that equitable considerations warranted a denial of all relief. The district asserts that the rate requested by the parents was unreasonably excessive. The district argues there is no evidence of the quantity or quality of what was provided to the student other than redirection to keep the student on task. The district asserts that it did contest the rate and questioned the witnesses on this issue.

The parent's submit an answer to the district's cross-appeal and argue that they satisfied their burden to demonstrate that the 20 hours per week of 1:1 SETSS was appropriate for the student and that equitable considerations favor full reimbursement/funding.

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]).¹¹ "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

¹⁰ The district notes that if the SRO does award some SETSS, the IHO was correct to reduce the parents' request for 20 hours per week to a maximum of 10 hours per week.

¹¹ 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]).

public or nonpublic schools located within the school district (*id.*).¹² 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. Preliminary Matters

Initially, neither party appealed the IHO's conclusion that the district failed to offer the student a FAPE or equitable services for the 2023-24 school year, and as such, this determination has 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]).¹³ The parties' continuing disputes on appeal include whether the IHO demonstrated bias through her conduct at the impartial hearing, whether the parents' met their burden to demonstrate that 20 hours of 1:1 SETSS was appropriate for the student, and whether equitable considerations warrant a reduction in the relief awarded.

1. IHO Bias/Conduct of Impartial Hearing

Turning first to the parents' allegation that the IHO was biased due to her questioning of the parents' witnesses and because she had worked as an attorney for the district previously, the parents point to the IHO's requirement for parties to appear via video and "extensive" questioning of the witnesses. The district contends that the IHO's conduct during the impartial hearing does not rise to the level of bias. It is well settled that an IHO must be fair and impartial and must avoid

¹² 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.

¹³ Further, there was no dispute at the impartial hearing regarding related services and neither party appealed the IHO's order on the issue.

even the appearance of impropriety or prejudice (see, e.g., Application of a Student with a Disability, Appeal No. 12-066). Moreover, an IHO, like a judge, must be patient, dignified, and courteous in dealings with litigants and others with whom the IHO interacts in an official capacity and must perform all duties without bias or prejudice against or in favor of any person, according each party the right to be heard, and shall not, by words or conduct, manifest bias or prejudice (e.g., Application of a Student with a Disability, Appeal No. 12-064). An IHO may not be an employee of the district that is involved in the education or care of the child, may not have any personal or professional interest that conflicts with the IHO's objectivity, must be knowledgeable of the provisions of the IDEA and State and federal regulations and the legal interpretations of the IDEA and its implementing regulations, and must possess the knowledge and ability to conduct hearings and render and write decisions in accordance with appropriate, standard legal practice (20 U.S.C. § 1415[f][3][A]; 34 CFR 300.511[c][1]; 8 NYCRR 200.1[x]).

State regulations set forth the procedures for conducting an impartial hearing and address, in part, minimal process requirements that shall be afforded to both parties (8 NYCRR 200.5[j]). Among other process rights, each party shall have an opportunity to present evidence, compel the attendance of witnesses, and to confront and question all witnesses (8 NYCRR 200.5[j][3][xii]). Furthermore, each party "shall have up to one day to present its case" (8 NYCRR 200.5[j][3][xiii]). State regulation provides that the IHO "shall exclude any evidence that he or she determines to be irrelevant, immaterial, unreliable, or unduly repetitious" and "may limit examination of a witness by either party whose testimony the impartial hearing officer determines to be irrelevant, immaterial or unduly repetitious" (8 NYCRR 200.5[j][3][xii][c], [d]).

Generally, unless specifically prohibited by regulation, IHOs are provided with broad discretion, subject to administrative and judicial review procedures, in how they conduct an impartial hearing, so long as they "accord each party a meaningful opportunity" to exercise their rights during the impartial hearing (Letter to Anonymous, 23 IDELR 1073 [OSEP 1995]; see Impartial Due Process Hearing, 71 Fed. Reg. 46,704 [Aug. 14, 2006] [indicating that IHOs should be granted discretion to conduct hearings in accordance with standard legal practice, so long as they do not interfere with a party's right to a timely due process hearing]). At the same time, the IHO is expected to ensure that the impartial hearing operates as an effective method for resolving disputes between the parents and district (Letter to Anonymous, 23 IDELR 1073). State and federal regulations balance the interests of having a complete hearing record with the parties having sufficient opportunity to prepare their respective cases and review evidence.

In this case, the IHO issued two preliminary orders regarding the rules for the impartial hearing to which she expected the parties to adhere (see IHO Exs. I; II). In those orders, the IHO specifically directed that the attorneys and witnesses appear via video as the IHO indicated she must assess credibility and that "is difficult to do so, if a witness appears behind a black rectangle" (IHO Exs. I at p. 2; II at p. 2).¹⁴ Regarding the attorneys, the IHO noted that they were professionals and should have working technology and internet access (*id.*). The parents' attorney took issue with what occurred at the second status conference, when the IHO informed the parents' attorney that she was required to appear via video (Tr. pp. 17-18). At that hearing, the IHO had

¹⁴ The IHO's prehearing orders indicate that if a witness did not have the "wherewithal or capability" to appear via video, the IHO should be notified three business days prior to the hearing (IHO Exs. I at p. 2; II at p. 2).

already issued the first preliminary order and the IHO noted on the record that the parents' attorney had appeared before her in the past, and knew that the IHO had this rule (Tr. p. 17; IHO Ex. I). The IHO's requirement that an attorney appear via video for the IHO to see the party is neither bias or an abuse of discretion. To the contrary, it was a permissible excise of the IHO's discretionary authority and an appropriate requirement for a due process proceeding. Notably, in this instance, the IHO did not dismiss the claim or disallow the participation of the attorney at that hearing; however, the parents' attorney is cautioned that the IHO has further authority to sanction a parties' noncompliance with reasonable directives for conducting the impartial hearing.

Turning to the allegation that the IHO extensively questioned the parents' witness and thereby demonstrated bias, this argument is also without merit. The hearing record demonstrates that the IHO engaged in permissible development of the evidentiary record which falls within her discretion as the appointed IHO. The hearing record shows that the IHO's questions were relevant to the issues before her; IHOs should use their authority to ensure the hearing record is fully developed regarding the issues disputed by the parties. In this case, the parents were able to present their case by asking questions, calling witnesses, and entering documentary evidence. The IHO's actions did not prevent the parents from putting forth their case on the issue of whether the unilaterally obtained services were appropriate to meet the student's needs. There is no evidence in the hearing record to find that the IHO abused her broad discretion to conduct the impartial hearing as she sought fit and both parties had a meaningful opportunity to exercise their rights during the impartial hearing. Because the district did not present witnesses and conceded that it failed to provide the IESP programming to the student, there was no opportunity or need for the IHO to similarly ask questions of witnesses called by the district.

2. Legal Standard

Both parties allege that the IHO conducted an improper analysis of the second Burlington Carter criterion regarding unilaterally selected private services, but for different reasons. The IHO set forth the proper legal standard in her decision (IHO Decision at pp. 12-13); however, as further described below, the IHO misapplied the standard to the facts of this case.

Turning to a review of the appropriateness of the unilaterally obtained services, a private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129). Citing the Rowley standard, the Supreme Court has explained that "when a public school system has defaulted on its obligations under the Act, a private school placement is 'proper under the Act' if the education provided by the private school is 'reasonably calculated to enable the child to receive educational benefits'" (Carter, 510 U.S. at 11; see Rowley, 458 U.S. at 203-04). 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 Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether a unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether the placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] ["evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

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

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

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

In this case, the IHO made findings that the 20 hours of 1:1 SETSS privately obtained by the parents from Path 2 Potential were not appropriate to address the student's needs because the student was not functioning on grade level in the classroom, should not have been in a general education classroom "without the support of a special education teacher," the letter from the student's teacher was unpersuasive, and the October 2023 neuropsychological evaluation of the student could not be considered because it was not before the May 2023 CSE. However, inconsistent with this finding, the IHO determined that the 10 hours of SETSS called for by the IESP "stands" and, despite finding the services provided to the student inappropriate, nevertheless awarded 10 hours of SETSS from Path 2 Potential apparently on the basis that 10 hours of SETSS was listed in the student's May 2023 IESP (see IHO Decision at pp. 13-16). While the parents assert that the IHO found that the 10 hours of SETSS called for in the May 2023 IESP was inappropriate, that is a misreading of the IHO's decision, which premised the denial of FAPE upon the district's concession that it did not "implement" the recommendation in the May 2023 IESP

(IHO Decision at p. 12). The IHO did not make any appropriateness finding at all related to the 10 hours of SETSS instruction in a group called for in the IESP, yet she awarded funding from Path 2 Potential for 10 hours of 1:1 instruction. The IHO's reasoning for relying on the IESP as a basis for awarding partial funding of the unilaterally obtained services from Path 2 Potential was contradicted by her findings that the same services were inappropriate for the student and was therefore error.¹⁵ The IHO should have determined whether, under the totality of the circumstances, the 20 hours per week of SETSS delivered to the student by Path 2 Potential during the 2023-24 school year, together with the other related services provided to the student, were reasonably calculated to enable the student to receive educational benefits. That question is further discussed below.

B. Unilaterally Obtained Services

1. Student Needs

Although not in dispute, a discussion of the student's needs is warranted to determine if SETSS delivered by Path 2 Potential provided specially designed instruction to address the student's individual needs.

The May 2023 IESP is relevant insofar as it contained a description of the student's needs and included his 2022-23 second grade third trimester report card grades which were issued just prior to the school year in dispute (Dist. Exs. 1 at pp. 1-2; 5 at pp. 1-2). According to the report card, at that time, the student performed at the "Excellent," "Good," or "Satisfactory" levels, with no skills falling in the "Needs Improvement" or "Improving" levels (see Dist. Ex. 5 at pp. 1-2).

With regard to reading, the May 2023 IESP indicated that the student independently and proficiently read on a first-grade level, he demonstrated difficulty decoding words, required prompting to decode words, and did not present with a vast vocabulary (Dist. Ex. 1 at p. 2). The student's fluency was not at a second grade level, and he required prompting to express himself, to sound out words and blends, and required constant review and repetition (id.). According to the IESP, the student's writing skills were "independently aligned with the skills for first-grade," he needed prompting to begin writing, required cues and supports to aid his writing responses, and needed time to process and write (id.). In mathematics, the IESP indicated that although the student was able to compute and solve math problems, he struggled with word problems and choosing the appropriate strategy to solve the word problem (id.).

According to the May 2023 IESP, the student displayed delays in language, attention, focus, and fine motor skills (cutting and handwriting), and although he was able to follow the classroom routines and assignments, he required reminders and prompts to stay focused and on

¹⁵ To the extent that the IHO may have been trying to reduce the amount of instruction on equitable grounds, this too is impermissible in the portion of a decision determining whether privately obtained instruction is appropriate. The Second Circuit Court of Appeals has recently held it is error for an IHO to apply the Burlington/Carter test by conducting reimbursement calculations based on the IHO's analysis of the appropriateness of the unilateral placement (A.P. v. New York City Dep't of Educ., 2024 WL 763386, at *2 [2d Cir. Feb. 26, 2024] [holding that the IHO should have determined only whether the unilateral placement was appropriate or not rather than holding that the parent was entitled to recover 3/8ths of the tuition costs because three hours of instruction were provided in an eight hours day]).

task, and he needed significant monitoring to complete the school day (Dist. Ex. 1 at pp. 2-3). The IESP stated that the student had difficulty staying focused, especially during class discussions and other presentations, he would not always participate unless given prompts and cues, and he benefitted from frequent breaks (id. at p. 3). In addition, the IESP indicated that the student had difficulty concentrating, staying on task, and focusing, and in order to transition smoothly, he required being "in tune with [SETSS] and classroom teacher" (id.).

The May 2023 IESP indicated that in terms of overall comprehension, at times, the student needed "to be pressed to answer even when he" knew the answer and would be reassured and given guidance to finish his thought by the classroom teacher or SETSS teacher (Dist. Ex. 1 at p. 3). The IESP stated that the student needed extra time and extra aid for processing, and that he required direction and help in responding and that his performance improved with sentence starters, cues, and prompting given by both the classroom teacher and SETSS teacher (id.). The IESP stated that even when the student was provided with starters and direction, and had shown understanding to his SETSS teacher, he, at times, would not want to try and answer (id.). The IESP indicated that the student required reminders to slow down, and, at times, he demonstrated that he did not want to complete assignments because he was not motivated, eager, or felt it was too challenging (id.).

In the area of language skills, the May 2023 IESP stated that receptively, the student demonstrated a general understanding of basic conversation and followed simple directions when focused, and, at times, needed directions and words repeated, simplified, and broken down for better success (Dist. Ex. 1 at p. 4). The IESP noted that vocabulary development would help with his receptive language, and that the student's attention also affected this area (id.). The IESP indicated that the student required support and aid to follow directions, stay on task, and maintain better attention (id.). According to the IESP, the student's language deficits were displayed in his expressive responses, both in conversation with peers and teachers and in responding to questions/giving replies (id.). When using spontaneous phrases, the student did not always use age-appropriate grammar or sentence structure, that the student did not always want to answer in class, and when he did, he often used simple sentences/phrases to respond (id.).

With respect to pragmatic and conversational language skills, the May 2023 IESP noted that the student needed to develop more conversational vocabulary and increase more interactions, that he might not always initiate and sustain conversations without prompting, and that development in this area was inconsistent (Dist. Ex. 1 at p. 5). According to the IESP, when the student discussed a familiar topic or one that he liked with his peers, he became excited, talked very quickly, could not always be understood, might have used longer phrases and his words were not always clear (id.). The IESP stated that the student needed prompting to speak slowly, pronounce words clearly, and use longer phrases, and when the student was "processing and finding vocabulary to use," he hesitated slightly in his response (id. at pp. 4, 5).

Regarding social development, the May 2023 IESP stated that the student's interactional play and engagement with his peers had improved, that he still needed "more development," and that he required prompting and support as he conversed and played with his classmates (Dist. Ex. 1 at p. 8). The IESP noted that the student sometimes needed to be encouraged to participate, that he frequently imitated his peers and followed their lead whether they were exhibiting on task behavior or not, and that this required monitoring throughout the year (id.). At times, the student also displayed behaviors that demonstrated his aversion to tasks or directions, which required

redirection and support (id.). The IESP included parental concerns such as that the student may "get picked on or bullied by other children," and regarding his frustration tolerance, friendship formation, aggressive behavior toward his brother and that he became easily angered and would "get physical and kick" at home, and that he demonstrated "difficulty listening to social cues" (id.).¹⁶

According to the May 2023 IESP, with respect to physical development, the student required cues for handwriting tasks such as using one finger space between words, improving sizing, letter alignment and baseline adherence during copying tasks (Dist. Ex. 1 at p. 9). The IESP stated that the student required reminders to correct writing errors such as letter or word omissions as well as writing the letters of a word in a correct order, and he required minimal to moderate verbal cues for writing with a slower pace in order to better check legibility (id.). With respect to fine motor skills, the IESP noted that the student required cues to use an age-appropriate hand grasp when holding his writing instrument, and was able to cut complex shapes and utilize appropriate scissor grasp 80 percent of the time with minimal cues (id.). The IESP indicated that the student required movement breaks from time to time to help him self-regulate and attend to the task at hand, and that he had difficulty maintaining his focus and attention to tasks and required occasional to frequent cuing to stay on task depending on the day (id.). With respect to gross motor skills, the IESP noted that the student's skills were "within range"; however, coordination for skills such as catching and throwing a ball could "be more developed" (id. at pp. 9-10).

2. SETSS from Path 2 Potential

The district argues in its cross-appeal that the IHO should have determined that the parents failed to meet their burden to show the appropriateness of the SETSS delivered to the student by Path 2 Potential, because there was a lack of evidence regarding how the SETSS were implemented, what student deficits the SETSS addressed, or how the SETSS were specially designed to meet the student's needs. The district also asserts that the parents failed to show that the student made progress during the 2023-24 school year.¹⁷

In the SETSS teacher's affidavit, she stated she provided 20 hours per week of 1:1 SETSS to the student in his general education classroom at the private religious school during the 2023-24 school year (third grade) (Parent Ex. K ¶¶ 5, 6). The SETSS teacher testified that the student required constant adult support, cues, verbal prompting, redirection, checks for understanding, repetition and review of class work, as he had difficulty concentrating and staying on-task during class time, and he earned stickers throughout the day when he displayed on-task behavior (Tr. p.

¹⁶ The IESP stated that the student's teachers reported that he did not exhibit physical aggression in school, that he was not aggressive in any way, that the teacher had not observed anyone picking on the student, and that he had many friends at recess he socialized with (Dist. Ex. 1 at p. 9).

¹⁷ The district also incorrectly asserts that the parents were required to show that Path 2 Potential "met or even partially achieved any of the goals in the IESP," and that Path 2 Potential was required to develop its own goals for the student. However, the district did not implement or defend the appropriateness of the annual goals contained in the student's May 2023 IESP, and the private agency need not have its own IEP for the student (Carter, 510 U.S. at 13-14). As such, the district's arguments on these points are misplaced.

72; Parent Ex. K ¶¶ 8, 17).¹⁸ In addition, the SETSS teacher noted that she provided the student with breaks throughout the school day that consisted of taking him out in the hall to stretch, do jumping jacks, or take a walk, which helped the student to refocus and address some of his internal and external distractions (Parent Ex. K ¶ 14). The SETSS teacher also provided encouragement for the student to participate, and prompts for him to raise his hand to answer questions in complete sentences and give longer responses (*id.* ¶ 8).

Academically, according to the SETSS teacher the student needed support in all of his classes including ELA, math, science, social studies, art, music, computer, and foreign language to grasp concepts, remain focused, and process language (Tr. p. 72; Parent Ex. K ¶19). The SETSS teacher stated that the student's academic delays, language delays, and impulsivity required him to have 1:1 support throughout the day to process the work, understand directions, and put answers down, and that he needed direct instruction to expand his language and vocabulary, and to put ideas together (Parent Ex. K ¶ 19). According to the SETSS teacher, to support the student's academic learning, she used refocusing and redirection strategies, visual aids, sentence starters, checks for understanding, math manipulatives, repetition of directions, small group and individualized instruction, modeling, scaffolding, chunking, wait time, and movement breaks during the day (*id.* ¶ 13). The SETSS teacher testified that in ELA, the student required constant review, repetition, and aid to learn and retain concepts, and that although his reading fluency was improving, the student required "a lot of support and prompting" (*id.* ¶ 15). In mathematics, the SETSS teacher testified that the student required guidance and support with word problems and with producing his answers, and that she used modeling to demonstrate how to underline key words and numbers in a math word problem (*id.* ¶ 16). The SETSS teacher confirmed that she broke down academic material for the student if he needed clarification or understanding "to get started" and checked for understanding afterward, that she sometimes broke down directions provided by the classroom teacher, and that with the increased academic expectations of third grade, she helped the student with his time management (Tr. pp. 79-80). In addition, the SETSS teacher testified that she repeated the classroom teacher's directions to the student, gave him reminders to make sure he understood what he was supposed to do, used verbal or gestural prompts such as pointing, and reminded him to slow down to ensure he understood the directions and was on task (Tr. pp. 103-05). According to the SETSS teacher's testimony, the student's independent performance was inconsistent, and he was not able to focus, concentrate, organize, start, and complete schoolwork without support (Tr. pp. 81-83).

With respect to social skills, the SETSS teacher testified that the student needed prompting and encouragement to engage with peers and to engage in appropriate play and conversation (Parent Ex. K ¶ 18). Further, the SETSS teacher stated that she incorporated strategies used in speech therapy including tapping out syllables of words and speaking slowly to improve

¹⁸ The CEO confirmed that multiple prompts per minute were necessary for the student to maintain skill acquisition (Tr. p. 131; *see* Parent Ex. L ¶ 3). In affidavit testimony, the CEO stated that during his observations at school, the student required prompts multiple times per minute to maintain this level of performance and progress and that consistent prompts were "100% required for the full duration of his day to avoid dangerous situations and maintain skill acquisition" (Parent Ex. L ¶ 9). Upon questioning by the IHO, the CEO attempted to clarify his statement to mean instances when the student was unaware of his social surroundings, and seemed "to be caught in his imagination where he w[ould] wander off and could potentially get into dangerous situations" (Tr. pp. 129-30).

intelligibility, and for pragmatic language, she encouraged and prompted the student to initiate and hold conversations with his classmates (*id.* ¶ 10). Additionally, the SETSS teacher stated that during recess, the student needed prompting to play with peers and use appropriate pragmatic language (*id.* ¶ 20). The SETSS teacher testified that the student had a group of friends he liked to play with during the 2023-24 school year, that he could become overexcited with them, and she supported his social skills by reminding the student when it was not time to be talking with friends (Tr. p. 80). According to the SETSS teacher, the student needed prompting with activity of daily living skills like getting in the lunch line, using the rest room, and washing his hands (*id.* at ¶ 20). With respect to support for his fine motor delays, the SETSS teacher stated that she prompted the student to slow down when writing so his handwriting was legible and worked on cutting along lines and cutting out shapes (Parent Ex. K at ¶ 12).

3. Progress

In its cross-appeal, the district argues that the parents failed to show evidence of the student's progress during the 2023-24 school year. The district is correct that the student's progress reports entered into the hearing record were prepared during the 2022-23 school year, which was not the school year at issue in this case and, therefore, not helpful in determining whether the student made progress during the 2023-24 school year (see Parent Exs. D; E; F). However, review of the evidence in the hearing record shows that generally, the student made progress during the school year in dispute and regardless, 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]).

In affidavit testimony, on December 21, 2023, the SETSS teacher stated that, with 1:1 support, during the 2023-24 school year the student was improving his attending skills and engaging in lessons, that he was making slow progress in sounding out words, blending words, and answering WH questions, as well as improving his reading fluency with a lot of support and prompting (Parent Ex. K ¶¶ 8, 15). The SETSS teacher testified that the student was raising his hand more, he had more verbal exchanges with classmates, and had improved his independence (*id.* ¶¶ 8, 18). In addition, the SETSS teacher stated that the student was progressing in the 2023-24 school year, had improved overall, could follow directions when focused, was progressing in mathematics, was more social with his peers, and that his vocabulary was improving (*id.* ¶¶ 9, 10, 16, 20).

The CEO of Path 2 Potential stated that he conducted an observation of the student at the private religious school in October 2023 and concluded that the student continued to make progress with the SETSS teacher (Parent Ex. L ¶¶ 11, 12). The CEO testified that the student made consistent progress with the SETSS teacher, that he was performing better in the classroom with the level of support he received (the student required multiple prompts per minute depending on the activities), and where he saw progress was in the SETSS teacher's ability to make the student's level of support "more subtle" and fade the intensity of the prompt level (Tr. pp. 121-24). According to the CEO, he knew of the student's social skills progress from conversations with the SETSS teacher, and but he did not know if the student made academic progress (Tr. p. 140). The parent stated in his affidavit that he had observed that the student had made progress over the course of the 2023-24 school year in the areas of comprehension, pragmatic language, concentration, and social skills (Parent Ex. M ¶¶ 25, 26).

Contrary to the conclusions of the IHO and the assertions of the district, the hearing record included statements of the student's needs, descriptions of how the SETSS teacher provided specially designed instruction to the student, and relevant evidence that the student was making progress during the 2023-24 school year. Therefore, the evidence in the hearing record supports a finding that the SETSS delivered to the student by Path 2 Potential were appropriate to address his special education needs.

C. Equitable Considerations

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 v. Medina City Sch. Dist., 348 F.3d 513, 523-24 [6th Cir. 2003]; 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).

Generally, districts who fail to comply with their statutory mandates to provide special education can be made to pay for special education services privately obtained for which a parent paid or became legally obligated to pay, a process that is essentially the same as the federal process under IDEA. "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"]).

Here, I agree with the IHO's ultimate decision to reduce the parents' requested award of SETSS to 10 hours per week, albeit for different reasons than the IHO found. The SETSS teacher testified that she was with the student for four hours per day totaling 20 hours per week (Tr. pp. 68-69; see Parent Ex. L at ¶ 7). However, the evidence shows that the student wanted more independence, and the SETSS teacher testified that she sat across the room from the student for approximately 30-40 percent of the 20 hours (Tr. pp. 87-91).¹⁹ She specified that she was in the student's private school every day from 9 a.m. to 1 p.m. but that she was not there for parts of the student's ELA and math instruction, and was not at the school for science, social studies, computer, or art (Tr. pp. 98-100). The SETSS teacher also testified that she went to the student's related services with him for two and half hours per week, services that were provided by the district (Tr. pp. 54, 163-64), but that she was trying to foster the student's independence by staying in the hallway or in a breakroom while he was with the related service provider (Tr. pp. 107-08). Further, the SETSS teacher testified that the student had lunch while she was at the school, but she did not sit at the table with the student, and that she sat at another table where she could still see him (Tr. pp. 105-06). According to the SETSS teacher, the student's lunch period was 40 minutes long and, usually, the student liked to talk with his friends and eat and she was there if he had any problems or concerns (Tr. pp. 106-07).

¹⁹ Additionally, review of the SETSS teacher's testimony shows that much of what she delivered to the student consisted of various prompts, redirection, and refocusing strategies to improve his task completion and interaction skills (see Tr. pp. 72, 81-83, 103-05; Parent Ex. K ¶¶ 8, 14, 17, 20).

The parents assert as part of their appeal that the IHO should have reviewed the October 2023 private neuropsychological evaluation as it supported the student's need for 20 hours of SETSS per week (see Parent Ex. C). The IHO refused to consider the October 2023 neuropsychological evaluation, which was conducted during the school year in question because it was not available to the May 2023 CSE, but that particular reasoning was error. The assessment could not be used to attack the adequacy of the May 2023 IESP, but the parents were permitted to offer it when trying to establish the need for the private special education services obtained by the parents or to show progress with private instruction under the second Burlington/Carter criterion. However, here the neuropsychological assessment was conducted remotely over teletherapy, in part, and in less-than-ideal circumstances using personal protective equipment by both the evaluator and the student (Parent Ex. C at pp. 1-2), and the neuropsychologist did not observe the student in his classroom during the time period in question. While the parents are correct that the private psychologist recommended that the student continue to receive 20 hours per week of 1:1 SETSS, the evaluation report did not show an understanding of how the SETSS teacher spent her time at the student's private school, which as described above, does not support a finding that the student required an additional 10 hours per week of services provided by a special education teacher (see Parent Ex. C). Under the circumstances of this case, in which the student's relative strengths and weaknesses in terms of cognition and academic achievement are not in question, I afford October 2023 neuropsychological evaluation considerably less weight than the educational professionals who observed the student or delivered services to him on a daily basis during his academic activities.²⁰ Based on this evidence, the hearing record does not support that the student required 20 hours of 1:1 SETSS per week as requested by the parents.

Among the factors that may warrant a reduction in tuition under equitable considerations is whether the frequency of the services or the rate for the services were excessive (see E.M., 758 F.3d at 461 [noting that whether the amount of the private school tuition was reasonable is one factor relevant to equitable considerations]). The IHO may consider evidence regarding whether the rate charged by the private agency was unreasonable or regarding any segregable costs charged by the private agency that exceed the level that the student required to receive a FAPE (see L.K. v. New York City Dep't of Educ., 2016 WL 899321, at *7 [S.D.N.Y. Mar. 1, 2016], aff'd in part, 674 Fed. App'x 100). More specifically, while parents are entitled to reimbursement for the cost of an appropriate private placement when a district has failed to offer their child a FAPE, it does not follow that they may take advantage of deficiencies in the district's offered placement to obtain all those services they might wish to provide for their child at the expense of the public fisc, as such results do not achieve the purpose of the IDEA. To the contrary, "[r]eimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71 [emphasis added]; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148). Accordingly, while a parent should not be denied reimbursement for an appropriate program due to the fact that the program provides benefits in addition to those required for the student to receive educational benefits, a reduction from full reimbursement may be considered where a unilateral placement provides services beyond those required to address a student's educational needs (L.K., 674 Fed.

²⁰ I was not convinced by the evaluator's statement that the student required 1:1 SETSS instruction, but as it relates to equitable considerations, I did not weigh the factor of 1:1 services heavily against the parents since the district in contrast did not show any attempts at all to provide SETSS to the student during the school year at issue.

App'x at 101; see C.B. v. Garden Grove Unified Sch. Dist., 635 F. 3d 1155, 1160 [9th Cir. 2011] [indicating that "[e]quity surely would permit a reduction from full reimbursement if [a unilateral private placement] provides too much (services beyond required educational needs), or if it provides some things that do not meet educational needs at all (such as purely recreational options), or if it is overpriced"]; Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ., 790 F.2d 1153, 1161 [5th Cir. 1986] ["The Burlington rule is not so narrow as to permit reimbursement only when the [unilateral] placement chosen by the parent is found to be the exact proper placement required under the Act. Conversely, when [the student] was at the [unilateral placement], he may have received more 'benefit' than the EAHCA [the predecessor statute to the IDEA] requires"]; Reimbursement does not require maximization of the student's potential, although the parents can of course choose to provide extra services on their own (Gagliardo, 489 F.3d at 112; see Frank G., 459 F.3d at 364-65). The evidence in this case described above showed that, for a portion of her time, the Path 2 Potential SETSS teacher was providing little to no support to the student and was not in attendance during some of the student's primary instruction in the general education classroom instruction. Furthermore, as described above, she was sitting in the breakroom and hallway when related services were provided to the student and, even when present in the classroom and during lunch, the student was making progress, but he did not want the SETSS teacher near him. Accordingly she acquiesced to the student and remain apart from him for significant periods in order to allow him to develop independence. Therefore, the evidence leads me to conclude that 20 hours of 1:1 SETSS was an excessive amount of services for this student, and while her mere presence was not necessarily harmful and at times she provided some educational benefits to the student, I find that the 20 hours per week of time sought by the parents leaned heavily toward maximization of the student's services, which is not required by IDEA or State law, and as a result I will decrease the funding by 50 percent.

Turning next to the hourly rate, the IHO reduced the requested rate by 15 percent for three reasons (see IHO Decision at pp. 17-20); however none of the reasons given by the IHO were sufficient to justify reducing the hourly rate sought by the parents. Specifically, the hearing record demonstrates that the parents are financially obligated to pay Path 2 Potential, despite the lack of a fixed number of hours per week in the contract for services and the lack of a signature of a representative of Path 2 Potential on the contract, and there is no evidence in the hearing record that the SETSS teacher was unqualified even if the IHO criticized the parents' reasons for choosing the particular SETSS teacher. Without discussing any evidentiary basis, the IHO also criticized the overhead costs of Path 2 Potential, but the district did not present arguments based on evidence to support a finding that the costs were excessive in this case. Accordingly, the IHO's three rationales were not sufficiently supported by evidence and must be reversed.

In light of the fact that the amount of services provided to the student during the 2023-24 school year were excessive, as described above, the IHO should have awarded 50 percent of the SETSS delivered to the student (10 hours per week) at the contracted rate of \$175 per hour (see Parent Ex. H).

VII. Conclusion

Overall, the hearing record demonstrates that the unilateral services were appropriate for the student, for the 2023-24 school year; however, the hearing record does not support finding that the full 20 hours per week of 1:1 SETSS was necessary to address the student's special education

needs in the private religious school. Additionally, the hearing record does not support the IHO's decision to reduce the hourly rate for SETSS and, as such, the district is ordered to fund 10 hours per week of SETSS for the 2023-24 school year at the rate of \$175 per hour.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the April 9, 2024 IHO decision is modified by reversing those portions which determined that the SETSS delivered to the student by Path 2 Potential during the 2023-24 school year was inappropriate to address his needs and that the hourly rate charged by Path 2 Potential must be reduced by 15 percent, and

IT IS FURTHER ORDERED that the district shall fund up to 10 hours per week of the student's SETSS provided by Path 2 Potential at a rate of \$175 per hour for the 2023-24 school year, upon the submission of proof of the student's attendance and delivery of SETSS by the student's teacher.

Dated: Albany, New York
July 8, 2024

JUSTYN P. BATES
STATE REVIEW OFFICER