The University of the State of New York

The State Education Department
State Review Officer
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No. 24-218

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

Appearances:
Liz Vladeck, General Counsel, attorneys for respondent, by Cynthia Sheps, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from a decision of an impartial hearing officer (IHO) which denied, in part, her request to be reimbursed for her son's private services delivered by EdZone, LLC (EdZone) at a specified rate for the 2023-24 school year. The district cross-appeals from those portions of the IHO's decision which found that the private services delivered by EdZone were appropriate and which awarded compensatory services. The appeal must be sustained. The cross-appeal must be sustained in part.

II. Overview—Administrative Procedures

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

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

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

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

III. Facts and Procedural History

The information in the hearing record regarding the student's educational history is sparse. A CSE convened on March 2, 2023, and finding the student eligible for special education as a

student with a learning disability, developed an IESP for the student with a projected implementation date of March 9, 2023 and a projected annual review date of March 2, 2024 (Dist. Ex. 1 at p. 1).[1] The March 2023 CSE recommended that the student receive six periods per week of direct group special education teacher support services (SETSS) and one 30-minute session per week of individual counseling (id. at pp. 11-12).[2]

In a May 16, 2023 letter, the parent informed the district that she would be placing the student in a nonpublic school for the 2023-24 school year and requested that the district provide educational services to the student under the State's dual enrollment statute (Parent Ex. D).

On June 27, 2023, the parent electronically signed an agreement with EdZone for the provision of special education services during the 2023-24 school year (Parent Ex. E).[3] The contract included a general listing of EdZone's rates ($198 per 60-minute individual session; $148 per 60-minute group session) for special education or related services but did not list the specific services to be provided to the student (id. at p. 3).

In a ten-day notice dated August 23, 2023, the parent, through "Prime Advocacy, LLC, duly Authorized o/b/o Parent," (Prime Advocacy) informed the district that it had failed to assign the student any providers to deliver the student's mandated services for the 2023-24 school year and requested that the district "fulfill the mandate" or the parent would be compelled to unilaterally obtain the services "through a private agency at an enhanced market rate" (Parent Ex. C). The hearing record does not include a district response to the parent's August 2023 notice (see Parent Exs. A-I; Dist. Exs. 1-5).

A. Due Process Complaint Notice

By due process complaint notice dated September 8, 2023, the parent, through an attorney from Prime Advocacy, alleged that the district failed to develop and implement a program for the student for the 2023-24 school year, thereby denying the student a free appropriate public education (FAPE) (Parent Ex. A). According to the parent, the district impermissibly shifted its responsibilities to the parent when it failed to "supply providers for the services it recommended for the [s]tudent and failed to inform the [p]arent how the services would be implemented" (id. at p. 2). The parent was unable to find providers willing to accept the district's standard rates but found providers willing to provide the student with his mandated services for the 2023-24 school year at enhanced rates (id.). Among other relief, the parent sought pendency, an order directing the district to fund the costs of the student's SETSS and counseling services at enhanced rates, and

[1] 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]).

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

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

an award of compensatory education services for any mandated services not provided by the district (id. at p. 3).

B. Impartial Hearing Officer Decision

The parties proceeded to an impartial hearing, with a hearing on the issue of pendency held on November 29, 2023, and two additional hearing dates held on February 27, 2024 and March 19, 2024 (Tr. pp. 1-136). On November 29, 2023, the district executed a pendency agreement reflecting that the student's pendency placement was based on the March 2023 IESP and consisted of six periods per week of group SETSS and one 30-minute session per week of individual counseling (see Pendency Imp. Form).

In a decision dated April 23, 2024, the IHO initially recounted the procedural history, summarized the parties' positions, and briefly discussed some legal standards that apply under the IDEA and New York State Education Law for determining whether the district offered the student a FAPE (IHO Decision at pp. 1-5). The IHO concluded that the district denied the student a FAPE for the 2023-24 school year (IHO Decision at p. 11). The IHO stated that there were only two issues in controversy for him to decide: whether the SETSS delivered to the student by EdZone was appropriate and what was the appropriate hourly rate for such unilaterally-obtained SETSS (id. at p. 5). The IHO noted that the parties agreed that the student required SETSS and should be provided with SETSS as reflected on his March 2023 IESP (id. at pp. 5-6). In what appeared to be a finding on the appropriateness of the student's SETSS delivered by EdZone, the IHO summarily found, without any reasoning but for general citation to the hearing record, that the privately obtained "services provided are just appropriate" (id. at p. 6; see also IHO Decision at p. 8).

Moving quickly on to the rate dispute, the IHO determined that neither party presented any evidence or testimony regarding what was "an appropriate, reasonable, and prevailing SETSS rate in the New York City market" (IHO Decision at p. 6). The IHO further noted that although the district challenged the parent's requested enhanced rate of $198 an hour as being excessive, the district failed to provide the student with a SETSS provider and then challenged the parent's proof without presenting any of its own evidence of what constituted an appropriate rate (id. at pp. 7-8, 10). In determining to award a rate of $150 an hour, the IHO found that the parent failed to explain why the student received individual SETSS from EdZone rather than group SETSS like the March 2023 IESP mandated (id. at pp. 8-9). Noting that the parent's contract with EdZone reflected an hourly rate of $148 for group services, the IHO determined that a rate of $150 was more aligned with the March 2023 IESP that reflected group SETSS and EdZone's contractual rate for group services (id. at p. 9). The IHO also found the requested rate of $198 to be excessive because less than $100 per hour goes directly to the SETSS provider and the rest goes to EdZone's administrative costs (id. at p. 8). In addition, the IHO determined that all of the student's SETSS providers from EdZone held licensing certificates from birth to second grade only, therefore, they were not the most appropriate providers for this student who was in seventh grade and provided further justification to reduce the rate awarded to $150 (id. at p. 9).

In the ordering clauses of his decision, the IHO reiterated that the district had failed to provide the student with a FAPE, and ordered that the district shall pay the costs of the student's SETSS at the "enhanced rate of $150 an hour for the 2023-24 school year" upon the submission

of invoices and proof of attendance (IHO Decision at p. 11). In addition, the IHO ordered that the "Department of Evidence [sic] must establish a bank of hours for the student equivalent to thirty-six weeks for one 30-minute session per week of individual counseling (id.).[4]

IV. Appeal for State-Level Review

The parent appeals with the assistance of a lay advocate from Prime Advocacy, alleging that the IHO arbitrarily and impermissibly reduced the contracted rate for the SETSS delivered by EdZone from $198 to $150. The parent further argues that the IHO incorrectly found there was no explanation for why the student received SETSS individually and not in a group, and incorrectly shifted the burden to the parent when the district failed to submit relevant evidence and present witness testimony. The parent requests an order awarding the individual service rate of $198 for SETSS as set forth in the contract between the parent and EdZone.

In an answer and cross appeal, the district asserts that the IHO properly reduced the rate for the SETSS, but erred in awarding SETSS relief because the parent failed to demonstrate the appropriateness of the unilaterally-obtained SETSS. The district further requests that the IHO's order awarding compensatory counseling services be modified to reflect a reduction for any counseling services provided to the student pursuant to pendency.

The parent filed a reply, denying the district's allegations and asserting that she met her burden to demonstrate the appropriateness of the unilaterally-obtained SETSS.

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]).[5] "Boards of education of all school districts of the state

[4] The IHO also ordered that if the district did not "immediately and directly" arrange for and provide counseling services, the district must pay an agency identified by the parent (IHO Decision at p. 11).

[5] 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]).

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

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

VI. Discussion

A. Preliminary Matters

Prior to reaching the substance of the parties' arguments, some consideration must be given to the facts of the case and 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 September 8, 2023 due process complaint notice, the parent alleged that the district had not implemented the student's IESP for the 2023-24 school year and the parent was unable to locate providers willing to accept the district's standard rates (Parent Ex. A at p. 1).[7] As a result, the parent unilaterally obtained private services

[6] 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.

[7] It is undisputed that the district developed a March 2023 IESP for the student that it failed to implement (see Dist. Ex. 1). It is not clear why the September 8, 2023 due process complaint notice states that a March 2021 IESP was the last program developed by the district for the student (Parent Ex. A at p. 2).

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 (id. at pp. 1-3). Accordingly, the issue that was presented to the IHO was whether the parent is entitled to public funding of the costs of the privately obtained SETSS from EdZone. "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 "[p]arents' 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"]).

Thus, 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]).[8] 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).

Upon review of the IHO's decision, the IHO did not cite to Burlington/Carter or any other standards related to relief in a due process proceeding, and it is not entirely clear what, if any, legal standard the IHO relied on to reach his determination that the SETSS EdZone delivered were appropriate to meet the student's needs (see generally IHO Decision). However, beginning with parent's ten day notice in August 2023, the parties addressed the parent's claim for EdZone throughout these proceedings with a Burlington/Carter style of analysis and continue to do so in this appeal.

Next, I note that the district does not cross-appeal from the IHO's decision that its failure to implement the March 2023 IESP resulted in a denial of a FAPE to the student for the 2023-24 school year (IHO Decision at p. 11). Accordingly, this aspect of the IHO's decision 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]).

[8] State law provides that the parent has the obligation to establish that a unilateral placement is appropriate, which in this case is the special education that the parent obtained from EdZone (Educ. Law § 4404[1][c]).

B. Unilaterally Obtained SETSS

I will turn next to the inquiry of whether the parent's unilaterally-obtained SETSS from EdZone were appropriate to meet the student's needs.[9] 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, 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., 459 F.3d at 364; 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. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). 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

[9] The parent was unable to procure unilateral counseling services (see Tr. pp. 34-35).

> 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. The Student's Needs

In this case, although the student's needs are not in dispute, a description thereof provides context to determine whether the parent's unilaterally obtained SETSS were appropriate to address those needs.

Regarding the student's learning style, the March 2023 IESP indicated that the student struggled to follow directions, initiate and complete tasks, and became easily distracted and went off topic during learning time, requiring frequent redirection to the task and directions provided (Dist. Ex. 1 at pp. 3, 4). The IESP indicated that the student was disorganized, had great difficulty locating his belongings for class, and had difficulty with transitions (id. at p. 5). The student exhibited impulsive behaviors, including getting out of his seat, disrupting his peers, and playing with various objects instead of completing his work (id. at p. 3). According to the IESP, the student worked best with hands on activities and projects, review and repetition, frequent breaks, and frequent positive reinforcement (id. at pp. 4, 5). The student also needed redirection, reinforcement, repetition, adult support, significant 1:1 practice to master skills, and prompting to remain on task as he looked for distractions during instruction (id. at pp. 3, 4).

Academically, the March 2023 SETSS report reflected in the March 2023 IESP indicated that the student's reading level was at a "4.5" grade equivalent and he required "maximal prompting and support when completing reading activities" (Dist. Ex. 1 at p. 3). According to the IESP, the student generally decoded most words and read fluently when interested in the topic, although he exhibited difficulty including relevant details and the main idea of text when summarizing (id.). The student was at times resistant to reading tasks and benefitted from "chunking" to ensure comprehension and 1:1 support to address behavioral challenges that affected his ability to perform at his potential (id.).

The March 2023 IESP indicated that the student's writing was often difficult to read and lacked organization (Dist. Ex. 1 at p. 3). The student needed support to begin writing tasks, otherwise he engaged in disruptive behaviors (id.). Even when prompted, the student needed significant help generating ideas and writing them down in a clear and cohesive manner (id.). The student benefitted from using a graphic organizer to organize his written work and sentence starters to produce ideas and needed extra help with spelling (id.). The student's writing often contained run on sentences and lacked punctuation or transition words (id.).

In math, the March 2023 IESP indicated that the student was functioning between a mid-fourth to early fifth grade level (Dist. Ex. 1 at p. 1). According to the March 2023 SETSS report reflected in the IESP, math was a relative strength for the student, in that he could fluently add and subtract integers and decimal equations and was progressing in his knowledge of multiplication and division facts up to three digits (id. at p. 4). The student struggled with converting improper

fractions to mixed numbers, dividing fractions, and solving math equations, at times becoming "very upset" and requiring "maximal intervention to calm down" (id.).

Regarding the student's social/emotional development, the March 2023 IESP reflected a teacher report that the student had "grown significantly since the beginning of the year," was very sociable and kept strong friendships with peers (Dist. Ex. 1 at p. 5). On "rare occasion" the student engaged in a verbal dispute with peers and reacted physically by throwing property on the floor or becoming physical with other students (id.). According to the SETSS report reflected in the IESP, at times the student needed support when interacting with peers and adults, often talked out or turn, made unrelated or rude comments, overreacted, yelled, used inappropriate language, and punched objects when frustrated (id.). The student received significant support from his SETSS provider to help him stay regulated, follow rules and routines, and interact appropriately with others (id. at p. 3). The SETSS provider reported that despite progress, the student's social/emotional development was "still well behind his peers" (id. at p. 6). A counseling report reflected in the IESP indicated that the student struggled to be appropriately assertive; being either overly aggressive or declining to express his needs (id.). The student had made limited progress meeting his goals, was often resistant to attend therapy sessions, and often asked to end sessions early (id.).

2. Unilateral Services from EdZone

The educational supervisor of EdZone (supervisor) provided affidavit testimony that during the 2023-24 school year three certified special education teachers delivered six hours per week of SETSS to the student at his nonpublic school (Parent Ex. F ¶¶ 1, 7, 8).[10] The supervisor testified that the student's decoding, reading comprehension, and math skills were assessed at the beginning of the school year (id. ¶ 9).

According to the January 2024 EdZone SETSS progress report, the student, who was then-currently in seventh grade, had difficulty staying focused, following directions, initiating and completing tasks, and staying quiet during instruction; additionally, he was frequently distracted, fidgety, and talked during instruction (Parent Ex. G at p. 1). The student became frustrated when challenged and had difficulty following multi-step directions independently (id.). To address those needs, the SETSS providers identified that the student needed redirection, extra time, repeated explanations for comprehension, a non-distracting environment, frequent reminders, and the "consistent presence of an adult nearby to ensure his engagement and progress" (id.). Additionally, the SETSS providers indicated that the student benefitted from substantial 1:1 practice and repetition to fully grasp skills, visual aids, positive reinforcement, hands on activities/projects, and in-class SETSS support (id. at p. 3).

Regarding reading skills, the EdZone progress report reflected that the student's reading skills were at a fifth grade level; however, his comprehension skills were "significantly" below grade level, and his reading pace was slow (Parent Ex. G at p. 1). The student had difficulty pronouncing challenging words, fully grasping text content, demonstrating comprehension and

[10] The supervisor testified that the first SETSS provider was described as not "a good match for" the student, and the services were not as "effective" as the agency wanted (Tr. p. 59). A new provider was assigned to work with the student, but was unable to begin immediately, requiring an interim provider who worked with the student "for a week or two" (Tr. p. 59-61).

responding to questions, focusing, staying on task, and completing reading tasks (id.). To address those needs, the student's SETSS providers reread passages to him, and provided background information and guidance to encourage his engagement with text, redirection, and ongoing one to one support for "behavioral issues that impede[d] his progress" (id. at p. 2).

The EdZone progress report indicated that the student had difficulty expressing his opinion in writing, often responding that he lacked an opinion and did not know what to write (Parent Ex. G at p. 2). The student avoided writing and required assistance initiating writing tasks by expressing his thoughts and "translating them onto paper" (id.). Additionally, the student's writing lacked completion, and included flaws in punctuation, syntax, and spelling (id.). The student's SETSS providers addressed his writing difficulties by using graphic organizers, sentence starters, and working on improving his spelling (id.). According to the report, the SETSS providers consistent intervention enabled the student to communicate his thoughts in a more organized way (id.).

With regard to math, the EdZone progress report indicated that the student's math skills were a relative strength (Parent Ex. G at p. 2). The student's skill of adding, subtracting, multiplying, and dividing fractions was progressing with consistent practice and repetition (id.). Math word problems posed a challenge for the student as he struggled to understand the question and he often became frustrated when attempting to solve multi-step problems, which his SETSS providers addressed by breaking them down into smaller steps (id.). To address the student's distractibility during math instruction, the SETSS providers delivered "constant reminders and redirection" to help him focus (id.). Since the start of the school year, the student had made progress in his confidence and ability to attempt grade-level math problems (id.).

Turning to the student's social development, the EdZone progress report indicated that the student was sociable but tended to express thoughts that were inappropriate (Parent Ex. G at p. 3). The student's SETSS providers encouraged him to think before speaking to determine whether his comment was appropriate to say (id.). The student tended to overreact, yell, talk back to teachers, disrupt peers, and use inappropriate language when facing a challenging task (id.). The student needed intervention to regulate his emotions and determine appropriate responses to situations (id.). Further, the student often had difficulty with transitions, taking more time to get organized and begin a task (id.). To address these needs, the SETSS providers reported that the student required consistent prompting, encouragement, positive reinforcement, and redirection to succeed (id.).

In addition to the supports and services reflected in the student's January 2024 EdZone progress report, review of SETSS session notes from November 2023 to February 2024 shows that during English language arts instruction, SETSS providers used strategies to address the student's needs that included using note taking to remain focused and obtain relevant information, a whiteboard to break down writing tasks into manageable segments, writing prompts to emphasize proper punctuation and capitalization, worksheets for targeted practice/reinforcement of spelling and grammatical concepts, sentence starters to form complete responses, sight word repetition, visual aids to model answering questions in complete sentences, discussion about text read to provide details about the passage, and repeated spelling of challenging words to visualize "the correct way of writing the words" (see Parent Ex. H). To address the student's math needs, the SETSS providers reported that they implemented the student's testing accommodations, gave the

student a "math tips" sheet which included various math formulas, helped the student stay calm and focused during the math test, used kinesthetic strategies such as colored pencils, to help him visually group like terms by color, provided an alternate understanding of "like terms," used flashcards to solve equations, and guided the student to apply problem-solving strategies (id.). Additionally, to address the student's executive functioning and social/emotional needs, the SETSS providers taught the student a "self-check routine" to review instructions before starting a task, introduced sequential instructions to help the student process information and execute the corresponding action, and presented hypothetical situations that "might evoke frustration or anger" while encouraging the student to discuss how he would feel and express those emotions verbally (id. at pp. 3, 4, 5).

Turning to the district's assertion on appeal that the SETSS EdZone provided were not appropriate because the student's IESP recommended group SETSS and EdZone delivered the SETSS to the student individually, as stated previously, the district did not defend the recommendation for group SETSS, and the evidence in the hearing record does not indicate that SETSS delivered to the student on an individual basis was inappropriate. For example, according to the supervisor, the student received individual SETSS, rather than group as mandated on his IESP, due to his distractibility (Tr. pp. 65-66). According to the EdZone progress report, the student needed interventions including "one to one instruction from his SETSS provider" to "stay on task, act appropriately, and understand and retain new concepts" taught to him (Parent Ex. G at p. 1). The progress report indicated that "[o]ngoing one-on-one support provide[d] the targeted intervention as well as redirection that [wa]s essential to address and improve [the student's] reading, vocabulary, and comprehension skills (id. at p. 2). Further, the progress report reflected that "1:1 SETSS support w[ould] continue to contribute to [the student's] success and motivation, enabling him to successfully complete tasks in class" (id.). Additionally, the progress report indicated that the student tended to become easily distracted in the classroom and engage in disruptive behaviors, such that he "perform[ed] more effectively when taken out of the classroom environment and engage[d] in one-on-one sessions with the provider" (id. at p. 3). For these reasons, the evidence in the hearing record does not support the district's argument on appeal that it was not appropriate for EdZone to deliver the student's SETSS individually rather than in a group setting.

The district also asserts on appeal that the SETSS progress report does not reflect how the student was functioning in September, October, and November 2023, or after the date of the progress report, i.e., as of March 2024.[11] The district's argument is not persuasive, as it is unclear how a parent would have evidence of progress available to her soon after the student commenced receiving SETSS from EdZone (see Parent Ex. F ¶ 6). In any event, while evidence of progress may be 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]), it 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].

[11] I note the last date of proceedings was March 19, 2024 (Tr. p. 75).

Additionally, although the district argued during the impartial hearing that the student's SETSS providers from EdZone lacked appropriate certification, it is well-settled that a parent need not engage the services of a certified special education teacher—or, as here, a SETSS provider—in order to qualify for reimbursement or direct funding of those services (Carter, 510 U.S. 7, 14 [noting that unilateral placements need not meet state standards such as state certification for teachers]). Here, the student's SETSS providers held teaching certificates for students with disabilities for birth through second grade (see Tr. p. 119; Dist. Ex. 5). While it is true that the student in this matter was a seventh grade student, it is also true that the student demonstrated academic skills below his grade level and the district has not otherwise argued that the instruction provided by the SETSS providers was not specially designed to meet the unique needs of the student. Therefore, whether the SETSS providers held a teaching certificate specific to the student's grade level would not, per se, be determinative of whether the SETSS delivered to the student was appropriate to meet his needs.

The district has not identified any other grounds for reversing the IHO's conclusion regarding the appropriateness of the parent's unilaterally-obtained SETSS for the student for the 2023-24 school year. Upon an independent review of the record, the SETSS delivered by EdZone were appropriate to meet the student's needs and provided the student with specially designed instruction (see Gagliardo, 489 F.3d at 112; Frank G., 459 F.3d at 364-65).

C. Equitable Considerations

Having determined that the SETSS delivered by EdZone were appropriate to meet the student's needs, the next inquiry is whether equitable considerations weigh in favor of the parent's requested relief to fund the unilaterally-obtained SETSS at a rate of $198 per hour for the 2023-24 school year.

The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]; L.K. v. New York City Dep't of Educ., 674 Fed. App'x 100, 101 [2d Cir. Jan. 19, 2017]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014] [identifying factors relevant to equitable considerations, including whether the withdrawal of the student from public school was justified, whether the parent provided adequate notice, whether the amount of the private school tuition was reasonable, possible scholarships or other financial aid from the private school, and any fraud or collusion on the part of the parent or private school]; C.L., 744 F.3d at 840 [noting that "[i]mportant to the equitable consideration is whether the parents obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA"]).

Reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to their removal of the student from public school, or by written notice 10 business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger v. Medina City Sch. Dist., 348 F.3d 513, 523-24 [6th Cir. 2003]; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G., 459 F.3d at 376; Voluntown, 226 F.3d at 68).

There was no finding by the IHO that the parent failed to cooperate with the district or interfered with the district's effort to deliver services, and the district makes no such allegations on the appeal. In the decision, the IHO reduced the SETSS providers' hourly rates due to the providers holding certifications for birth to second grade only, and because the SETSS had been delivered individually, as opposed to in a group. However, as set forth above, these factors go to the question of the appropriateness of the unilaterally-obtained SETSS and are not compelling grounds to reduce an award of direct funding for unilaterally-obtained SETSS. The IHO determined that the SETSS delivered by EdZone were otherwise appropriate and since the factors relied on by the IHO for reducing the rate have been properly addressed above within the analysis of whether the SETSS was appropriate to meet the student's needs, the only remaining basis upon which to potentially reduce or eliminate the parent's requested relief is to determine whether the hourly rate of $198 for SETSS was excessive (see A.P. v. New York City Dep't of Educ., 2024 WL 763386 at *2 [2d Cir. Feb. 26, 2024] ["The first two prongs of the [Burlington/Carter] test generally constitute a binary inquiry that determines whether or not relief is warranted, while the third enables a court to determine the appropriate amount of reimbursement, if any"]).

Among the factors that may warrant a reduction in tuition based on equitable considerations is whether the frequency of the services or the cost for the services was excessive (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., 674 Fed. App'x at 101; 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 excessive cost argument focuses on whether the rate charged for a service was reasonable and requires, at a minimum, evidence of not only the rate charged by the unilateral placement, but evidence of reasonable market rates for the same or similar services.

The district contends that the IHO's reduction of the rate for funding the unilaterally-obtained SETSS should be upheld because the evidence in the hearing record supports the IHO's determination that the cost of the SETSS services were excessive. Notably, as the IHO frequently indicated in his decision, at no time during the impartial hearing did the district present any documentary or testimonial evidence regarding the reasonableness of the rate (IHO Decision at pp. 6-10). During the impartial hearing, the district sought to admit into evidence a report conducted by the American Institutes for Research (AIR report) to support its argument that the rate sought by the parent should be reduced but the IHO sustained the parent's objection to the proffered exhibit and did not allow it to be entered into the hearing record (see Tr. pp. 16-21). On appeal, the district does not challenge the IHO's decision to exclude the AIR report from evidence, does not present the AIR report or any other additional evidence for consideration regarding the rate, and instead makes conclusory arguments that the rate is excessive without citing to any evidence. Thus, the hearing record is devoid of any evidence concerning the reasonableness of the rate or current market rates for comparable private SETSS providers.

Absent any documentary or testimonial evidence regarding the reasonableness of the rate or current market rates for SETSS providers, and given that the IHO erred in relying on factors that go toward the appropriateness of the unilaterally-obtained SETSS, I find that the IHO's erred in limiting the cost of the SETSS because it was based upon factors that were not relevant to the analysis, and the IHO otherwise lacked an evidentiary record upon which reduce the funding awarded to the parent due to excessive costs by EdZone.

D. Compensatory Education

The district cross-appeals the IHO's award of compensatory counseling services. There is no dispute that the district did not deliver or facilitate the delivery of counseling as mandated on the student's March 2023 IESP, nor is there any dispute that the parent was unable to privately obtain counseling services for the student for the 2023-24 school year (Tr. pp. 34-35). The district does not challenge the type or amount of compensatory education ordered by the IHO on the grounds that the award was not aligned with the student's needs or would not serve to place the student in the position he would have occupied but for the district's violations of Education Law § 3602-c. Rather, the district specifically argues that such the award of compensatory counseling services must be reduced in light of any pendency services already provided. The parent did not respond to this branch of the district's cross-appeal.

The hearing record shows that the parties agreed to the student's services under pendency in this case (see Pendency Imp. Form); however, the hearing record is not developed regarding what counseling services, if any, were delivered pursuant to pendency. The Second Circuit has held that where a district fails to implement a student's pendency placement, students should receive the pendency services to which they were entitled as a compensatory remedy (Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 456 [2d Cir. 2015] [directing full reimbursement for unimplemented pendency services awarded because less than complete reimbursement for missed pendency services "would undermine the stay-put provision by giving the agency an incentive to ignore the stay-put obligation"]; see Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *25, *26 [E.D.N.Y. Oct. 30, 2008] [ordering services that the district failed to implement under pendency awarded as compensatory education services where district "disregarded the 'automatic injunction' and 'absolute rule in favor of the status quo' mandated by

the [IDEA] and wrongfully terminated [the student's] at-home services"] [internal citations omitted]).

Generally, if a district was required to provide pendency services to the student and failed to do so, an order for compensatory make-up services from private providers (as opposed to district providers) may be warranted (see E. Lyme, 790 F.3d at 456-57). While the IHO did not specifically articulate that the compensatory education was intended to address the district's failure to deliver pendency services, the award is sufficiently targeted to remedy that violation and I find insufficient basis to disturb the IHO's order except that I will limit the award to cover the period of time during which this matter has been pending, beginning from the date of the due process complaint notice through the date of this decision and for such counseling services that have not already been provided by the district pursuant to pendency.

VII. Conclusion

In summary, an independent review of the hearing record reveals that the parent sustained her burden to prove that the unilaterally-obtained SETSS delivered by EdZone for the 2023-24 school year were appropriate to meet the student's special education needs. The district has not raised any equitable considerations that would warrant a reduction or denial of the relief sought and did not present any evidence regarding the SETSS providers' rate, therefore, the IHO erred by reducing the rate. The IHO's compensatory award is modified to reflect the parties' pendency agreement.

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision dated April 23, 2024 is modified by reversing that portion which reduced the rate for the unilaterally-obtained SETSS for the 2023-24 school year; and

IT IS FURTHER ORDERED that the district shall fund the costs of the student's SETSS from EdZone at a rate not to exceed $198 per hour upon the parent's submission of proof of attendance and delivery of services to the student for the 2023-24 school year; and

IT IS FURTHER ORDERED that that portion of the IHO's decision dated April 23, 2024 that directed the district to provide compensatory counseling services is modified to require that the hour-for-hour compensatory counseling services ordered therein shall be reduced by any counseling services provided pursuant to pendency for the duration of these proceedings.

Dated: **Albany, New York**
July 25, 2024

JUSTYN P. BATES
STATE REVIEW OFFICER