The University of the State of New York

The State Education Department
State Review Officer
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No. 24-222

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:
Gulkowitz Berger LLP, attorneys for petitioner, by Shaya M. Berger, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Thomas W. MacLeod, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request to be reimbursed for, or to directly fund, the costs of her daughter's unilaterally-obtained special education teacher support services (SETSS) delivered by Always A Step Ahead (Step Ahead or agency) for the 2023-24 school year. Respondent (the district) cross-appeals from the IHO's decision awarding SETSS as compensatory educational services. The appeal must be sustained in part. The cross-appeal must be sustained in part.

II. Overview—Administrative Procedures

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

In this case, the evidence in the hearing record concerning the student's educational history is sparse. Briefly, a CSE convened on September 20, 2023, and developed an IESP with an anticipated implementation date of September 27, 2023 and an anticipated annual review date of September 20, 2024 (see Dist. Ex. 1 at p. 1). Finding that the student was eligible for special education as a student with a learning disability, the September 2023 CSE recommended that the student receive three periods per week of SETSS in a group, together with testing accommodations consisting of extended time and a separate location (id. at pp. 4-5).[1, 2] In addition, the September 2023 CSE developed annual goals targeting the student's needs in the areas of reading, mathematics, and writing, and recommended strategies to address the student's management needs, including "small group remediation in reading comprehension and math word problems" (id. at pp. 2-4).

Based on the limited evidence, it appears that the student has been parentally placed at a religious, nonpublic school for the 2023-24 school year at issue (see Parent Exs. A at p. 1).[3] In addition, the evidence reflects that the student began receiving SETSS on or about September 21, 2023 (see Parent Ex. F at p. 1; see also Tr. pp. 21-22; Parent Exs. D-E).

A. Due Process Complaint Notice

By due process complaint notice dated January 26, 2024, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2023-24 school year (see Parent Ex. A at p. 1). According to the parent, the student's September 2023 IESP represented the last-agreed upon IESP, which included a recommendation for three sessions per week of SETSS, as well as "certain related services" (id.).[4] The parent further indicated that she "dispute[d] any subsequent program the [district] developed that removed and/or reduced services on the IESP, and also dispute[d] any act the [district] may have taken to deactivate or declassify the student from being eligible to receive services" (id.). The parent asserted that the student continued to require the "same special education services and the same related services each week as set forth on the IESP" (id.).

Next, the parent indicated that she could not locate providers to work at the district's "standard rates," and the district had not provided any for the student for the 2023-24 school year (Parent Ex. A at p. 1). The parent further indicated that she had located providers to deliver "all

[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 within the district.

[3] Given the student's age, it appears that she would have been considered, chronologically, as a fifth grade student during the 2023-24 school year (see Parent Ex. A at p. 1).

[4] To be clear, the September 2023 IESP did not include any recommendations for related services (see Dist. Ex. 1 at pp. 4-5).

required services" to the student for the 2023-24 school year, but at "rates higher than standard [district] rate[s]" (id.).

As relief, the parent sought an order directing the district to continue the student's special education and related services under pendency, to fund three sessions per week of SETSS at an enhanced rate for the 2023-24 school year, and to issue related services authorizations (RSAs) for the parent to obtain the student's related services through parent-selected providers or to directly fund the costs of the student's related services delivered by parent-selected providers at the providers' rates "even if higher than the standard [district] rate" (Parent Ex. A at p. 2).

B. Events Post-Dating the Due Process Complaint Notice

On March 4, 2024, the district executed a pendency implementation form, which documented the parties' agreement that the September 2023 IESP formed the basis of the student's pendency services, consisting of three periods per week of SETSS in a group (see Pendency Imp. Form).

On March 12, 2024, the parent signed a document on Step Ahead's letterhead indicating that she was "aware that the services being provided to [the student] [we]re consistent with those listed" in the student's September 2023 IESP, and that she was aware SETSS were provided to the student at a rate of $200.00 per hour (Parent Ex. C at p. 1).[5, 6] On March 12, 2024, an "Office Manager" with Step Ahead (office manager) signed a statement, which identified the student's SETSS provider, the hourly rate Step Ahead paid the SETSS provider ($90.00), and that the agency charged $225.00 per hour for SETSS (Parent Ex. D).[7, 8] In addition, the office manager's statement noted that the SETSS provider would deliver a "total of 120 hours" of services to the student for the 2023-24 school year (id.). According to the evidence, the SETSS provider held an "Internship Certificate" for student with disabilities, grades one through six, and that the certificate was effective June 15, 2023 through August 31, 2025 (Parent Ex. E).[9]

[5] The letterhead of Step Ahead on this document appears to have a number of typographical errors in the address for the company as well as printing issues with the company's logo and school motto (see Parent Ex. C at p. 1).

[6] The director of the Step Ahead agency appears to have signed the letter as well (see Parent Ex. C at pp. 2, 3; see also Tr. pp. 24-27).

[7] The letterhead of Step Ahead on this document appears to have a number of different typographical errors in the address for the company from those in the March 2024 letter, as well as some formatting errors as to spacing (see Parent Ex. D at p. 1).

[8] At the impartial hearing, the office manager testified that the agency charged $200.00 per hour, and not $225.00 per hour as noted in her written statement (compare Tr. p. 27, with Parent Ex. D). The office manager also testified that the student was not receiving any related services (see Tr. p. 27).

[9] At the impartial hearing, the district's attorney noted in the closing statement that, pursuant to State regulation, "an individual with an internship certificate ha[d] to be in school," meaning that the individual had to be "pursuing their teaching degree" because the "internship certificate expire[d] upon the [individual's] matriculation" (Tr. pp. 43-44; see 8 NYCRR 80-5.9).

C. Impartial Hearing Officer Decision

On April 18, 2024, the parties proceeded to, and completed, the impartial hearing before an IHO with the Office of Administrative Trials and Hearings (OATH) in this matter (see Tr. pp. 1-53). In a decision dated April 24, 2024, the IHO found that the district failed to offer the student a FAPE for the 2023-24 school year, and the parent failed to establish that the SETSS delivered by Step Ahead were appropriate to meet the student's needs (see IHO Decision at pp. 5-9, 14).

In reaching the determination that the parent failed to sustain her burden demonstrating that the SETSS Step Ahead delivered to the student was not appropriate, the IHO initially pointed to the parties' arguments presented during closing statements (see IHO Decision at pp. 9-10). Thereafter, the IHO concluded that the hearing record failed to contain sufficient evidence regarding "how the SETSS [] provided to the [s]tudent were specially designed to meet the [s]tudent's needs," noting that the parent's only witness was the Step Ahead office manager (id. at p. 10). In reviewing the office manager's testimony, the IHO indicated that she testified about the hourly rate the agency charged for SETSS, the rate paid to the SETSS provider, and her role at Step Ahead (id.). The IHO also indicated, however, that the office manager "could not testify as to the work the [s]tudent performed when receiving SETSS, their performance levels, goals, any progress reports, if they existed, if the [s]tudent made progress, how the [hourly] rate [for SETSS] was determined, and whether funds from the rate were used to pay attorney fees" (id.). The IHO further found that the office manager "could not testify as to overhead costs at the [a]gency, what the remainder of the [hourly] rate was used for once the provider was paid, whether the [s]tudent received services on a 1:1 basis or in a group setting, and whether the provider adhered to the mandated service in the IESP" (id. at pp. 10-11).

Next, the IHO examined the session notes the parent entered into the hearing record as evidence (see IHO Decision at p. 11). Here, the IHO initially noted that the SETSS provider did not testify at the impartial hearing, and based on the session notes, it was unclear whether the student received SETSS "in accordance with their latest IESP" (id.). The IHO found that the hearing record failed to contain evidence explaining why the SETSS delivered by Step Ahead began prior to the implementation date on the IESP, which was September 27, 2023 (id.). reviewing the September 2023 IESP, the IHO noted that the student was performing at a "fourth grade level" for mathematics computations and writing, but was performing at a "third grade level" in the areas of reading and word problems (id.). As determined by the IHO, the hearing record failed to contain any evidence regarding when the student began receiving SETSS, whether a "baseline was established" for the student's areas of delay, "when the noted strengths and weaknesses were determined, what the SETSS provider worked on with the [s]tudent, whether the services were uniquely tailored to the [s]tudent's disability to enable them to learn, or whether the [s]tudent made any progress" (id.). Additionally, the IHO found that the hearing record was devoid of evidence regarding whether the student "required modifications to their SETSS services and if the [s]tudent continued to struggle in any particular academic area" (id.). As a result, the IHO concluded that, absent "crucial information as to how the unilaterally obtained SETSS services [we]re individualized in light of the [s]tudent's disability to permit them to access their educational curriculum," the parent failed to sustain her burden to demonstrate that the student received specially designed instruction enabling her to benefit from instruction in light of her disability (id.). Consequently, the IHO denied the parent's request to fund the unilaterally-obtained SETSS at the rate of $200.00 per hour for the 2023-24 school year (id. at pp. 11-12).

As a final matter, the IHO addressed equitable considerations (see IHO Decision at pp. 12-13). While noting that she need not reach the issue given the determination that the parent had failed to establish the appropriateness of the SETSS, the IHO found that equitable considerations would not have weighed in the parent's favor even if she had otherwise prevailed (id. at p. 13). The IHO indicated that the parent's failure to provide the district with a 10-day notice, "or any other notice, that they would be seeking private services and requesting public funding," would result in a denial of her requested relief (id.).

Based on the foregoing, the IHO ordered the district to provide the student with three periods per week of SETSS in a group and in a separate location for the 2023-24 school year, consistent with the recommendation in the September 2023 IESP (see IHO Decision at p. 14).

IV. Appeal for State-Level Review

The parent appeals, arguing that the IHO erred by denying her request to fund the unilaterally-obtained SETSS delivered to the student by Step Ahead during the 2023-24 school year. Initially, the parent argues that equitable services cases, such as the instant matter, should not be subjected to a Burlington/Carter analysis; however, even if assessed under this standard, the parent contends that the IHO erred by finding that the SETSS was not appropriate. More specifically, the parent asserts that the IHO's rationale for denying funding consisted of "nitpicking and second guessing" the SETSS provider, rather than noting "fatal flaws in service or a provider not understanding [the s]tudent's unique needs or not working towards those needs," and instead, pointed to "additional information that perhaps might be useful for [the IHO] to consider." For example, the parent notes that beginning the SETSS a week prior to the implementation date of the IESP was "inconsequential," and similarly, that the session notes' failure to include the student's needs—which were already written in the IESP—was "inconsequential." The parent also argues that she sustained her burden because she used an agency with a "credential provider" and submitted session notes that reflected an "understanding" of the student's needs, with services provided pursuant to the student's September 2023 IESP.

Next, the parent asserts that the evidence in the hearing record supports an award of funding at the contracted rate of $200.00 per hour. The parent argues that the hearing record lacked sufficient evidence to find that the hourly rate was unreasonable, given that the district's evidence essentially consisted of an "expert report without the experts testifying to their methodology and how it accurately reflects what hourly SETSS rate is reasonable." Nevertheless, the parent points out that Step Ahead's hourly rate falls within the range of rates within the district's evidence. As relief, the parent seeks to reverse the IHO's decision and to order the district to fund the unilaterally-obtained SETSS at the contracted rate of $200.00 per hour for the 2023-24 school year.

In an answer, the district responds to the parent's allegations and generally argues to uphold the IHO's decision in its entirety. As a cross-appeal, the district asserts that the parent's failure to provide a 10-day notice and proof of a legal obligation to pay the costs of the unilaterally-obtained SETSS weigh against an entitlement to direct funding as relief. In addition, the district asserts that the evidence in the hearing record does not support an award funding the unilaterally-obtained SETSS at $200.00 per hour, but instead, the hourly rate must be reduced to a more reasonable rate of $125.00 per hour, based on the "independent rate study of the American Institutes of Research"

(AIR study report). The district further asserts that the IHO erred by ordering the district to provide the student with SETSS, as relief, because the award amounts to compensatory educational services, which the parent did not seek in her due process complaint notice. The district also argues that, if the parent is entitled to compensatory educational services for missed pendency services, which did not appear to be the IHO's intention, the award must be reduced to cover the period of the instant administrative proceeding.

The parent did not file an answer to the district's cross-appeal or a reply to the district's answer.

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 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]).[10] "Boards of education of all school districts of the state shall furnish services to students who are residents of this state and who attend nonpublic schools located in such school districts, upon the written request of the parent" (Educ. Law § 3602-c[2][a]). In such circumstances, the district of location's CSE must review the request for services and "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an [IEP]" (Educ. Law § 3602-c[2][b][1]). The CSE must "assure that special education programs and services are made available to students with disabilities attending nonpublic schools located within the school district on an equitable basis, as compared to special education programs and services provided to other students with disabilities attending public or nonpublic schools located within the school district (id.).[11]

[10] 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]).

[11] State guidance explains that providing services on an "equitable basis" means that "special education services are provided to parentally placed nonpublic school students with disabilities in the same manner as compared to other students with disabilities attending public or nonpublic schools located within the school district" ("Chapter 378 of the Laws of 2007–Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the Individuals with Disabilities Education Act (IDEA) 2004 and New York State (NYS) Education Law Section 3602-c," Attachment 1 at p. 11, VESID Mem. [Sept. 2007], available at

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., 694 F.3d at 184-85).

VI. Discussion

A. Legal Standard

The parent challenges the IHO's reliance on the Burlington/Carter model of analysis for resolving the parties' dispute. Accordingly, the first issue to be addressed is 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, as a self-help remedy, she unilaterally obtained private services from Step Ahead 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 who fail to comply with their statutory mandates to provide special education can be made to pay for special education services privately obtained for which a parent paid or became legally obligated to pay, a process that is essentially the same as the federal process under IDEA. Accordingly, the issue in this matter is whether the parent is entitled to public funding of the costs of the private services. "Parents who are dissatisfied with their child's education can unilaterally change their child's placement . . . and can, for example, pay for private services, including private schooling. They do so, however, at their own financial risk. They can obtain retroactive reimbursement from the school district after the [IESP] dispute is resolved, if they satisfy a three-part test that has come to be known as the Burlington-Carter test" (Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 526 [2d Cir. 2020] [internal quotations and citations omitted]; see Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 14 [1993] [finding that the "Parents' failure to select a program known to be approved by the State in favor of an unapproved option is not itself a bar to reimbursement."]).

The parent's request for district funding of privately obtained services must be assessed under this framework. 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]).[12] 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.

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http://www.p12.nysed.gov/specialed/publications/policy/nonpublic907.pdf). The guidance document further provides that "parentally placed nonpublic students must be provided services based on need and the same range of services provided by the district of location to its public school students must be made available to nonpublic students, taking into account the student's placement in the nonpublic school program" (id.).

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

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).

The parent's claims involve a self-help remedy seeking public funding of the special education services that she privately obtained from Step Ahead. That is the hallmark of a Burlington/Carter style of claim and analysis, and such relief is permissible if the parent meets the evidentiary burden of showing that the private services she obtained were appropriate under the totality of the circumstances. Based on the foregoing, the IHO in this case correctly relied on the Burlington/Carter analysis.

B. Unilaterally Obtained SETSS

On appeal, the parent argues that, contrary to the IHO's determination, she sustained her burden to establish that the unilaterally-obtained SETSS delivered by a Step Ahead was appropriate, because the SETSS provider was "credentialed," the session notes showed the provider's understanding of the student's unique needs, and the provider delivered SETSS pursuant to the student's September 2023 IESP.

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 v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998]). Citing the Rowley standard, the Supreme Court has explained that "when a public school system has defaulted on its obligations under the Act, a private school placement is 'proper under the Act' if the education provided by the private school is 'reasonably calculated to enable the child to receive educational benefits'" (Carter, 510 U.S. at 11; see Bd. Of Educ. Of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 203-04 [1982]). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (id. at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether a unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether the placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] ["evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of

a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

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

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

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

1. The Student Needs

While the student's needs are not in dispute, a brief discussion thereof provides context for the issue to resolved on appeal, namely, whether the parent's unilaterally-obtained SETSS were appropriate to meet the student's needs. According to the student's September 2023 IESP, an administration of cognitive testing to the student yielded processing speed, fluid reasoning, visual spatial, and verbal comprehension scores all within the average range, and a working memory score in the superior range (see Dist. Ex. 1 at p. 1).[13] The student's scores on achievement testing revealed that the student was performing at a fourth-grade level and within the "average range" on subtests assessing her letter and word recognition, writing, and mathematic computation skills, and her scores revealed that she performed at a third-grade level on measures assessing her reading comprehension and mathematics word problem skills (id.). Annual goals in the September 2023 IESP for the student included answering questions about details in text; reading text with accuracy, appropriate rate, and understanding; improving sight word knowledge; making inferences; solving mathematics computation and word problems; and writing sentences with proper grammar, punctuation, capitalization, and spelling (id. at pp. 3-4).

Socially, the September 2023 IESP described the student as "cooperative, motivated, and responsive," and further noted that "[s]he was focused, and did not become frustrated, annoyed, or impulsive" (Dist. Ex. 1 at p. 2). The student reported that her classmates were nice, she had friends, and her teachers were "good," and she "gave positive and concrete responses on personality measures" (id.). Regarding the student's physical development, the September 2023 IESP

[13] The evidence in the hearing record does not establish when the WISC-V was administered to the student (see generally Tr. pp. 1-53; Parent Exs. A; C-F; Dist. Exs. 1-3).

indicated that the student had celiac disease, but was "healthy overall," and her past low attention and energy was improving (id.). According to the IESP, the student could "function in the general education setting," but could benefit from small group remediation in reading comprehension and mathematics word problems to address her management needs (id.).

2. Services From Step Ahead

As noted above, to qualify for reimbursement under the IDEA, parents must demonstrate that the unilateral placement provided instruction specially designed to meet the student's unique needs, supported by services necessary to permit the student to benefit from instruction (Gagliardo, 489 F.3d at 112; see Frank G., 459 F.3d at 364-65). Regulations define specially designed instruction, in part, as "adapting, as appropriate to the needs of an eligible student under this Part, the content, methodology, or delivery of instruction to address the unique needs that result from the student's disability" (8 NYCRR 200.1[vv]; see 34 CFR 300.39[b][3]).

At the impartial hearing, the Step Ahead office manager testified that she did not know when the parent first communicated with the agency with respect to obtaining services for the student for the 2023-24 school year (see Tr. p. 31). The office manager was not responsible for arranging or implementing services delivered by the agency (see Tr. p. 32). She explained that, as the office manager, it was her role to "just compile all the documents for the case hearings" (Tr. p. 32). Therefore, she testified that she had no knowledge of the student's "assessments performance" or "how goals [we]re created for the student" (Tr. pp. 32-33). With respect to progress reports, the office manager testified that her only knowledge or receipt of such included "whatever [wa]s in the software" (Tr. p. 33). With regard to the SETSS provider's credentials, the office manager had no "knowledge of whether an internship certificate differ[ed] from an initial certificate" (Tr. p. 33). She also confirmed that she had no knowledge of the "actual services" delivered to the student or whether the student made progress (Tr. pp. 33-34). The office manager did not know whether the agency delivered SETSS in a group (see Tr. p. 35).

Based upon the foregoing, the IHO properly concluded that the office manager's testimony did not offer any evidence to support a finding that the SETSS being delivered to the student by Step Ahead was specially designed instruction to meet the student's needs (see IHO Decision at pp. 10-11).

Yet, in addition to the testimonial evidence, the hearing record includes what appears to be a fillable document, which the parent submitted into evidence and identified as a "Session Report"; however, the document, itself, does not bear any title or reflect the origin of the document (Parent Ex. F at pp. 1-8). The session report reflects the student's name; the SETSS provider's name; the date of session, as well as reporting the "time in" and "time out" for each date; the location of the service (i.e., "school"); areas to describe goals (all left blank); and areas for notes (id.).[14] Overall, a review of the session report shows that the student generally received 60-minute sessions with

[14] Based on the session report, the student received SETSS beginning anywhere between 11:00 a.m. to 3:00 p.m.; on occasion, however, the student received SETSS at 9:00 a.m. to 10:00 a.m. and from 4:00 p.m. to 4:30 p.m. (see generally Parent Ex. F). The hearing record does not include any evidence describing the student's school day at her religious, nonpublic school, such as the length of her day or a class schedule (see generally Tr. pp. 1-53; Parent Exs. A; C-F; Dist. Exs. 1-3). The student's September 2023 IESP recommended three periods per week of SETSS in a group that would be delivered in a separate location (see Dist. Ex. 1 at p. 4).

the SETSS provider from September 21, 2023 through March 11, 2024 (id.; see generally Parent Ex. E). According to the session report, the student worked on skills such as conversing about and responding to questions about assigned reading materials; making predictions; identifying underlying themes, characters, and settings; and analyzing persuasive texts (id. at pp. 1-7). In addition, the session report indicates that grammar rules were reinforced with the student, and the student developed a personal narrative, essays about class novels, and a persuasive essay (id. at pp. 2-8). The session report also reflects that the student worked on solving problems involving fractions, mixed numbers, decimals, and word problems; using mental math; estimating numbers; converting units of measurement; estimating to find quotients; and preparing for and reviewing math quizzes and tests (id. at pp. 1-8). Additionally, the student worked on vocabulary skills and her ability to conduct research for a project and demonstrate understanding of science and social studies concepts (id. at pp. 1-5, 7).

In the decision, the IHO was concerned that the session notes lacked information about the student's present levels of performance, goals, baselines in her areas of delay, and progress in reading, writing, and mathematics (see IHO Decision at p. 11). However, the September 2023 IESP reported the student's present levels of performance and annual goals, and further noted that the student had been assessed as performing at a fourth-grade level in writing, mathematics computation, and letter or word recognition; and at a third-grade level in reading comprehension and mathematics word problems (see Dist. Ex. 1 at p. 1). According to the parent's contract with Step Ahead, the agency agreed to provide SETSS consistent with the services set forth in the student's September 2023 IESP (see Parent Ex. C).[15] In addition, the Step Ahead office manager's affidavit noted that the agency's providers working with the student had reviewed her September 2023 IESP and delivered services in accordance with the IESP, and were "adapted as necessary to the student's current progress" (Parent Ex. D).

With respect to the IHO's concern that the hearing record lacked information regarding the student's progress, 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).

[15] Notably, the evidence in the hearing record does not indicate what grade the student was expected to attend during the 2023-24 school year (see generally Tr. pp. 1-53; Parent Exs. A; C-F; Dist. Exs. 1-3). However, as previously estimated, it appears that, based on the student's chronological age, she would likely have been attending fifth grade during the 2023-24 school year.

Next, the IHO also noted concerns that the hearing record lacked evidence demonstrating when the student began receiving services, what the SETSS provider worked on with the student, and whether the services were uniquely tailored to the student's needs (see IHO Decision at p. 11). However, based on the session notes, the document reflects that the SETSS began on September 21, 2023 (see Parent Ex. F at p. 1). The session notes, as previously described, reflect what the student was working on during the SETSS sessions; the session notes do not, however, describe what, if any, interventions modifications, or specific strategies the SETSS provider used with the student or show how, if at all, the instruction provided was tailored to the student and met the student's unique needs (see generally Parent Ex. F).

Based on the foregoing, while it would be preferrable to have the testimony of the SETSS provider at the impartial hearing, there is nonetheless sufficient evidence to show that the student received SETSS from Step Ahead and that such services addressed the student's specific needs related to reading, writing, and mathematics during the 2023-24 school year. In light of the foregoing and contrary to the IHO's determination, the evidence in the hearing record supports a finding that the parent sustained her burden to prove that the unilaterally-obtained SETSS delivered by Step Ahead was appropriate to meet the student's needs.

C. Equitable Considerations

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

Reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to their removal of the student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C.

§ 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger v. Medina City Sch. Dist., 348 F.3d 513, 523-24 [6th Cir. 2003]; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G., 459 F.3d at 376; Voluntown, 226 F.3d at 68).

Here, the parent appeals—and the district cross-appeals—the IHO's alternate finding that equitable considerations did not favor an award of funding for the unilaterally-obtained services because she failed to provide 10-day notice to the district. The parent asserts that she was not required to provide 10-day notice because the district did not provide the parent with prior written notice. The district asserts that a hearing officer retains the fundamental discretion to reduce or bar reimbursement if the parent failed to provide the requisite notice.

Consistent with the IHO's finding, the evidence in the hearing record reflects that the parent did not submit a 10-day notice to the district. In addition, the evidence indicates that although the private agency began delivering SETSS to the student on September 21, 2023, the parent failed to notify the district at the CSE meeting held on September 20, 2023, that she already had a SETSS provider to deliver services to the student and intended to seek public funding from the district.

The IDEA provides that an award of reimbursement may not be reduced or denied if the parent did not receive a procedural safeguards notice but does not include similar reference to a prior written notice (20 U.S.C. § 1412[a][10][C][iv][I][bb]; 34 CFR 300.148[e][1][ii]; see 20 U.S.C. § 1415; 34 CFR 300.504). Ultimately, however, there was no argument or allegation during the impartial hearing regarding either the lack of 10 day notice or a lack of procedural safeguards notice or prior written notice. The IHO should utilize the prehearing conference procedures to discuss with the parties whether such issues are germane to the matter before her so that the parties are on notice and the hearing record is properly developed (see 8 NYCRR 200.5[j][3][xi]). While the hearing record does not include a 10-day notice from the parent, given the lack of discussion during the impartial hearing and the undeveloped state of the hearing record, I decline to exercise my discretion to reduce the award of district funding for the unilaterally-obtained services based solely on equitable grounds of the absence of a 10-day notice.

Next, with respect to the district's assertion that the parent failed to demonstrate that she had a financial obligation to pay for the SETSS, this assertion is without merit, as the parent produced the contract with Step Ahead obligating her to pay for the services (see Parent Ex. C).

Finally, the district asserts that, if the parent's unilaterally-obtained SETSS was appropriate and the parent was legally obligated to pay for such services, then the hourly rate for SETSS must be reduced because the contracted rate of $200.00 per hour is excessive and unreasonable. The district argues that, consistent with the arguments made at the impartial hearing and consistent with the independent AIR study report, the parent's requested hourly rate is unreasonable and should be limited to $125.00 per hour.

Among the factors that may warrant a reduction in tuition under equitable considerations is whether the frequency of the services or the rate for the services were excessive (see E.M., 758 F.3d at 461 [noting that whether the amount of the private school tuition was reasonable is one factor relevant to equitable considerations]). The IHO may consider evidence regarding whether the rate charged by the private agency was unreasonable or regarding any segregable costs charged by the private agency that exceed the level that the student required to receive a FAPE (see L.K. v. New York City Dep't of Educ., 2016 WL 899321, at *7 [S.D.N.Y. Mar. 1, 2016], aff'd in part, 674 Fed. App'x 100). More specifically, while parents are entitled to reimbursement for the cost of an appropriate private placement when a district has failed to offer their child a FAPE, it does not follow that they may take advantage of deficiencies in the district's offered placement to obtain all those services they might wish to provide for their child at the expense of the public fisc, as such results do not achieve the purpose of the IDEA. To the contrary, "[r]eimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71 [emphasis added]; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148). Accordingly, while a parent should not be denied reimbursement for an appropriate program due to the fact that the program provides benefits in addition to those required for the student to receive educational benefits, a reduction from full reimbursement may be considered where a unilateral placement provides services beyond those required to address a student's educational needs (L.K., 674 Fed. App'x at 101; see C.B. v. Garden Grove Unified Sch. Dist., 635 F. 3d 1155, 1160 [9th Cir. 2011] [indicating that "[e]quity surely would permit a reduction from full reimbursement if [a unilateral private placement] provides too much (services beyond required educational needs), or if it provides some things that do not meet educational needs at all (such as purely recreational options), or if it is overpriced"]; Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ., 790 F.2d 1153, 1161 [5th Cir. 1986] ["The Burlington rule is not so narrow as to permit reimbursement only when the [unilateral] placement chosen by the parent is found to be the exact proper placement required under the Act. Conversely, when [the student] was at the [unilateral placement], he may have received more 'benefit' than the EAHCA [the predecessor statute to the IDEA] requires"]).

Generally, an excessive cost argument focuses on whether the rate charged for 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.

With regard to the evidence in this case, the question of the hourly rate paid to the unilaterally-obtained SETSS provider, the office manager did not know whether the $90.00 reflected in her affidavit was paid to the provider per hour or half hour, or if the $90.00 was a "flat" rate (Tr. p. 34). The office manager was unable to explain how the agency determined the $200.00 per hour rate charged for SETSS, and when asked if Step Ahead paid any of the parent's attorney fees, she indicated that she did not know (see Tr. pp. 34-35).[16] Additionally, the office manager

[16] The due process hearing provisions in the IDEA do not authorize an administrative hearing officer to grant relief in the form of attorney's fees, and instead, at least in this jurisdiction, "in any action or proceeding brought under the IDEA, a court 'may award reasonable attorneys' fees...to a prevailing party who is the parent of a child with a disability'" (S.J. v. New York City Dep't of Educ., 2022 WL 1409578, at *1 [2d Cir. May 4, 2022]; see 20 U.S.C. § 1415[i][3][B][i][I]). Thus, it would not be permissible for the IHO or the undersigned to award any reimbursement related to attorney fees or expenses, and I note that the parent's attorney failed to clarify on the record whether Step Ahead was responsible for or facilitating the collection of the attorney fees for the parent. While awarding attorney fees is not permissible in a due process proceeding, it is a permissible to inquire and

did not know what the agency did with the remainder of the SETSS hourly rate of $110.00 that it received (see Tr. p. 35). The office manager also did not know the range of hourly rates paid to SETSS providers (see Tr. p. 35).

With respect to the delivery of SETSS, the office manager testified that agency providers were "supposed to document all of their session notes," and therefore, if "sessions [we]re not mentioned in a set of session notes," it was "safe to say that they did not take place" (Tr. p. 35). She did not know whether the agency required SETSS providers to "adhere to the mandate on the IESP," and testified that she did not know whether the student's SETSS provider had been absent during the 2023-24 school year or if the student had "missed a host of sessions" (Tr. pp. 35-36).

Based on this testimony, as well evidence that the SETSS provider held an internship certificate, the district argued that the contracted rate of $200.00 per hour was unreasonable. More specifically, the district asserted that the evidence provided no basis upon which to derive how the agency arrived at the hourly rate, whether the hourly rate incorporated payment of the parent's attorney's fees, and that, due to the status of the SETSS provider's internship certificate, the hearing record lacked any evidence establishing that the provider had been supervised (as required by such certificate and regulations) and was incorporated as part of the $200.00 per hour rate (see Tr. pp. 42-44).

Next, with respect to whether $200.00 per hour is an excessive rate, the district appears argue that the rate should be $125.00 based upon the report. Upon review, the AIR study report is dated October 2023 and entitled "Hourly Rates for Independently Contracted Special Education Teachers and Related Services Providers" (Dist. Ex. 2 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 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. 2 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

determine the extent which any fees may be part of any of relief sought from the IHO, whether the inquiry is directed at the staff of the private school, the private company, or the parent.

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).[17] 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 id.).

The district further argued at the impartial hearing that, based on the wage statistics set forth in a district exhibit, the hourly rate broke down to approximately $81.33 per hour; however, the district did not take the position that $81.33 per hour was a reasonable hourly rate, but rather, used it to demonstrate that it was drastically different than the $200.00 per hour requested by the parent in this case.

With respect to fashioning appropriate equitable relief and its relevancy, I find that the AIR report and the district's arguments offer some basis to conclude that the rate charged by Step Ahead is excessive, but 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 Step Ahead. 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 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.[18] It was not inappropriate for the AIR to use such government-published data in its report. 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 2023 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).[19] Furthermore, the geographic data in this

[17] The 2022-2027 salary schedules for district teachers from the district-UFT agreement are cited in the report.

[18] 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, which shortly preceded the 2022-23 school year at issue in this proceeding and would be relevant thereto (see https://www.bls.gov/oes/tables.htm); however, I note that May 2023 data is the most recent annual data published by the USBLS as of the date of this decision. 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.

[19] District Exhibit 3 shows a mean wage of $117,120 from the USBLS' May 2022 data for the same occupation in the same New York metropolitan region, but because this case relates to the 2023-24 school year, the

metropolitan subset does not have to be perfect in order to be sufficiently reliable for use when weighing equitable considerations.

When calculating the SETSS rates in the AIR study report, operational costs were approximated at 8.3 percent (Dist. Ex. 2 at p. 11). Here, the amount attributed to the Step Ahead's operational costs, based on the hourly rate for SETSS, is $110.00 per hour or approximately 55 percent of the $200.00 hourly rate charged by Step Ahead, based upon the $90.00 per hour paid to the SETSS provider.

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. 2 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 across the spectrum including private schools, charter schools, and district special teachers. 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

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undersigned has taken judicial notice of the USBLS' data from May 2023, which is closer in time to the events of this case. I also note that when using a similar analysis in Application of a Student with a Disability, Appeal No. 24-132, the undersigned also used May 2023 wage figures, but inadvertently referred to them as USBLS' May 2022 figures, and there is a slight difference between the two years.

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).[20]

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.[21] When using the USBLS data, a calculation leads to the conclusion that the $200.00 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.

As for the district's argument regarding the insufficient certification of the SETSS teacher, 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. Therefore, whether the SETSS provider held a current teaching certificate, or as here, was or was not properly supervised, would not be a per se determinative factor in this matter. Next, there is no other evidence in the hearing record, or specifically within the parent's contract with Step Ahead, that suggests that Step Ahead incorporates the costs of the attorney's fees within the hourly rate it charges for SETSS (see Parent Ex. C; see generally Tr. pp. 1-53; Parent Exs. A; D-F; Dist. Exs. 1-3); however as noted above it would not be impermissible for the district to further develop a hearing record to confirm whether the private company has any business relationship with the attorney to ensure that no attorney fees are included in the relief sought from the IHO.

The $90.00 per hour costs for the teacher's hourly wage was within the USBLS data in between the median and 75th percentile. When considering the testimony described above, in which Step Ahead's own office manager was unable to provide any explanation at all as to why indirect employer costs above the teacher's hourly wage were approximately 55 percent, which is far more that the 27.7 percent in the USBLS data, and the evidence leads me to the conclusion that the costs of Step Ahead were excessive as the district argues and more than what the district should be required to pay. The $90 per hour when adding indirect costs supported by USBLS data would yield a result of approximately $115 per hour in costs. Because the district does not assert that it 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.

[20] The ECEC covers the civilian economy, which includes data from both private industry and state and local government. One could make an argument that a company like a Step Ahead should fall in one of the different rows of private employers, but it would result in only nominal differences in calculation, and the parent did not avail herself of the opportunity to develop the record further regarding the indirect costs beyond that of the teacher's hourly wage.

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

Based on the foregoing, the evidence in the hearing record supports a finding that the parent is entitled to district funding for the costs of SETSS for up to three periods per week for the 2023-24 school year, at a rate of 125.00 per hour.

VII. Conclusion

Having determined that the evidence in the hearing record does not support the IHO's conclusion that the SETSS delivered by Step Ahead to the student during the 2023-24 school year was not appropriate, and that equitable considerations weigh partially in favor of the parent's requested relief, the necessary inquiry is at an end.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision, dated April 24, 2024, is modified by reversing the determination that the SETSS delivered by Step Ahead was not appropriate to meet the student's needs; and,

IT IS FURTHER ORDERED that the IHO's decision, dated April 24, 2024, is modified by reversing the determination that equitable considerations did not weigh in favor of the parent's requested relief; and,

IT IS FURTHER ORDERED that the district shall directly fund the costs of the student's SETSS delivered by Step Ahead at a rate not to exceed $125.00 per hour and upon presentation of proof of attendance and services delivered.

Dated: **Albany, New York**
July 5, 2024

JUSTYN P. BATES
STATE REVIEW OFFICER