



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 24-207

### **Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability**

#### **Appearances:**

Liz Vladeck, General Counsel, attorneys for petitioner, by Lindsay VanFleet, Esq.

Shehebar Law, PC, attorneys for respondents, by Y. Allan Shehebar, Esq.

### **DECISION**

#### **I. Introduction**

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from a decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondent's (the parent's) son and ordered it to fund the costs of special education teacher support services (SETSS) delivered by Alpha Student Support (Alpha) at a specified rate for the 2023-24 school year. The appeal must be sustained.

#### **II. Overview—Administrative Procedures**

When a student who resides in New York is eligible for special education services and attends a nonpublic school, Article 73 of the New York State Education Law allows for the creation of an individualized education services program (IESP) under the State's so-called "dual enrollment" statute (see Educ. Law § 3602-c). The task of creating an IESP is assigned to the same committee that designs educational 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**

A CSE convened on December 19, 2023 to develop an IESP for the student for the 2023-24 school year, with an implementation date of January 10, 2024 (Parent Ex. B at pp. 1, 7). Finding

the student eligible for special education and related services as a student with a learning disability, the December 2023 CSE recommended that the student receive three periods per week of direct, group SETSS in a separate location, delivered in Yiddish (id. at p. 7).<sup>1, 2</sup>

A parent service contract with Alpha dated January 4, 2024, was electronically signed by the parent and a representative from Alpha (Parent Ex. C at p. 2).

### **A. Due Process Complaint Notice**

By due process complaint notice dated January 31, 2024, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2023-24 school year (Parent Ex. A at p. 1). The parent argued that the district failed to implement the December 2023 IESP (id. at p. 2). The parent invoked the student's right to pendency and further requested that the district directly fund or reimburse the parent for the SETSS mandated by the December 2023 IESP at an enhanced rate (id. at p. 3). The parent also "reserve[d] the right to seek compensatory educational services for any services that were mandated but not provided" by the district (id.).

### **B. Impartial Hearing Officer Decision**

The parties convened for an "omnibus" impartial hearing for this matter and for four other matters before the Office of Administrative Trials and Hearings (OATH) on March 14, 2024 (Tr. pp 1-12; see Feb. 5, 2024 IHO Omnibus Settlement Order at p. 1). During the impartial hearing, the parties submitted documentary evidence (Tr. pp. 6-7; see Parent Exs. A-C; Dist. Exs. 1-2). The parties did not present opening or closing statements in this proceeding. After proposed by the IHO, the parent's attorney requested that his closing argument from a previous case involving a different student which was part of the omnibus proceedings be used in lieu of a closing brief for the instant proceeding (Tr. pp. 8-10; IHO Exs. I; II).<sup>3</sup> The district submitted an undated written

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

<sup>2</sup> 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 among parents and school officials within the district.

<sup>3</sup> When faced with a large number of proceedings involving the same attorneys for both sides, it is a prudent exercise of the IHO's discretion in managing proceedings to schedule each matter in succession on the same day(s) for the sake of judicial economy. It may even be permissible to provide a window of time within which a certain number of proceedings are expected to be addressed rather than a specified time for each and every proceeding. However, such practices necessarily have limits. It is inconsistent with standard legal practice to merge multiple cases together into a blended hearing record (see Impartial Due Process Hearing, 71 Fed. Reg. 46,704 [referencing IHOs discretion in conducting hearings so long as they are conducted in accordance with standard legal practice]). Each parent is entitled to an unredacted, verbatim hearing record that applies to their own child (8 NYCRR 200.5[j][3][v]), and the parents, SROs, and reviewing courts must be provided with a clear record of each proceeding. Moreover, each parent is entitled to a confidential proceeding that is closed, unless the parent seeks an open proceeding (8 NYCRR 200.5[j][3][x]). Accordingly, if the IHO chooses to address multiple proceedings with the same attorneys on the same day, the IHO should open the record separately in each proceeding, place all motion papers, prehearing orders, scheduling information, e-mail communications from the parties to the IHO, and documentary evidence, if any, into each hearing record all bearing in mind that the parents in each proceeding are entitled to an unredacted verbatim record. Here, the IHO maintained a separate hearing record with the

closing brief, arguing that the parent failed present anything other than the contract with Alpha such as evidence showing that the privately obtained services for the student were appropriate to address the student's needs (Dist. Closing Br.; see IHO Decision n. 8 at p. 3).

By decision dated April 15, 2024, the IHO found that the burden of proof on all issues was on the district and that it failed to provide the student with the services recommended in the December 2023 IESP (IHO Decision at pp. 4, 5). The IHO declined to apply a Burlington/Carter analysis to the parent's claims and found that the parent was entitled to the services recommended in the December 2023 IESP (id. at pp. 4-8). The IHO determined that the parties agreed that a private provider must be appropriately credentialed (id. at p. 10). The IHO further found that the only evidence of a market rate came from the parent's evidence and that the district, although submitting a report regarding wages, did not refute the evidence (id. at p. 10). The IHO also found that the district must reimburse the parent or fund her properly licensed providers of her choosing at their customary rates (id.). The IHO awarded direct funding of SETSS at a rate not to exceed \$195 per hour (id. at p. 11). The IHO further directed the district to fund the services for the 10-month, 36-week 2023-24 school year beginning with the January 10, 2024 implementation date of the IESP until such time as the district implemented the December 2023 IESP (id.).

#### **IV. Appeal for State-Level Review**

The district appeals and argues that the IHO erred in failing to apply a Burlington/Carter analysis to the parent's claims, and that the parent failed to demonstrate the appropriateness of her unilaterally obtained SETSS. The district also asserts that the IHO should have denied all of the parent's requested relief. The district further argues that the matter should not be remanded because the parent affirmatively chose not to present evidence from the providers of her unilaterally obtained services. The district also asserts that the IHO erred in finding the provider's rates were reasonable.

In an answer, the parent denies the district's material allegations and argues that the IHO's decision should be affirmed in its entirety.<sup>4</sup>

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exception of suggesting that the parties have their closing arguments in this matter be redacted and included in the hearing records of Application of the New York City Dep't of Educ., Appeal Nos. 24-204; 24-205; 24-206. However, the heavily redacted transcript is incomplete with pages omitted that included the district's legal argument, which the IHO stated was to be applied to all of the omnibus hearing cases (see IHO Ex. I). The redacted transcript does include the IHO's references to a status conference that was not recorded, about which she stated,

there was a status conference that was held for this omnibus, and I did ask the parties how they wanted me to proceed, whether they wanted me to proceed under Burlington/Carter analysis or under Reid. And I did state that ...I would defer to [the p]arent as this is [the p]arent's case and the [p]arent actually had requested a comp ed analysis under Reid

(IHO Ex. I at pp. 14-15; see also IHO Ex. I at p. 20). The parents' attorney argued that a Burlington/Carter analysis should not apply (id. at p. 14).

<sup>4</sup> The parent failed to file a verification of the answer in this proceeding, and while the student's initials appear to

## 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]).<sup>5</sup> "Boards of education of all school districts of the state shall furnish services to students who are residents of this state and who attend nonpublic schools located in such school districts, upon the written request of the parent" (Educ. Law § 3602-c[2][a]). In such circumstances, the district of location's CSE must review the request for services and "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an individualized education program" (IEP) (Educ. Law § 3602-c[2][b][1]). The CSE must "assure that special education programs and services are made available to students with disabilities attending nonpublic schools located within the school district on an equitable basis, as compared to special education programs and services provided to other students with disabilities attending public or nonpublic schools located within the school district (id.).<sup>6</sup>

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be correct in the caption, the parents' initials are not. Furthermore, the student's mother who attended the IESP meeting and was specifically named in the due process complaint is not otherwise identified all in the pleading and, but the pleading fails to comply with State regulation, Overall, I am not convinced how informed, if at all, the parent is regarding these proceedings, given that she did not appear at the impartial hearing, did not sign a verification, and is not properly identified in the anywhere in answer. The answer bears the correct IHO and SRO docket numbers for the student's case. The district correctly identified the parent in the request for review. Although the answer is defective, I nevertheless conduct an independent review of the evidence and render a decision as required.

<sup>5</sup> 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]).

<sup>6</sup> 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

Thus, under State law an eligible New York State resident student may be voluntarily enrolled by a parent in a nonpublic school, but at the same time the student is also enrolled in the public school district, that is dually enrolled, for the purpose of receiving special education programming under Education Law § 3602-c, dual enrollment services for which a public school district may be held accountable through an impartial hearing.

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

## **VI. Discussion**

### **A. Unilaterally Obtained Services**

The district does not appeal from the IHO's decision that its failure to implement the December 2023 IESP resulted in a denial of a FAPE to the student for the 2023-24 school year (IHO Decision at p. 4). Accordingly, this determination has become final and binding upon the parties (see 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]). In addition, even if the parent's answer was not defective, it does not contain a cross-appeal from any aspect of the IHO's decision, including the IHO's failure to address the parent's request for compensatory education. State regulation provides that a pleading must set forth "a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately," and further specifies that "any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer" (8 NYCRR 279.8[c][2], [4]; see Phillips v. Banks, 656 F. Supp. 3d 469, 483 [S.D.N.Y. 2023], aff'd, 2024 WL 1208954 [2d Cir. Mar. 21, 2024]; L.J.B. v. N. Rockland Cent. Sch. Dist., 2024 WL 1621547, at \*6 [S.D.N.Y. Apr. 15, 2024]; Davis v. Carranza, 2021 WL 964820, at \*12 [S.D.N.Y. Mar. 15, 2021] [upholding an SRO's conclusions that several claims had been abandoned by the petitioner]; M.C. v. Mamaroneck Union Free Sch. Dist., 2018 WL 4997516, at \*23 [S.D.N.Y. Sept. 28, 2018] [upholding dismissal of allegations set forth in an appeal to an SRO for "failure to identify the precise rulings presented for review and [failure] to cite to the pertinent portions of the record on appeal, as required in order to raise an issue" for review on appeal]). As such, the parent's request has been deemed abandoned and will not be further reviewed.

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 31, 2024 due process complaint notice, the parent alleged that the district had not implemented the student's December 2023 IESP and that the parent

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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.

was unable to locate providers willing to accept the district's standard rates (Parent Ex. A at p. 2). As a result, the parent unilaterally obtained private services from Alpha for the student without the consent of the school district officials, and then commenced due process to obtain remuneration for the costs thereof (*id.* at pp. 2-3). Accordingly, the issue in this matter is whether the parent is entitled to public funding of the costs of the privately obtained services. "Parents who are dissatisfied with their child's education can unilaterally change their child's placement . . . and can, for example, pay for private services, including private schooling. They do so, however, at their own financial risk. They can obtain retroactive reimbursement from the school district after the [IESP] dispute is resolved, if they satisfy a three-part test that has come to be known as the Burlington-Carter test" (Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 526 [2d Cir. 2020] [internal quotations and citations omitted]; see Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 14 [1993] [finding that the "Parents' failure to select a program known to be approved by the State in favor of an unapproved option is not itself a bar to reimbursement"]<sup>7</sup>).

The parent's request for privately obtained services must be assessed under this framework. That is, a board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Carter, 510 U.S. 7; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 252 [2d Cir. 2009]). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

Turning to a review of the appropriateness of the unilaterally obtained services, the federal standard is instructive. A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998]). Citing the Rowley standard, the Supreme Court has explained that "when a public school system has defaulted on its obligations under the Act, a private school placement is 'proper under the Act' if the education provided by the private school is 'reasonably calculated to enable the child to receive educational benefits'" (Carter, 510 U.S. at 11; see Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 203-04 [1982]). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (*id.* at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement

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<sup>7</sup> 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 Step Ahead for the student (Educ. Law § 4404[1][c]).

was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 207 [1982]). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether a unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether the placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] ["evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

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

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

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

### **1. Student's Needs**

As the IHO noted, there is no dispute between the parties related to the student's IESP as designed. The only evidence of the student's needs appearing in the hearing record is drawn from the description of the student in the December 2023 IESP (Parent Ex. B). The student's needs as set forth in the IESP are not in dispute, and a review of them is warranted as background for determining whether the services that the parent obtained from Alpha are appropriate (see Parent Ex. A at p. 2).



The December 19, 2023 IESP reflected the results of the student's performance on the Wechsler Intelligence Scales for Children – Fifth Edition (WISC-V) and Wechsler Individual Achievement Test – Fourth Edition (WIAT-4); however, a date of administration was not reported for either assessment (Parent Ex. B at p. 1). The IESP indicated that the student's full-scale IQ as measured by the WISC-V was in the "[v]ery [l]ow" range (id.). Notably, the student's performance on the fluid reasoning index fell in the "[v]ery [l]ow" range and his performance on the verbal comprehension index fell in the "[e]xtremely [l]ow" range, while his scores on the visual spatial, working memory, and processing indexes were reported as being in the average range (id. at pp. 1-2). On the WIAT-4 the student scored in the "[e]xtremely [l]ow" range on the reading composite, and in the "[v]ery [l]ow range on the mathematics composite (id.).

The December 2023 IESP, noted that an informal Yiddish reading assessment, reported in the undated psychoeducational evaluation, indicated the student could decode accurately in Yiddish but struggled with reading comprehension in both Yiddish and English (Parent Ex. B at p. 2). The IESP also cited a "teacher report" that indicated the student was able to read with accuracy but "invest[ed] too much energy to be able to read with fluency and accuracy" (id.). According to the IESP, the student presented with "extremely poor" verbal comprehension, as well as "deficient reasoning and cognitive skills which impact[ed] his ability to comprehend text" (id.). After reading a text fluently and accurately, the student was unable to repeat the story in chronological order or answer a simple "yes" or "no" question related to the text (id.). The IESP stated that the student's comprehension skills were "an area of major concern" and that he "was unable to read for meaning at all" (id.). The student put "so much effort into reading accurately, that he [wa]s unable to pick up any information without direct prompting or assistance" (id.). With respect to writing, the IESP indicated that the student was able to spell and write basic words that he could read, but was "unable to explain himself in writing, because he even struggle[d] to express himself in full sentences verbally" (id.). Turning to mathematics, the IESP reported that the student enjoyed working with manipulatives and was able to add and subtract "sufficiently" (id.). The student understood the concept of multiplication, but his fluency and accuracy were delayed (id.). According to the IESP, the student was unable to divide or complete operations with fractions (id.). In addition, the student was unable to complete word problems independently as he was unable to distinguish between necessary and extraneous information and could not determine which operation needed to be used (id.). The IESP indicated that, during the CSE meeting, the parent noted that the student struggled across all academic subjects and with expressive language skills (id.).

With regard to the student's social development, the IESP again referred to the undated psychoeducational evaluation and indicated that during testing the student maintained adequate eye-contact with the examiner, was quiet and focused, and maintained a serious manner as he attempted to complete "all that he was asked to do" (Parent Ex. B at p. 3). The IESP indicated that, as reported by the student's teacher, the student could be immature and act silly to get attention from his peers (id.). The teacher reported that the student's self-esteem was "very negatively affected" by his poor academic performance and the student felt bad about his academic challenges (id.). According to the teacher, as reported in the IESP, the student struggled to communicate effectively and although his classroom behavior was generally "okay," he could become easily frustrated and shut down or answer impulsively when instruction was above his capability (id.). The parent reported that the student was very shy and enjoyed playing on his own (id.). The IESP reflected the results of a social history evaluation which described the student as helpful and

willing to follow his parents' direction and stated that he got along well with his siblings (id.). The IESP noted that the student completed chores at home, helped his parents take care of younger siblings, and completed daily living tasks, such as getting dressed and ready for school, appropriately (id.). The IESP indicated that the student had friends in school but was quiet (id.). The IESP also reflected the parents' concern that the student was aware of his academic delays and often felt embarrassed (id.).

In terms of the student's physical development, the IESP indicated that the student was healthy with no serious underlying medical conditions and engaged in all activities throughout the day (Parent Ex. B at p. 3).

The December 2023 IESP identified the following resources and strategies to address the student's management needs: modeling and repetition, directions simplified/repeated, visual aids, on-task focusing prompts, small group instruction, graphic organizers, pre-teaching and re-teaching, multi-sensory approaches, multi-modal lessons, evidence-based academic intervention, strength-based instructional approach, documented IESP team collaboration, explicit instruction, teacher prompts for focusing and redirection, visual thinking strategies, simplified directions/steps/questions, and teacher provided exemplars (Parent Ex. B at pp. 3-4).

The December 2023 IESP also included approximately four annual goals that targeted the student's ability to read with sufficient accuracy and fluency to support comprehension, answer literal questions about a text, apply a variety of reasoning strategies to solve math problems on grade level, and write grammatically correct sentences that included correct spelling and punctuation (Parent Ex. B at pp. 5-6).

## **2. Appropriateness of Unilateral SETSS by Alpha**

As described above, the December 2023 IESP identified areas of need with respect to the student's academic abilities, and social/emotional development (Parent Exs. B at pp. 1-6). The student was recommended to receive three periods per week of direct, group SETSS in a separate location, delivered in Yiddish (id. at p. 7). Services were recommended to begin on January 10, 2024 (id.).

Initially, the time period at issue in this matter falls within the portion of the ten-month academic 2023-24 school year following the implementation date of the December 2023 IESP on January 10, 2024 (Parent Exs. A; B at pp. 1, 7; see IHO Decision at p. 11). According to the hearing record, prior to the scheduled implementation date of the December 2023 IESP on January 10, 2024, the parent entered into a service contract with Alpha, dated January 4, 2024, wherein the parent "confirmed [her] understanding that [the student wa]s entitled to receive funding or reimbursement from the [district]" for the recommended services, that Alpha would "make every effort to implement the recommended services . . . with suitable qualified providers for the 2023-24 school year," and that the parent was "liable to pay Alpha" the full amount for all services delivered by Alpha in the event she does not secure funding (Parent Ex. C at pp. 1-2). The contract further stated that Alpha "intend[ed] to provide" SETSS at a specified rate (id. at p. 2). The hearing record includes no further information about the private services the parent obtained from Alpha for the 2023-24 school year.

As a result, there is no evidence regarding Alpha's provision of the services identified in the contract. Neither the parent, the providers, nor any representatives from Alpha appeared or provided written testimony at the impartial hearing, and the hearing record does not include any progress reports, service records, or even invoices. Although the parent purports through the statements of her attorney that the Alpha service provider was following the IESP, the parent must still come forward with evidence that describes the services and the delivery thereof. The hearing record lacks any information about the level of services the student received or where or when the services were delivered and does not explain how any services that may have been provided by Alpha addressed the student's needs (see L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 491 [S.D.N.Y. 2013] [in reviewing the appropriateness of a unilateral placement, courts prefer objective evidence over anecdotal evidence]; L.Q. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 490 [S.D.N.Y. 2013] [rejecting parents' argument that counseling services met student's social/emotional needs where "[t]here was no evidence . . . presented to establish [the counselor's] qualifications, the focus of her therapy, or the type of services provided" and, further, where "[the counselor] did not testify at the hearing and no records were introduced as to the nature of her services or how those services related to [the student's] unique needs"]; R.S. v. Lakeland Cent. Sch. Dist., 2011 WL 1198458, at \*5 [S.D.N.Y. Mar. 30, 2011] [rejecting the parents' argument that speech-language therapy services met student's needs where parents "did not offer any evidence as to the qualifications of the provider of the therapy, the focus of the therapy, or when and how much therapy was provided"], aff'd sub nom., 471 Fed. App'x 77 [2d Cir. June 18, 2012]).

Based on the foregoing, the IHO erred in failing to apply a Burlington/Carter analysis to the parent's claims and erred in awarding the parent direct funding for SETSS. Accordingly, the IHO's decision must be reversed.

## **VII. Conclusion**

Having found that the parent did not meet her burden of demonstrating the appropriateness of her unilaterally obtained services, the necessary inquiry is at an end.

**THE APPEAL IS SUSTAINED.**

**IT IS ORDERED** that the IHO's decision dated April 15, 2024 is modified by reversing those portions which ordered the district to directly fund the parent's unilaterally obtained services from Alpha.

**Dated: Albany, New York  
July 18, 2024**

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**JUSTYN P. BATES  
STATE REVIEW OFFICER**