The University of the State of New York

The State Education Department
State Review Officer
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No. 24-260

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:
Law Office of Philippe Gerschel, attorneys for petitioner, by Philippe Gerschel, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Emily McNamara, 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 his request that respondent (the district) fund the costs of his son's private services delivered by Learning Learners LLC (Learning Learners) at specified hourly rates for the 2023-24 school year. The district cross-appeals from that portion of the IHO's decision which ordered it to fund private services by Learning Learners at a reduced rate. 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

In this matter, the evidence in the hearing record reflects that a CSE convened on May 23, 2023 for the student's annual review and developed an IESP that included recommendations for the student—who was eligible to receive special education as a student with a speech or language impairment—to receive seven periods per week of individual special education teacher support services (SETSS), two 30-minute sessions per week of individual speech-language therapy, one 30-minute session per week of speech-language therapy in a group, and two 30-minute sessions per week of individual counseling (see Parent Ex. B at pp. 1, 15).[1] For assistive technology, the CSE recommended that the student be provided with a tablet as needed at home and school (id. at pp. 15-16). According to the May 2023 IESP, the student was then-currently enrolled in ninth grade at a religious, nonpublic school (see id. at pp. 2, 5).

On May 31, 2023, the parent—via an email sent by Learning Learners with a letter attached—informed the district that he had parentally placed the student in a nonpublic religious school at his own expense but wanted the district to continue to provide special education to the student for the next school year (see Parent Ex. D at pp. 1-2).[2]

On August 24, 2023, the parent signed a "Parent Service Contract" with Learning Learners to provide the student with SETSS, speech-language therapy, counseling, and assistive technology "to whatever extent possible" for the 2023-24 school year (Parent Ex. E at pp. 1-2).[3]

In a letter to the district dated September 3, 2023, the parent, through his attorney, notified the district of his intention to unilaterally obtain services to implement the student's May 2023 IESP and to seek reimbursement or direct payment of those services from the district (see Parent Ex. C at p. 2).

A. Due Process Complaint Notice

In a due process complaint notice dated September 7, 2023, the parent, through his attorney, alleged that the district denied the student a free appropriate public education (FAPE) for the 2023-24 school year (see Parent Ex. A). The parent alleged the district had not implemented the student's SETSS and related services for the 2023-24 school year and that he had been unable to locate providers (id. at p. 2). The parent asserted that "[w]ithout supports, the parental mainstream placement [wa]s untenable" (id.). According to the parent, he "located appropriate services providers independently for the 2023-24 school year" (id.). As relief, the parent sought an order directing the district to fund the costs of the unilaterally-obtained services "at reasonable

[1] The student's eligibility to receive special education and related services as a student with a speech or language impairment is not in dispute (see 34 CFR 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

[2] The parent signed the letter to the district on May 23, 2023 (Parent Ex. D at p. 2).

[3] The document indicated that Learning Learners would "make every effort to implement" the SETSS, speech-language therapy, counseling, and assistive technology; however, the contract also indicated that Learning Learners "intend[ed] to provide" SETSS and speech-language therapy and specified the hourly rates for those services (Parent Ex. E).

market rate" and fund a bank of compensatory educational services for any services not provided to the student during the 2023-24 school year (id. at p. 3).[4]

B. Impartial Hearing Officer Decision

The matter was assigned to an IHO with the Office of Administrative Trials and Hearings (OATH) who presided over a prehearing conference on April 17, 2024, and an impartial hearing on May 9, 2024 (Tr. pp. 17-46).[5, 6] In a decision dated May 13, 2024, the IHO found that the district failed to meet its burden to prove that it provided the student with a FAPE for the 2023-24 school year (IHO Decision at pp. 4-5). The IHO characterized the entirety of the relief sought by the parent as compensatory education and discussed the legal standards attendant thereto (id. at pp. 5-6). The IHO found that Learning Learners arranged for certified providers to deliver seven hours per week of SETSS and one and a half hours per week of speech-language therapy to the student for the 2023-24 school year (id. at p. 7). The IHO determined that the relief sought by the parent was appropriate but that the hourly rates of $215 for SETSS and $265 for speech-language therapy were excessive (id.). In particular, noting that the SETSS provider was paid $90 per hour and the speech-language therapy provider was paid $100 per hour, the IHO found that the overhead charged by the company exceeded a reasonable percentage and, in support of this conclusion, cited a memorandum from the New York State Education Department (SED), which set a limit on overhead expense reimbursement for tuition for State-approved programs educating students with disabilities (id.). Based on this, the IHO ordered the district to fund the student's SETSS at the rate of $135 per hour and speech-language therapy at a rate of $150 dollars per hour (id. at pp. 7-8). Because the parent had been unable to locate a provider to deliver counseling services, the IHO ordered the district to fund 36 hours of compensatory counseling by a provider of the parent's choosing at a reasonable market rate (id. at pp. 8-9). The IHO denied the parent's request that the district provide the student an assistive technology device as outside the scope of the impartial hearing (id. at p. 8).

IV. Appeal for State-Level Review

The parent appeals, alleging that the IHO erred in reducing the hourly rates awarded for the SETSS and speech-language therapy delivered by Learning Learners. The parent argues that the services requested were appropriate in that they addressed the student's needs and met the goals set forth in the student's IESP and progress report, the providers were certified, and the student made progress. As for the hourly rate, the parent argues that the IHO erred in not awarding the contract rate given that the district presented no evidence of a "reasonable market rate." In

[4] The parent also requested pendency for the student based on the May 2023 IESP (Parent Ex. A at p. 2).

[5] The matter was originally assigned to a different IHO (IHO I) who conducted four status conferences between November 17, 2023 and March 18, 2024 (see IHO I Tr. pp. 1-19). References in this decision to "the IHO" are to the IHO from OATH who presided over the substantive hearing date and issued the final decision (see IHO Decision; Tr. pp. 1-46). The transcript of the proceedings before IHO I are not consecutively paginated with the transcripts of proceedings that took place before the IHO. For the remainder of this decision, all citations to the transcripts in this matter are to the April 17, 2024 and May 9, 2024 transcripts of proceedings that took place before the IHO who issued the final decision.

[6] The IHO issued a written prehearing conference summary and order dated April 17, 2024 (Pre-Hr'g Order).

addition, the parent alleged that, in finding the rate charged to be excessive, the IHO improperly relied on evidence outside of the record and failed to address whether the rate charged was consistent with other providers "in the neighborhood."

In an answer with cross-appeal, the district responds to the parent's allegations and argues that the IHO erred by failing to consider whether the services delivered by Learning Learners were appropriate and by failing to deny all relief based on equitable considerations. Regarding the services from Learning Learners, the district asserts that, despite testimony that providers offered assessments twice per year, the parent only offered one report into evidence and that the hearing record lacked evidence of the student's progress. Additionally, the district argues that, despite testimony about documentation of delivery of services, the hearing record lacked evidence "to support when services were actually provided by Learning Learners" such as session notes or attendance records. Overall, the district asserts that the hearing record did not contain evidence that demonstrated what services the student received or how the contracted agency addressed the student's needs, arguing that the fact that the providers were credentialed and submitted one assessment did "not save [the parent] from [his] failure to present substantive evidence of the services provided." As for equitable considerations, the district asserts that the IHO correctly found the rate charged by Learning Learners to be excessive. However, the district argues that the IHO should have denied the relief in its entirety because the parent's notice to the district of his intent to unilaterally obtain services was untimely.

In an answer to the district's cross-appeal, the parent responds to the district's cross-appeal.

V. Applicable Standards

A board of education must offer a FAPE to each student with a disability residing in the school district who requires special education services or programs (20 U.S.C. § 1412[a][1][A]; Educ. Law § 4402[2][a], [b][2]). However, the IDEA confers no individual entitlement to special education or related services upon students who are enrolled by their parents in nonpublic schools (see 34 CFR 300.137[a]). Although districts are required by the IDEA to participate in a consultation process for making special education services available to students who are enrolled privately by their parents in nonpublic schools, such students are not individually entitled under the IDEA to receive some or all of the special education and related services they would receive if enrolled in a public school (see 34 CFR 300.134, 300.137[a], [c], 300.138[b]).

However, under State law, parents of a student with a disability who have privately enrolled their child in a nonpublic school may seek to obtain educational "services" for their child by filing a request for such services in the public school district of location where the nonpublic school is located on or before the first day of June preceding the school year for which the request for services is made (Educ. Law § 3602-c[2]).[7] "Boards of education of all school districts of the state shall furnish services to students who are residents of this state and who attend nonpublic schools located in such school districts, upon the written request of the parent" (Educ. Law § 3602-c[2][a]). In such circumstances, the district of location's CSE must review the request for services and

[7] State law provides that "services" includes "education for students with disabilities," which means "special educational programs designed to serve persons who meet the definition of children with disabilities set forth in [Education Law § 4401(1)]" (Educ. Law § 3602-c[1][a], [d]).

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

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

VI. Discussion

Initially, neither party appealed the IHO's findings that the district failed to meet its burden to prove that it provided the student a FAPE, the IHO's order that the district fund compensatory counseling services, or the IHO's denial of the parent's request that the district provide the student an assistive technology device (see IHO Decision at pp. 4-5, 8-9). Accordingly, these determinations have become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]). The remaining issues relate to the parties' dispute over parent's request that the district fund the services provided by Learning Learners.

In this matter, the student has been parentally placed in a nonpublic school and the parent does not seek tuition reimbursement from the district for the cost of the parental placement. Instead, the parent alleged that the district failed to implement the student's mandated public special education services under the State's dual enrollment statute for the 2023-24 school year and, as a self-help remedy, he unilaterally obtained private services from Learning Learners for the student without the consent of the school district officials, and then commenced due process

[8] State guidance explains that providing services on an "equitable basis" means that "special education services are provided to parentally placed nonpublic school students with disabilities in the same manner as compared to other students with disabilities attending public or nonpublic schools located within the school district" ("Chapter 378 of the Laws of 2007–Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the Individuals with Disabilities Education Act (IDEA) 2004 and New York State (NYS) Education Law Section 3602-c," Attachment 1 (Questions and Answers), VESID Mem. [Sept. 2007], available at https://www.nysed.gov/special-education/guidance-parentally-placed-nonpublic-elementary-and-secondary-school-students). The guidance document further provides that "parentally placed nonpublic students must be provided services based on need and the same range of services provided by the district of location to its public school students must be made available to nonpublic students, taking into account the student's placement in the nonpublic school program" (id.). The guidance has recently been reorganized on the State's web site and the paginated pdf versions of the documents previously available do not currently appear there, having been updated with web based versions.

to obtain remuneration for the costs thereof. Generally, districts that fail to comply with their statutory mandates to provide special education can be made to pay for special education services privately obtained for which a parent paid or became legally obligated to pay, a process that is essentially the same as the federal process under IDEA. Accordingly, the issue in this matter is whether the parent is entitled to public funding of the costs of the private 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 they obtained for a student if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Carter, 510 U.S. 7; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 252 [2d Cir. 2009]).[9] In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

The IHO found that the relief sought by the parent was compensatory education and did not apply the Burlington/Carter analysis to assess the parent's relief. While I acknowledge that the use of the Burlington/Carter framework is utilized here in a matter related to an IESP arising under Education Law § 3602-c rather than an IEP under IDEA, there is no caselaw from the courts as to what other, more analogous framework might be appropriate when a parent privately obtains special education services without consent that a school district failed to provide pursuant to an IESP and then retroactively seeks to recover the costs of such services from the school district. I also note that IHOs have not approached the question with consistency. While the IHO may disagree with the use of the Burlington/Carter standard, I find the alternative approaches adopted by some IHOs insufficient to address the factual circumstances in these cases.

On appeal, the parties both frame their arguments by reference to the Burlington/Carter framework and, therefore, notwithstanding the IHO's treatment of the parent's relief sought as

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

compensatory education, I will use the Burlington/Carter standard to review the parties' contentions.

A. Unilaterally-Obtained Services

Turning to a review of the appropriateness of the unilaterally-obtained services, the federal standard for adjudicating these types of disputes is instructive. A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak 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]; Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see also Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] ["evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (id. at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G., 459 F.3d 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 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

Although not in dispute, a discussion of the student's needs is informative to address the issue on appeal. The May 2023 IESP reflected that cognitive testing administered to the student in September 2021 yielded scores within the average range on scales measuring visual spatial, fluid reasoning, working memory, and verbal comprehension skills, a score within the borderline range for processing speed, and an overall full scale score in the "upper range of [l]ow [a]verage" (Parent Ex. B at p. 2). Assessments of the student's language skills revealed expressive and receptive language and pragmatic delays and indicated that he presented with "inappropriate voice intonation and prosody" (id. at pp. 2, 4-5). Additionally, the student demonstrated delays in organization and study skills, struggled to retrieve, integrate, and articulate information, and had difficulty applying information to new situations and interpreting meaning to comprehend what he was learning (id. at pp. 2, 7). He also exhibited difficulty planning how to complete homework in a timely manner and spent "many hours" on homework after school (id. at pp. 6, 7).

April 2023 academic achievement testing conducted with the student indicated that his overall reading and letter word identification skills were in the average range, with passage comprehension skills in the low average range, and that his reading skills were estimated to be at an "end of 6th grade level" (Parent Ex. B at p. 1). According to the IESP, the student presented with "significant reading comprehension delays" (id. at p. 3). The student's overall math, applied problems, and calculation skills were in the average range and estimated to be at an eighth grade level (id. at p. 1). The IESP indicated that the student struggled with new math concepts and needed support to understand multistep questions (id. at p. 4). The student's written language and spelling skills were in the low average range, and his writing sample was in the low range (id.). His handwriting was below grade level and hard to read, and the student struggled with independent writing beyond simple sentences (id. at p. 3).

Socially, the May 2023 IESP student described the student as "obedient" and "sensitive" who was "extremely reserved" and did not join peers in conversation (Parent Ex. B at p. 6). Although well liked, he struggled to interact with peers, did not participate in group activities or make eye contact, and had a hard time with transitions (id.). According to the IESP, the student needed time to adjust to unfamiliar situations and displayed signs of anxiety at times; however, the student did not "express any sort of emotion" (id.). The IESP did not reflect concerns with the student's physical development (id. at p. 7).

2. Services from Learning Learners

Turning to the unilaterally obtained services, in an affidavit, the director of Learning Learners (director) provided written testimony that the student received special education services

from Learning Learners consisting of seven hours per week of individual SETSS and three 30-minute sessions per week of individual speech-language therapy (Parent Ex. G ¶¶ 3, 10, 11, 13, 14; see Tr. pp. 17, 19, 20).[10] Evidence in the hearing record shows that the student's SETSS provider holds a Students with Disabilities grades 7-12 Generalist initial certificate, and the speech-language therapy provider holds New York State licensure in speech-language pathology (Parent Exs. G ¶ 12; F). The director testified that, in addition to providing services, both providers "prepare[] for sessions, create[] goals, write[] progress reports, and meet[] with teachers and parents" (Parent Ex. G ¶ 13). According to the director, goals were developed for the student to work on and reviewed quarterly, and the progress reports entered into the hearing record were an "accurate representation" of what the providers were working on with the student, "including how the services [we]re addressing the student's specific delays," and the goals that were worked on during the 2023-24 school year (id. ¶¶ 13, 15, 16). The director further testified that the sessions were "individualized" and included "a great deal of specialized instruction" (id. ¶ 17). Additionally, the director testified that the student's progress was measured "through quarterly assessments, meetings with the provider and support staff, observation of [the student] in the classroom, and daily session notes" and that the student had "already shown signs of progress with his SETSS . . . provider" (id. ¶¶ 18-19).

In a progress report dated November 2023, the SETSS provider reported that the student was in 10th grade at the nonpublic school and had "difficulty processing what he learne[d] and retaining the information," as such, he had "a difficult time inferring logical conclusions and organizing his thoughts into cohesive sentences" (Parent Ex. I at p. 1). According to the progress report, in reading the student was functioning at a seventh grade level, struggled with fluency, and read "very slowly" (id.). He often could not summarize or answer basic "wh" questions and was challenged by high order thinking such as inferring, analyzing, comparing, and contrasting (id.). To address these needs, the SETSS provider worked with the student to identify significant context clues, used repeated readings and timers for fluency and pace, and used graphic organizers and highlighters to aid reading comprehension (id. at pp. 1-2). Additionally, the SETSS provider used "constant encouragement and positive reinforcement to boost the student's morale" (id. at p. 2). The SETSS provider developed goals for the student to improve his ability to summarize grade level passages and answer "wh" and higher order thinking questions, and produce at least 10 quotes from a book, explaining how those quotes support a position/argument (id.).

Regarding math, the SETSS provided reported that the student was performing at an eighth grade level, as he made careless mistakes and got lost in the details of multistep problems requiring higher order thinking skills (Parent Ex. I at p. 3). The student had difficulty retaining rules for one-step processes, confused the rules, and often made computational errors (id.). Additionally, the student had difficulty understanding word problems and applying math concepts to real-life situations (id.). The SETSS provider reported using manipulatives and real-life objects to make

[10] The parent signed the contract with Learning Learners on August 24, 2023 (Parent Ex. E at p. 2). He testified he did not recall when the agency began delivering services to the student, but he believed it was at the beginning of the 2023-24 school year (Tr. pp. 34, 37). In his affidavit testimony, the parent indicated Learning Learners was facilitating SETSS, speech-language therapy and occupational therapy (OT) for the student and requested reimbursement for all such services; however, the student was not recommended to receive OT and there is no other evidence in the hearing record that the student received OT (Parent Ex. H ¶¶ 7, 12). As the parent does not pursue district funding for OT services on appeal, the student's receipt of OT services will not be further discussed.

word and abstract problems more concrete, reviewing math rules "constantly," and practicing multiplication and division tables daily (id.). Further, the SETSS provider worked with the student to break down larger equations into smaller steps, scaffolded information for easier understanding, and used colored pens to underline key words in word problems to pinpoint the operation needed to solve the equation (id.). Math goals developed for the student included solving multistep algebraic equations, using problem solving skills for word problems to determine the correct operation to use, solving systems of linear equations graphically, and factoring quadratic expressions (id.).

In the area of writing, the SETSS provider reported that the student had many interesting thoughts and opinions, but struggled with spelling and grammar, frequently misused punctuation, and used sentence fragments (Parent Ex. I at p. 2). According to the progress report, the student struggled to write a coherent essay with logical components, required assistance to organize his thoughts into an outline, and lacked "a glossary of transitional phrases" to help his sentences flow logically (id.). To address these needs, the SETSS provider focused on the writing process—prewriting, drafting, revising, and self-editing—to increase the student's attention to grammar and spelling errors, and used graphic organizers and "brainstorming aids" (id.). To improve the student's spelling skills, the SETSS provider reported using flashcards, highlighters, and word lists, and developing a transition word list to help the student's writing "flow more seamlessly from paragraph to paragraph" (id.). Additionally, the SETSS provider encouraged the student to look up his frequently used words in a thesaurus to "find more sophisticated replacement words" (id.). Goals developed for the student included writing paragraphs that conformed with spelling and grammar rules, writing an essay that included an introduction, body, and conclusion, and expanding vocabulary to at least "100 new grade level" words and using them in his writing (id. at pp. 2-3).

The SETSS provider's report reflected information from an October 2023 speech-language progress report and also reported on the student's social/emotional skills (compare Parent Ex. I at p. 4, with Parent Ex. J at pp. 1-2). According to the SETSS progress report, the student joined in conversations with peers rather than initiate them, and when he initiated conversations, he spoke in a "low tone of voice" (id.). The SETSS report indicated that "[t]he provider" was working with the student by using social scripts to act out plays to practice voice intonation, encouragement, positive reinforcement, and incentives to ask for assistance and initiate conversation (id.). Goals developed for the student were to ask for help from a teacher/provider when needed, and to initiate conversations with peers three times per week (id.).

In an October 31, 2023 progress report, the speech-language pathologist reported that she provided three 30-minute sessions per week to the student, who exhibited delays in pragmatic, expressive, and receptive language skills (Parent Ex. J at p. 1). Specifically, the provider reported that the student demonstrated "inappropriate voice intonation and prosody," and difficulty using age-appropriate vocabulary, expanding his ideas, and constructing complex sentences (id.). Receptively, the student had difficulty providing rationales for characters' actions, comprehending figurative language, and grasping the significance of unfamiliar vocabulary using semantic cues (id.). To improve the student's skills, the speech-language pathologist reported using "an array of methodologies" including social scripts and stories to improve intonation and prosody, verbal cues, modeling, positive reinforcement, highlighters, and graphic organizers (id. at pp. 1-2). One goal developed for the student was to increase pragmatic language skills using strategies by observing

turn-taking rules, clarifying during conversations, appropriately joining in or leaving ongoing interactions, and participating/interacting in group activities (id. at p. 2). Another goal was for the student to improve writing skills by taking notes to organize relevant data, etc., as part of pre-writing activities (id.). A third goals was for the student to read and comprehend age-appropriate text by determining the main idea, summarizing the text, determining the meaning of words, and comparing and contrasting text structures (id.).

Based on the foregoing, and contrary to the district's argument that there was no evidence of how the teacher addressed the student's needs, the hearing record demonstrates that the SETSS and speech-language therapy services addressed the student's needs.

Turning to the issue of documentation regarding the student's receipt of services, the director testified that Learning Learners "track[ed]" whether sessions were provided to students via a "Dragon App" in which "the providers put their sessions in there so [the agency was] able to track everything over there" (Tr. pp. 20-21). She stated that providers did not take notes during every session but were able to "see where the student's holding based on what they d[id]" and the providers wrote a progress report twice yearly "based on working with the students and seeing their progress" (Tr. pp. 21-22). The director confirmed that there were no other formal assessments or evaluations conducted "besides those two progress reports" (Tr. p. 22). As described above, the hearing record contains one fall 2023 progress report each for SETSS and speech-language therapy and does not include data or reporting from the "Dragon App" regarding when the specific dates the student's services were delivered (see Parent Exs. A-J). Nevertheless, while session notes or invoices may have provided session-by-session documentation of the delivery of the services, the director's and the parent's testimony that Learning Learners provided the student with seven hours per week of SETSS and three 30-minute sessions per week of speech-language therapy went unrebutted by the district (see Tr. p. 36; Parent Exs. G ¶ 11; H ¶ 8).[11] The progress reports summarized above provide further evidence that the services were being delivered (see Parent Exs. I; J).

With respect to the district's argument about the student's progress, it is well settled that a finding of progress is not required for a determination that a student's unilateral placement is adequate (Scarsdale Union Free Sch. Dist. v. R.C., 2013 WL 563377, at *9-*10 [S.D.N.Y. Feb. 4, 2013] [noting that evidence of academic progress is not dispositive in determining whether a unilateral placement is appropriate]; see M.B. v. Minisink Valley Cent. Sch. Dist., 523 Fed. App'x 76, 78 [2d Cir. Mar. 29, 2013]; D.D-S. v. Southold Union Free Sch. Dist., 506 Fed. App'x 80, 81 [2d Cir. Dec. 26, 2012]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 486-87 [S.D.N.Y. 2013]; C.L. v. Scarsdale Union Free Sch. Dist., 913 F. Supp. 2d 26, 34, 39 [S.D.N.Y. 2012]; G.R. v. New York City Dep't of Educ., 2009 WL 2432369, at *3 [S.D.N.Y. Aug. 7, 2009]; Omidian v. Bd. of Educ. of New Hartford Cent. Sch. Dist., 2009 WL 904077, at *22-*23 [N.D.N.Y. Mar. 31, 2009]; see also Frank G., 459 F.3d at 364). However, while not dispositive, a finding of progress is, nevertheless, a relevant factor to be considered in determining whether a unilateral placement is

[11] The parent testified that he was "not always home" to supervise the delivery of the student's SETSS and speech-language therapy; however, he trusted the providers and he "did not suspect them of giving one minute less to my son" (Tr. p. 35). He confirmed that "since these services began," the student has received seven sessions of SETSS per week and three sessions per week of speech-language therapy (Tr. p. 36).

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]).

Here, the November 2023 SETSS progress report indicated that "with guided notes, graphic organizers, rewritten texts, visual aids, and other forms of accommodations, [the student] [wa]s making slow and steady progress" (Parent Ex. I at p. 1). The SETSS provider recommended that the student's SETSS continue "[t]o ensure that he keeps progressing in his areas of weakness and that he keeps up to par with the class" (id. at pp. 4-5). According to October 2023 the speech-language progress report, the student had exhibited "gradual yet consistent advancement throughout the year" including improvement in his ability to structure thoughts and ideas while recounting narratives, comprehend and respond to "wh" questions, make inferences, and engage in critical thinking (Parent Ex. J at p. 1). The speech-language pathologist also reported that the student had improved his ability to maintain eye contact, join or exit communicative interactions, and sustain conversational topics with adults (id.). Additionally, the progress report indicated that the student had made progress using appropriate voice intonation and prosody when reading short stories (id. at p. 2).

While the district argues that the hearing record includes no subsequent progress report despite the director's testimony that the providers assessed the student twice a year (see Tr. p. 22), the 2023-24 school year had not concluded at the time of the impartial hearing. Moreover, the director testified that, generally, the student's confidence had improved and he was able to be successful in a classroom setting (Tr. p. 26). In addition, the director testified that the student had demonstrated progress increasing eye contact, he spoke a "little bit louder," and his writing had improved with the provider's support (Tr. pp. 24-25).

Based on the foregoing, the parent's unilaterally-obtained SETSS and speech-language therapy were similar in frequency and duration to the services recommended for the student in the May 2023 IESP, and the parent established through documentary and witness testimony that the SETSS and speech-language therapy were delivered to the student during the 2023-24 school year by Learning Learners, that they constituted instruction specially designed to meet the student's unique needs, and that the student made progress during the 2023-24 school year. Accordingly, review of the evidence in the hearing record demonstrates that the parent met his burden to prove that the services provided by Learning Learners were appropriate.

B. Equitable Considerations:

The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]; L.K. v. New York City Dep't of Educ., 674 Fed. App'x 100, 101 [2d Cir. Jan. 19, 2017]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the

actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014] [identifying factors relevant to equitable considerations, including whether the withdrawal of the student from public school was justified, whether the parent provided adequate notice, whether the amount of the private school tuition was reasonable, possible scholarships or other financial aid from the private school, and any fraud or collusion on the part of the parent or private school]; C.L., 744 F.3d at 840 [noting that "[i]mportant to the equitable consideration is whether the parents obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA"]).

1. Excessive Costs

Thus, among the factors that may warrant a reduction in tuition under equitable considerations is whether the frequency of the services or the rate for the services were excessive (see E.M., 758 F.3d at 461 [noting that whether the amount of the private school tuition was reasonable is one factor relevant to equitable considerations]). An IHO may consider evidence regarding whether the rate charged by the private agency was unreasonable or regarding any segregable costs charged by the private agency that exceed the level that the student required to receive a FAPE (see L.K. v. New York City Dep't of Educ., 2016 WL 899321, at *7 [S.D.N.Y. Mar. 1, 2016], aff'd in part, 674 Fed. App'x 100).

The parent's contract with Learning Learners set the hourly rate for SETSS at $215 per hour and for speech-language therapy at $265 per hour (Parent Ex. E). The director testified that the hourly rates set forth in the contract with the parent included $90 per hour paid to the SETSS provider and $100 per hour paid to the speech-language pathologist (Tr. p. 18). The director indicated that the total rates included "one-on-one supervision, educational resources and support, professional development and materials, employment taxes, administrative costs and overhead costs" as well as "the costs necessary to run the agency such as "paying for materials and supplies for [the] teachers, paying [the] rent, and paying support staff" (Parent Ex. G ¶ 8; see Tr. p. 18).

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 private provider but evidence of reasonable market rates for the same or similar services. During the impartial hearing, the district argued that, because the student received services at home, "some of th[e] overhead cost[s] [were] not applicable to the student" (Tr. p. 40); however, the district presented no evidence f regarding the reasonableness of the rates charged by Learning Learners.

The IHO relied on a memorandum issued by SED regarding the methodology to be used to establish a rate setting methodology in relation to State-approved nonpublic schools, special act schools, and BOCES programs (see IHO Decision at pp. 7-8).[12] However, it is not clear that the rate-setting methodology for tuition costs described in the memorandum is relevant or comparable to the question of how much a parent can reasonably bargain in a private arrangement with special education teachers and speech-language pathologists are paid in the New York City metropolitan

[12] In terms of process, the IHO's approach of taking notice of the SED memorandum might have worked better had he discussed it with the parties and allowed them an opportunity to be heard.

region.[13, 14] Moreover, while it was within the IHO's authority to inquire of the witnesses about the reasonableness of the costs of the SETSS and speech-language therapy (see 8 NYCRR 200.5[j][3][vii]), he did not do so. Moreover, while the district could have attempted to offer relevant evidence on this topic, it failed to do so during the impartial hearing.

In the absence of any reliable documentary or testimonial evidence regarding the reasonableness of the costs of the SETSS and speech-language therapy provided by Learning Learners, the IHO's finding that the hourly rates charged for the services were excessive lacks support in the hearing record (see IHO decision at pp. 7-8).

2. 10-Day Notice

Turning to the other equitable consideration raised by the district in its cross-appeal, 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 provided notice to the district of his intent to unilaterally obtain private services by letter dated September 3, 2023 (see Parent Ex. C). It is unclear when Learning Learners began providing services to the student for the 2023-24 school year (see Tr. pp. 34, 37). To the

[13] Generally, an adjudicative fact may be judicially noticed when that fact "is not subject to reasonable dispute because it" is either "generally known within the trial court's territorial jurisdiction" or "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned" (Fed. R. Evid. 201[a], [b][1]-[b][2]). While a court is empowered with the discretion to "take judicial notice on its own," a court "must take judicial notice if a party requests it and the court is supplied with the necessary information" (Fed. R. Evid. 201[c][1]-[2]). In addition, while a court "may take judicial notice at any stage of the proceeding," a party—upon request—must be provided with the opportunity to be heard "on the propriety of taking judicial notice and the nature of the fact to be noticed" (Fed. R. Evid. 201[d]-[e]). However, if a court "takes judicial notice before notifying a party, the party, on request, is still entitled to be heard" (Fed. R. Evid. 201[e]). Here, a reasonable overhead cap for special education teachers or speech-language pathologists cannot be readily determined from the SED memorandum and the applicability of the memorandum could be reasonably disputed. Accordingly, it was not appropriate for the IHO to rely on the SED memorandum for this purpose.

[14] The district's reliance on Application of a Student with a Disability, Appeal No. 24-076 is misguided as the language quoted was from the IHO's decision and the parent in that matter had not challenged the IHO's reliance on the State Education Department's rate-setting guidance on appeal.

extent Learning Learners began providing services to the student earlier than the tenth business day following the September 3, 2023 letter, on equitable grounds, I will exclude those days from the total amount that the district shall be required to fund. However, I do not find that the timing of the parent's notice to the district warrants a complete bar to relief. Therefore, the district shall be required to directly pay Learning Learners for the costs of up to seven periods per week of SETSS and three 30-minute sessions per week of speech-language therapy delivered during the 2023-24 school year on or after September 18, 2023.

VII. Conclusion

Based on the foregoing, the parent sustained his burden of demonstrating the appropriateness of the unilaterally-obtained services from Learning Learners. As for equitable considerations, the evidence in the hearing record does not support the IHO's reduction of the rate to be paid Learning Learners as excessive but, as a matter within my discretion, I find that the evidence supports a small reduction for the timing of the parent's notice to the district of his intent to unilaterally obtain private services.

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that that the IHO's decision dated May 13, 2024, is modified by reversing that portion which directed the direct to fund the SETSS and speech-language therapy delivered to the student by Learning Learners during the 2023-24 school year at rates not exceed $135.00 and $150.00 per hour, respectively; and

IT IS FURTHER ORDERED that, upon proof of delivery, the district shall directly pay Learning Learners for the costs of up to seven periods per week of SETSS and three 30-minute sessions per week of speech-language therapy delivered during the 2023-24 school year on or after September 18, 2023 at the contracted rates of $215.00 per hour for SETSS and $265 per hour for speech-language therapy.

Dated: **Albany, New York**
September 9, 2024

JUSTYN P. BATES
STATE REVIEW OFFICER