The University of the State of New York

The State Education Department
State Review Officer
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No. 24-211

Application of a STUDENT WITH A DISABILITY, by her parent, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

Appearances:
Liz Vladeck, General Counsel, attorneys for respondent, by Sarah M. Pourhosseini, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from a decision of an impartial hearing officer (IHO) which denied her request that respondent (the district) fund the costs of her daughter's private services delivered by EdZone, LLC (EdZone) for the 2023-24 school year. The district cross-appeals asserting that IHO failed to address the appropriateness of the unilateral services. The appeal must be dismissed. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

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

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

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

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

III. Facts and Procedural History

A CSE convened on April 4, 2022, found the student eligible for special education as a student with an other health impairment, and developed an IESP with an implementation date of

April 18, 2022 (see Parent Ex. B).[1, 2] Based on the student's academic and social/emotional deficits, the CSE recommended that she receive five periods per week of direct group special education support services (SETSS) and two 30-minute sessions per week of individual counseling services (Parent Ex. B at p. 9).

On May 19, 2023, the parent sent a letter to the district notifying it that she intended to place the student at a non-public school at her own expense and was seeking special education services from the district for the upcoming 2023-24 school year (Parent Ex. D).

The parent electronically signed a contract with EdZone on June 23, 2023 (see Parent Ex. E).[3] The contract indicated that EdZone would provide the student with services for the 2023-24 school year (id.). The service addendum indicated that the student would receive services from EdZone "in accordance with the last agreed upon" individualized education program (IEP), IESP, or decision for the 10-month school year at specified hourly rates (id. at p. 3).

In a letter to the district dated August 23, 2023, the parent indicated that the district had failed to assign a provider for the student's mandated services for the 2023-24 school year and requested that the district "fulfill the mandate" (Parent Ex. C). The parent further indicated that, should the district failed to assign a provider, she would "be compelled to unilaterally obtain the mandated services through a private agency at an enhanced market rate" (id.).

A. Due Process Complaint Notice

In a due process complaint notice dated September 7, 2023, the parent alleged that the district denied the student a free appropriate public education (FAPE) and/or equitable services under Education Law § 3602-c for the 2023-24 school year (Parent Ex. A at p. 1).[4] The parent contended that the district failed to develop an appropriate program for the student and failed to assign providers to implement services under the prior IESP (id. at pp. 1-2). The parent alleged that she was unable to locate a provider to deliver the student's services "at the [district] rates" and, therefore, "had no choice but to retain the services of an agency to provide the mandated services at an enhanced rate" (id. at p. 2). For relief, the parent requested an order of funding for payment to the provider agency for the April 2022 IESP services at the enhanced rate (id. at p. 3). The

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[1] Both the parent and the district offered a copy of the April 2022 IESP into evidence; for the sake of clarity, only the parent exhibit will be cited (see Parent Ex. B; Dist. Ex. 3). The district also offered into evidence the documentation the CSE used to develop the April 2022 IESP (see Dist. Ex. 11-13).

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

[3] EdZone is a corporation and 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).

[4] The parent requested pendency services based on the last agreed upon IESP dated April 2022 (Parent Ex. A at p. 2). The parent asserted pendency services included group SETSS five times per week and two 30-minute sessions of individual counseling services (id. at p. 2). On a form signed by the district on October 19, 2023, the district agreed that the student's pendency placement lay in the April 2022 IESP (Pendency Implementation Form; see Tr. p. 8).

parent also requested a bank of compensatory education services to make-up for any mandated services not provided by the district (id.).

B. Impartial Hearing Officer Decision

An impartial hearing convened on October 11, 2023 and concluded on March 13, 2024 after seven days of proceedings (see Tr. pp. 1-64).[5] In a decision dated April 19, 2024, the IHO found that the district failed to implement the services mandated on the IESP and, therefore, denied the student a FAPE (IHO Decision at pp. 4-5, 9). The IHO noted that there was no factual dispute between the parties regarding the student's entitlement to program and the district's failure to implement the mandated program and that the district "agreed" the student was entitled to relief but disputed the rate charged by EdZone for the services (id. at pp. 4-5, 11).

Turning to the evidence regarding the rates charged by EdZone, the IHO found that the testimony of the supervisor was not credible regarding whether the student was seen in a group or individually and that the supervisor was not able to "explain intelligently why the rate of $198" was charged to the parent, especially when the services provider was only paid $70 per hour (IHO Decision at pp. 5, 11). The IHO held that the supervisor "lacked candor" (id. at p. 5). Reviewing the evidence in the hearing record, the IHO found that the rate charged by EdZone appeared "to be somewhat excessive and unreasonable" (id. at p. 10). The IHO noted the market rate study entered by the district showed a range of rates and that the district requested that an award of district funding for services be capped at $125 per hour (id.). Based on the foregoing, the IHO determined an appropriate rate for SETSS provided to the student should not exceed $125 per hour (id.).

The IHO found that, equitable considerations weighed in favor of granting relief sought by the parent, except that the district's denial of FAPE did not "equate to the issuance of a blank check" and that the hourly rate charged was excessive and, therefore, a reduction was warranted (IHO Decision at p. 11). The IHO ordered the district to fund five hours of group SETSS per week at the rate of $125 per hour for the 2023-24 school year (id.). In addition, the IHO ordered the district to issue a related service authorization (RSA) for provision of two 30-minute sessions of individual counseling for the 2023-24 school year (id.).

IV. Appeal for State-Level Review

The parent appeals and the district cross-appeals. The parent argues that the IHO erred in reducing the rate and arbitrarily setting the costs of SETSS. The parent contends that the IHO shifted the burden of proof to her and that the district failed to present any testimonial evidence or "proper documentary evidence" regarding the appropriateness of the rate, noting the IHO's statement during the impartial hearing that he would not accord the AIR report much weight. The parent asserts that she presented evidence from the agency supervisor as to the rate for the services obtained and argues that the AIR report is flawed and should not be relied upon. The parent asserts that the IHO erred holding that the agency supervisor lacked candor, contending that this finding

[5] During the impartial hearing, the district moved to enter a report conducted by the American Institutes for Research (AIR report) dated October 2023 (Tr. p. 28; Dist. Ex. 14). The parent objected to the exhibit and the IHO decided to admit the document but stated "not much weight [was] going to be given to it" (Tr. pp. 28-31).

was unfounded. The parent requests that the district be ordered to pay the contracted rate of $198.00 per hour for individual SETSS and $148.00 per hour for group SETSS.

In its answer and cross-appeal, first, the district asserts that the IHO correctly reduced the rate to $125 per hour as the requested rate was excessive and unreasonable and contends that the AIR report is objective evidence of market rates for SETSS. As for its cross-appeal, the district alleges that the IHO erred by failing to address whether the services obtained by the parent were appropriate under the Burlington-Carter standard. The district argues that the hearing record does not support a finding that the SETSS obtained by the parent were appropriate to meet the student needs. Therefore, the district requests that the IHO's award for funding be reversed.[6]

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

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[6] Here, neither party appealed the IHO's finding that the district denied the student a FAPE or the IHO's order for the district to provide an RSA for two 30-minute sessions of individual counseling (IHO Decision at pp. 5, 11). Accordingly, these findings have become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

[7] 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]).

nonpublic schools located within the school district (id.).[8] 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

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

[8] 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.

program known to be approved by the State in favor of an unapproved option is not itself a bar to reimbursement"]).

The parent's request for 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]).[9] 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).

A. Unilaterally Obtained Services

Turning to a review of the appropriateness of the unilaterally obtained services, the federal standard for adjudicating these types of disputes is instructive. A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129). Citing the Rowley standard, the Supreme Court has explained that "when a public school system has defaulted on its obligations under the Act, a private school placement is 'proper under the Act' if the education provided by the private school is 'reasonably calculated to enable the child to receive educational benefits'" (Carter, 510 U.S. at 11; see Rowley, 458 U.S. at 203-04; Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see also 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 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., 459 F.3d at 364; 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).

[9] 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 EdZone for the student (Educ. Law § 4404[1][c]).

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 Needs

The student's eighth grade report card from the private school where she was parentally placed was included in the evaluation results of the April 2022 IESP (first two marking periods) (Parent Ex. B at p. 1; see Dist. Ex. 11 at pp. 1-2). The IESP noted that the student scored a "B" in both marking periods in ELA, a "D" and then a "D+" in mathematics, a "D" and then a "C-" in science, and a "C" and then a "B" in social studies (id.).

According to the IESP, the student was reading below grade level (Parent Ex. B at p 1). She demonstrated difficulty with reading, specifically with nonfiction texts, and was unable to focus on large pieces of texts at a time (id.). The student performed better when texts were read aloud to her than she did by reading texts herself (id.). The IESP noted that the student's spelling and grammar were below grade level (id.). The IESP further noted that the student had difficulty receiving oral instructions and written directions, and that she got frustrated very easily when trying to express herself (id.). The IESP stated that the student could decode well, and her vocabulary was adequate, however, she demonstrated difficulty making inferences, and required assistance with identifying the main idea (id. at p. 2). According to the IESP, at times the student's comprehension was difficult to assess because of work completion challenges and the student's lack of participation in class (id.). According to the IESP, the student had very neat handwriting and was very creative in developing her ideas, however, she demonstrated difficulty in following the proper essay structure and her writing was often disorganized (id.). The IESP indicated that,

although the student enjoyed writing and could express herself in writing very well, she demonstrated difficulty with essay structure in a more formal product and with pacing herself in time assessments, even with extra time (id. at p. 1). The IESP stated that the student's writing also contained spelling and syntactical errors, and, although with a lot of scaffolding and reinforcement the student could turn in an adequate essay, she was not always willing to put in the necessary effort (id. at p. 2). The IESP noted that, with respect to expressive language, the student communicated "very expressively" and clearly, but often did so inappropriately (id.). Additionally, the student demonstrated difficulty following directions, got frustrated with following along with lessons or conversations, and in discussions with other students, she had difficulty keeping track of who was saying what and when (id. at pp. 1-2).

The IESP stated that the student performed below grade level in mathematics, and, although she presented with strong math abilities and was often able to calculate information in her head, she really struggled to focus (Parent Ex. B at p. 2). In addition, the IESP noted that the student became frustrated if she did not understand the information right away and gave up easily (id.). According to the IESP, when the student focused, she could perform very well, but she rarely focused and did her work (id.). The IESP stated that, although the student could solve for an unknown variable in a two-step equation, she struggled with problems that contained more than two steps as she insisted on only performing the calculations in her head, instead of using the methods that were shown in class (id.). The IESP indicated that the student showed more of an understanding and willingness to participate in the geometry unit, but overall, she gave up very easily when she thought she could not do a given problem (id.).

According to the IESP, the student's social behavior was below grade level, she could be immature, and she demonstrated difficulty expressing herself to others and understanding social cues (Parent Ex. B at p. 3). The IESP stated that the student often inserted herself into conversations, and that she could be loud and impulsive with her thoughts and sharing (id.). The student had difficulty with regulating her feelings and understanding others' perspectives, which could result in conflict, and she had poor impulse control, in both social and academic settings (id.). When interacting with authority figures and peers, the student often misread social situations and had little volume control (id.). With respect to the student's classroom behavior, the IESP noted that she frequently refused to participate and do her work and made irrelevant and inappropriate comments loudly (id.). According to the IESP, the student demonstrated very little accountability, such as if an assignment was not completed, there was often some excuse given for why it was not done (id.). In addition, the IESP stated that the student suffered "with ADHD and mood issues that . . . interfered with her ability to perform academically" and experience social success (id.). The IESP noted that the student was quite unmotivated, sad, and anxious the first few months of school because she felt she was "doomed" and that she was not going to be accepted into high schools, and, after she was accepted, she became more confident, more social, and more motivated regarding her studies (id.). The IESP indicated that the student had become more mature, responsible, and social and no longer used negative behaviors for attention (id. at p. 4).

An EdZone progress report, prepared by the student's SETSS providers in January 2024, provided additional information regarding the student's educational needs (Parent Ex. G). The progress report indicated that, at the time it was written the student was functioning at a seventh-grade level in reading and math (id. at p. 1). The student had difficulty maintaining focus and attention and often distracted herself or completely "tuned out" of the class (id.). She struggled to

grasp and retain information and her difficulty understanding basic math concepts made it "exceedingly difficult" for her to complete multi-step equations and solve word problems (id. at pp. 1, 2). The student struggled to complete ninth grade multiplication examples due to difficulty retaining multiplication tables and struggled to understand fractions and decimals (id. at p. 2). With help the student was able to grasp the coordinate planes and could identify the axis and graph a line (id.). The progress report indicated that the student could write an equation representative of a short, clear word problem (id.). In addition to delays in math, the progress report indicated that the student demonstrated delays in reading comprehension and had difficulty identifying key points (id.). The student struggled to identify the main idea, as well as relevant information from the text to support her opinions (id.). The student struggled to summarize what she had read and often added extraneous details or incorrect information (id.). The progress report stated that the student's writing often lacked structure and depth (id.). However, it also indicated that that the student was a prolific writer when she was inspired or deemed something to be important (id. at p. 2).

In addition to academic delays the progress report noted that the student presented with social/emotional delays (Parent Ex. G at p. 3). The progress report indicated that the student had very few friends, if any, in her grade, got frustrated easily, and did not value school authority (id.). However, it also described the student as respectful and mostly compliant with school rules (id.). The progress report characterized the student as "anxious" and "jittery" and noted that she often needed to be calmed by teachers and peers (id.). The progress report stated that the student came to class unprepared and handed in assignments only when she deemed it necessary (id.). The student often gave her personal opinion without being asked, and enjoyed sharing her personal experiences with others, whether they were interested or not (id.). Lastly, the progress report stated that the student did not have a lot of confidence in her ability to perform and did not understand the ramifications her distractibility had on her academic achievement (id.).

2. SETSS by EdZone

According to the EdZone SETSS supervisor, the agency began providing the student SETSS on September 11, 2023 at the student's nonpublic school (Parent Ex. F ¶¶ 7-8). The supervisor indicated she delivered SETSS to the student along with two other providers who held masters' degrees in special education and State certification to work with students with disabilities (id. ¶ 9). She testified that the services were delivered in a group but, at time, the student was "seen one-on-one" (Tr. p. 50).

The district is correct that time sheets included in the hearing record do not reflect delivery of five sessions per week of SETSS (Parent Ex. J). The time sheets indicate that, between September and December 2023, the EdZone supervisor delivered SETSS to the student in sessions of 40-minute duration at a frequency of between one to three sessions per week; for several weeks in the time frame, no sessions were recorded (id.). However, it appears that the time sheets show only the services delivered by the SETSS supervisor, whereas, according to the supervisor's testimony, three different providers including herself delivered the student's services (Parent Exs. F ¶ 9; J). The hearing record also contains session notes prepared by the one of the student's other EdZone SETSS providers for November 2023 (Parent Ex. I; see Parent Ex. F at pp. 1, 2). At most, the hearing record is not fully developed regarding the total number of sessions of SETSS delivered to the student; however, given the information available regarding the instruction provided, I do

not find that, under the totality of the circumstances, the lack of additional evidence on this point is determinative.

For example, according to the November 2023 SETSS session notes, the provider worked with the student on how to talk to an adult and respond to a peer and on reading a play and interpreting one scene (Parent Ex. I at p. 1). In addition, the provider discussed with the student the need to refrain from providing unsolicited advice (id.).

The January 2024 SETSS progress report stated that five periods of mandated SETSS were used to address the student's "deficits through activities and strategies" that were designed to remediate the student's "deficits and support [her] in making progress towards age-appropriate goals and objectives," and that the educational services were "specially designed to meet the unique needs of [the student]" (Parent Ex. G at p. 1). The progress report noted that the student learned best with direct instruction in a small group setting and during lessons that required constant engagement (id. at p. 2). In addition, she benefitted from constant repetition with manipulatives and visuals (id.). According to the progress report, the SETSS provider delivered individualized instruction to the student with reading materials that were on her instructional level with the goal of improving the student's reading fluency by getting her to slow down and properly chunk sentences in order to improve comprehension (id.). In addition, to aid in the student's comprehension and develop her vocabulary, the instructor defined and explained difficult words in the text prior to reading (id. at pp. 1-2). The progress report stated that the SETSS provider taught the student how to use a highlighter while reading to identify key points and that this technique also kept the student engaged with the text and focused (id. at p. 2). The progress report noted that the student learned the "idea of rereading when something" was not clear, as well as "how to clump smaller amounts of information together to break down" a larger topic or passage and that she required SETSS support to help her maintain focus and develop decoding and comprehension skills (id.). For math, the progress report stated that the student required review to acquire new concepts and "lots of individualized attention with prompting and support" to ensure her progress and success and aid her in focusing and applying herself (id.). According to the progress report, with respect to writing, the student required SETSS support in order to stay on top of her work and not get distracted by other ideas and topics (id.). The progress report stated that the SETSS provider had numerous conversations with the student regarding her recognition of the ramifications that her disability had on her academic achievement (id. at p. 3).

In her affidavit, the SETSS supervisor reiterated information from the January 2024 progress report (Parent Ex. F). She stated that the SETSS providers tailored reading instruction using materials at the student's instructional level, and that the primary goal was to improve the student's fluency and comprehension by teaching her to slow down and properly chunk sentences in order to enhance comprehension and build vocabulary (id. ¶ 11). The supervisor testified that techniques taught by the student's SETSS providers included pre-defining difficult words, using a highlighter to identify key points, and strategies such as rereading for clarity, grouping smaller pieces of information to better understand larger passages or topics, and chunking information (id.). With regard to writing, the supervisor stated that the student benefitted from SETSS intervention to maintain focus, prevent distraction from other ideas, and effectively manage and complete her writing work (id. ¶ 12). According to the supervisor, the student required repetitive, individualized SETSS instruction with much reinforcement to acquire new math concepts (id. ¶

13). In addition, the student's ongoing need for individualized intervention, prompting, and support remained essential for sustained progress and success in math (id. ¶ 13).

With respect to the student's progress during the 2023-24 school year, the January 2024 SETSS progress report indicated that the student demonstrated progress in her ability to break up sentences correctly for understanding as well as in her ability to use of grammatical cues as guides when reading (Parent Ex. G at p. 2). The student also showed improvement in her multiplication skills and understanding of the coordinate plane (id.). The SETSS supervisor echoed the progress report and noted the student's progress in using strategies to assist with reading comprehension and improvement in the student's understanding of math concepts (Parent Ex. F ¶¶ 11, 13).

Based on the foregoing, the hearing record supports a finding that the SETSS providers delivered instruction to the student that was specially designed to address her unique needs and that the student made progress.[10] As such, the parent met her burden to prove that the unilaterally obtained SETSS were appropriate.

B. Equitable Considerations

Having found that the parent met her burden to prove that the unilaterally obtained services were appropriate, I turn to review the IHO's findings regarding 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

[10] It is well settled that progress, while 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]), is not required for a determination that a unilateral placement is appropriate (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).

tuition was reasonable, possible scholarships or other financial aid from the private school, and any fraud or collusion on the part of the parent or private school]; C.L., 744 F.3d at 840 [noting that "[i]mportant to the equitable consideration is whether the parents obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA"]).

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

Turning to the hourly rate for the services, the addendum to the parent's contract with EdZone reflected that the company charged $198 per hour for individual SETSS and $148 for group SETSS (Parent Ex. E at p. 3). In her written testimony, the EdZone supervisor indicated that the rates charged by the company were "based on rates which are consistent with rates charged by other agencies offering similar services," which the company ascertained by conducting a survey (Parent Ex. F ¶ 16; see Tr. p. 49). The educational supervisor indicated that the company paid the student's three SETSS providers hourly rates of $70, $75, and $95, respectively, "as well as employer Fringe Benefits" (Parent Ex. F ¶ 17).

The IHO found that the supervisor lacked candor, noting that she was unable to clarify how often the student was seen individually versus in a group or explain why the agency set the rate at $198 per hour when the providers' hourly rates were as low as $70 per hour (IHO Decision at p. 5). Generally, an SRO gives due deference to the credibility findings of an IHO, unless non-testimonial evidence in the hearing record justifies a contrary conclusion or the hearing record, read in its entirety, compels a contrary conclusion (see Carlisle Area Sch. v. Scott P., 62 F.3d 520, 524, 528-29 [3d Cir. 1995]; P.G. v. City Sch. Dist. of New York, 2015 WL 787008, at *16 [S.D.N.Y. Feb. 25, 2015]; M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 330 [E.D.N.Y. 2012], aff'd 725 F.3d 131 [2d Cir. 2013]; Bd. of Educ. of Hicksville Union Free Sch. Dist. v. Schaefer, 84 A.D.3d 795, 796 [2d Dep't 2011]; Application of a Student with a Disability, Appeal No. 12-076). The IHO's finding on credibility should be given due deference in this instance and there is nothing the hearing record that would comply a contrary conclusion.

The IHO's determination that the rate charged by EdZone is further supported by the October 2023 AIR report (see Dist. Ex. 14). Although the IHO indicated he did not accord the AIR report much weight (Tr. pp. 28-31), his statements to this effect do not preclude consideration of the report (see S.W. v. New York Dep't of Educ., 2015 WL 1097368, at *15 n.6 [S.D.N.Y. Mar.

12, 2015] [noting that an IHO's decision to discredit portions of a document was not based on a credibility determination of a witness and that the SRO had the same ability to weigh the evidence]).

As to the rate for SETSS, a review of the content and methodology underlying the AIR report is warranted. The AIR study report is dated October 2023 and entitled "Hourly Rates for Independently Contracted Special Education Teachers and Related Services Providers" (Dist. Ex. 14 at p. 1). The district commissioned the report from AIR to "[d]evelop an approach to using data from the [United States Bureau of Labor Statistics (USBLS)] to calculate hourly rates for independently contracted providers" and to "[c]alculate hourly rates for special education teachers in the region that [the district] c[ould] use to determine a fair market rate for its [SETSS] special education teachers" (id. at p. 4). The report describes a five step methodology starting with USBLS' Occupational Employment and Wage Statistics (OEWS) data for occupations that resemble the positions in the district (steps one and two), using the district's collective bargaining agreements to convert the salaries into hourly rates (step 3), and then using adjustments from the district's financial reports to factor in fringe benefits and indirect costs (step 4), and, last, using the consumer price index to address inflation over time (step 5) (id. at pp. 4-6).

The AIR study report offers a secondary adaptation to this methodology for hourly rate adjustments for the district to take into account different combinations of educational attainment ("measured as a combination of degree, earned college credits, and/or other professional development accomplished, such as obtaining a certificate from the National Board for Professional Teaching Standards") and/or experience (number of years teaching within the district) (Dist. Ex. 14 at pp. 6-7, 9-10, 19-24). This adaptation in the methodology was clearly designed to address the fact that the collective bargaining agreement between the district and the United Federation of Teachers that represents the school district's employee teachers contains salary schedules for special education teachers that function similarly in that district employees such as SETSS teachers who have greater educational attainment such as a master's degree versus a bachelor's degree, additional credits that relate to four differentials depending on the types of credits and other criteria (first, intermediate promotional, and second), and certifications and/or experience are entitled to higher salaries under the labor agreement's salary schedules (id. at pp. 6-8).[11] However, the AIR report does not specifically factor State certifications in describing hourly rate adjustments, likely because it would be violative of State law to employ a teacher in a public school in contravention of the State's certification requirements, thus dispensing with any need to collectively bargain that factor (see generally Dist. Ex. 8).

With respect to fashioning appropriate equitable relief and its relevancy, I find that the AIR report does not suffer from all of the infirmities that the parent claims but, at the same time, not all of the report and its methodologies are strictly applicable to a parent's decision to unilaterally obtain private special education services from a private company like EdZone. First the AIR report draws data published by the United States Bureau of Labor Statistics, a U.S. government agency, and it is well settled that judicial notice may be taken of such tabulations of data published by government agencies (Canadian St. Regis Band of Mohawk Indians v. New York, 2013 WL

[11] The 2022-2027 salary schedules for district teachers from the district-UFT agreement are cited in the report (see Dist. Ex. 14 at p. 5).

3992830 [N.D.N.Y. Jul. 23, 2013]; Mathews v. ADM Milling Co., 2019 WL 2428732, at *4 [W.D.N.Y. June 11, 2019]; Christa McAuliffe Intermediate School PTO, Inc. v. de Blasio, 364 F.Supp.3d 253 [2019]). I find that the wage information contained in the data from the USBLS is relevant to the question of how much special education teachers are paid in the New York City metropolitan region in a given year in which the data is published.[12] It was not inappropriate for the AIR to use such government-published data in its report. The parent's argument that the data from USBLS is dispersed over too wide a geographic area because it is from areas as far away as Pennsylvania is a misreading of the report and does not preclude use of the USBLS data. The data set in the New York, New Jersey and Pennsylvania region can be further limited and refined to the New York City, Newark, and Jersey City metropolitan region. It is reasonable to find that most teachers (public and private) working with special education students in New York City fall within this subset of data that is the greater metropolitan region specified in USBLS data ("May 2022 Metropolitan and Nonmetropolitan Area Occupational Employment and Wage Estimates New York-Newark-Jersey City, NY-NJ-PA," available at https://www.bls.gov/oes/current/oes_35620.htm). Furthermore, the geographic data in this metropolitan subset does not have to be perfect in order to be sufficiently reliable for use when weighing equitable considerations.

The AIR report appears to address a question of what kind of approach "NYC DOE can use to determine a fair market rate for its Special Education Teacher Support Services (SETSS)" (Dist. Ex. 14 at p. 1). If the district were to offer hourly rates that were formulated on a negotiated basis (i.e., to employees paid on an hourly basis), it would understandably try to do so in a similar manner to the way it used its bargaining power in negotiations with both the United Federation of Teachers and other entities for fringe benefits and incidental costs that result in the pay scales for public school employees. However, a parent facing the failure of the district to deliver his or her child's IESP services and who is left searching for a unilaterally selected self-help remedy would be unable to hire teachers already employed by the district (unless a teacher is "moonlighting" and thus dually employed), and the parent facing that situation would therefore not be able to negotiate for private teaching services with the same bargaining power that the district holds. Thus, while the AIR report's reliance on the salary schedules negotiated with the United Federation of Teachers that include provisions for steps, longevity, and criteria for additional experience and education, these provisions serve a different purpose—they are designed to ensure fair treatment among union members who are operating in public employment. But the fair treatment among district employees is of little or no interest to a parent who is trying to contract for services with private schools or companies after the district has failed in its obligations to deliver the services using its employees, and thus the district negotiated provisions are not particularly relevant to equitable considerations in a due process proceeding involving the funding of unilaterally obtained services.

Fortunately, the USBLS data does not indicate that it is limited to district-employed teachers. It covers wages in the entire metropolitan region, which would include teachers from

[12] The Occupational Employment and Wage Statistics data is published by the USBLS starting in May of each calendar year, and the AIR report in evidence used May 2022 data (Dist. Ex. 14); however, I note that May 2023 data is the most recent annual data published by the USBLS as of the date of this decision (see https://www.bls.gov/oes/tables.htm). While the AIR report presented a snapshot in time, I do not share any concern that the data itself is "fixed in perpetuity" because it is updated annually, which is particularly relevant when considering due process claims under IDEA and Article 89 are almost always related to a specific annual time period.

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

The undersigned had little difficulty with the explanation in the AIR report that children must be educated for 180 days per year in this state and that school days are typically between six and seven hours long.[14] When using the USBLS data, a calculation leads to the conclusion that the $198.00 per hour rate falls above the 90th percentile of salary for the metropolitan region in which the district is located, using indirect and fringe benefit costs of 27.7 percent. I will take this into account when ordering equitable relief.

The $70, $75, and $95 per hour costs for the teachers' hourly wages (see Parent Ex. F ¶ 17) fall within the USBLS data, with $70 and $75 falling between the 25th percentile and the median and $95 falling between the median and the 75th percentile. However, based on these hourly wages compared to the hourly rates charged for the services, indirect employer costs above the teachers' hourly wages amount to approximately $128, $123, or $103 per hour when viewing the hourly rate for individual services (65, 62, or 52 percent of the hourly rate) or $78, $73, or $53 per hour when viewing the hourly rate for group services (53, 49, or 36 percent of the hourly rate) charged by EdZone. All of these percentages fall above the 27.7 percent in the USBLS data, and, therefore, the evidence leads me to the conclusion that the costs of EdZone were excessive as the IHO found and more than what the district should be required to pay. The $70, $75, and $95 per hour when adding indirect costs supported by USBLS data would yield a result of approximately $89, $96, or $121 total per hour.

Presumably these hourly rates would be attributable to an individual student only if the services were delivered individually, and, on this point, the IHO was correct to raise concern regarding the lack of information in the hearing record about the number of sessions delivered to

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

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

the student received individually versus in a group. To the extent some of the services were delivered in a group, information about the size of the group, for example, might also be relevant in considering the reasonableness of a rate charged to an individual student. Indeed, the supervisor's testimony that the company would request "the higher rate" from the district "so when it's necessary it's available" appeared at first to be an admission that the company would charge the higher rate regardless of how the services were delivered but the supervisor then backtracked and said that the company billed for the group rate if that is how the service was delivered (Tr. pp. 51).

Ultimately, here, because the district does not assert that the hourly rate should be less than $125 per hour based on its own study, I will as a matter of equitable considerations require the district to pay the $125.00 rate. As such, the IHO's determination that the rate charged by EdZone was excessive is supported by the record and will not be disturbed.

VII. Conclusion

The hearing record demonstrates that the services provided by EdZone of five periods per week of SETSS were appropriate to meet the student's needs. However, the IHO properly reduced the rate for funding to $125 per hour based on equitable considerations.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

Dated: Albany, New York
July 25, 2024

SARAH L. HARRINGTON
STATE REVIEW OFFICER