The University of the State of New York

The State Education Department
State Review Officer
www.sro.nysed.gov

No. 24-306

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

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

DECISION

I. Introduction

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

II. Overview—Administrative Procedures

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

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

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

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

III. Facts and Procedural History

The parties' familiarity with this matter is presumed and, therefore, the facts and procedural history of the case and the IHO's decision will not be recited here in detail.

A CSE convened on November 23, 2020, found the student eligible for special education as a student with an other health-impairment, and developed an IESP to be implemented beginning on November 30, 2020 (Parent Ex. I at p. 1).[1] The CSE recommended that the student receive four periods per week of direct group special education teacher support services (SETSS) and two 30-minute sessions of individual occupational therapy (OT) per week (id. at p. 7).[2] The IESP noted that the student was "Parentally Placed in a Non-Public School" (id. at p. 10).

According to progress reports, during the 2022-23 school year the student received five hours per week of SETSS and "individualized" OT services (see Dist. Exs. 6; 8).

On April 10, 2023, the parent signed a district form indicating that she was seeking special education services for the student for the 2023-24 school year while he was attending a nonpublic school (Parent Ex. C; see also Dist. Ex. 7).

In a letter to the district dated September 11, 2023, the parent indicated that the student was attending a nonpublic school and entitled to special education but that the district had not taken any action to implement the recommended SETSS or related services for the 2023-24 school year (Parent Ex. D). The parent notified the district that she planned to assert her due process rights by filing a due process complaint notice, at which time the student would be entitled to pendency (id.). Additionally, the parent indicated that, should the district not implement the student's IESP, she would be forced to contract with a private agency for the provision of those services and seek direct payment and/or reimbursement for the privately obtained services (id.).

The parent signed a contract with Kinship Resources on September 12, 2023 for the 2023-24 school year (see Parent Ex. E).[3] The contract indicated that Kinship Resources would "endeavor to provide special education teacher services and/or related services" from the last-agreed upon IESP or in accordance with pendency (id. at p. 1). Additionally, the contract provided that the parent could provide three weeks' notice prior to terminating services (id. at p. 2). The contract indicated that Kinship Resources would provide the services at "enhanced rates" and the rates charged were included in an addendum to the contract (id.). Moreover, the contract indicated that, should the parent defer payment, she would have to pay a deferred rated and that the parent was "obligated" to commence a due process proceeding (id.).[4]

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

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

[3] Kinship Resources is a limited liability company and has not been approved by the Commissioner of Education as a school or agency with which school districts may contract to instruct students with disabilities (8 NYCRR 200.1[d], 200.7).

[4] The Kinship Resources administrator testified that the agency started providing services to the student on or about September 12, 2023 (Parent Ex. H ¶¶ A, D).

A CSE convened on September 29, 2023, found the student continued to be eligible for special education as a student with an other health-impairment, and developed an IESP with a projected implementation date of October 16, 2023 (Parent Ex. B at p. 1).[5] The CSE recommended that the student receive five periods of direct group SETSS per week with two 30-minute sessions of individual OT per week (id. at p. 8).

A. Due Process Complaint Notice

In a due process complaint notice dated April 16, 2024, the parent alleged that the district denied the student a free appropriate public education (FAPE) for the 2023-24 school year (Parent Ex. A at p. 1). The parent contended that the CSE failed to consider a full continuum of services and the district failed to implement agreed-upon services (id.). The parent also asserted that the district failed to provide her with the procedural safeguards notice and prior written notice (id.). The parent noted that an IESP developed for the student mandated four periods of direct group SETSS and two 30-minute sessions of individual OT services per week but that the district failed to assign any services providers to deliver the services and shifted the burden onto the parent to find and obtain services for the student (id. at pp. 1-2). The parent asserted that she was unable to find providers at the district's standard rates and was compelled by the district's inaction to implement the mandated services at an enhanced rate (id. at p. 2). For relief, the parent requested an order compelling the district to implement and/or directly fund the student's mandated services for the entire 2023-24 school year at the provider rates and an order compelling the district to provide a bank of compensatory services for the hours missed due to the district's failure to implement services (id.).[6]

B. Impartial Hearing Officer Decision

An impartial hearing convened before the Office of Administrative Trials and Hearings (OATH) on May 30, 2024 (see Tr. pp. 1-97). In a decision dated June 3, 2024, the IHO determined that the case would be analyzed under the Burlington-Carter framework (IHO Decision at pp. 4-5). The IHO found that the district failed to offer the student equitable services for the 2023-24 school year as it was undisputed that the district did not implement the November 2020 IESP (id. at pp. 2, 5). The IHO noted that the district did not raise the defense that the parent failed to comply with the June 1 deadline and that the hearing record established that the parent requested equitable services for the 2023-24 school year (id. at p. 4).

As for services from Kinship Resources, the IHO found that the parent failed to meet her burden to show that the unilaterally obtained services were appropriate to meet the student's needs (IHO Decision at pp. 2, 6). The IHO held that testimony by the parent and the administrator of Kinship Resources was inconsistent with the documentary evidence as they both testified the

[5] The hearing record contains duplicative exhibits. For purposes of this decision, only parent exhibits are cited in instances where both a parent and district exhibit are identical in content. The IHO is reminded that it is her responsibility to exclude evidence that she determines to be irrelevant, immaterial, unreliable, or unduly repetitious (8 NYCRR 200.5[j][3][xii][c]).

[6] The parent also requested pendency services of four periods of direct group SETSS and two 30-minute sessions of individual OT services per week (Parent Ex. A at p. 2).

student did not start receiving five periods of SETSS until October 2023, when the "new" IESP was implemented; however, the documentary evidence indicated that the student had been receiving five periods of SETSS prior to that time (id. at p. 6). Moreover, the IHO noted that the administrator testified that the agency just started working with the student prior to the start of the 2023-24 school year, while the parent testified the student had been working with the agency for a couple years (id. at p. 7). Also, the IHO noted the parent's testimony that she received and signed off on invoices, but the administrator testified they do not send invoices to the parent (id.). Turning to the progress reports, the IHO held that "given the amount repetition from one school year to the next, in conjunction with the incorrect name and pronouns in the reports, . . . Student's progress ha[d] not been truly tracked or analyzed and . . . Parent ha[d] offered . . . credible evidence with respect to Student's performance, needs, or progress" (id.). The IHO noted that, therefore, the parent failed to meet her burden to show that the unilaterally obtained services were specially designed to meet the student's unique needs (id.). In the alternative, the IHO found that, if the progress reports were to be credited, the student "ha[d] made no progress during the 2023-2024 school year, given the identical functional levels from one school year to the next" (id. at pp. 7-8). Therefore, the IHO found that the parent failed to meet her burden to demonstrate the unilaterally obtained services were appropriate (id. at p. 8). The IHO denied the parent's claim for direct funding (id. at p. 10).

The IHO reviewed the issue of equitable considerations "for completeness of the record" (IHO Decision at p. 8). The IHO held that equitable considerations would only partially favor the parent's requested relief (id. at pp. 2, 8-10). Specifically, the IHO held that the equities would have warranted a 30 percent reduction in funding to $136.50 per hour for SETSS (id. at p. 10). The IHO determined that the parent's 10-day notice did not provide the district "real notice" as the letter was dated September 11, 2023, the parent signed the contract on September 12, 2023, and services started on or around that date (id. at pp. 8-9). Next, the IHO held that the SETSS provider was not certified to teach the student as she was not certified to teach high school (id. at p. 9). Additionally, the student's SETSS were supposed to be deliver in a group, but the student was receiving SETSS on an individual basis (id.). Lastly, the IHO found that the parent had no financial obligation to pay for the private services for several reasons, such as the parent did not understand the cost of the services, the plain language of the contract failed to indicate what services were being provided to the student, and the agency had no intention to enforce the terms of the contract on the parent (id. at pp. 9-10). Based on these findings, the IHO found that, had the services been found appropriate, he would have only awarded 70 percent of the rate requested, totaling $136.50 per hour for SETSS (id. at p. 10).

Regarding OT services, the IHO noted that it was undisputed that the student did not receive these services (IHO Decision at p. 8). However, the IHO declined to order a bank of OT services as the parent testified the student did not want OT services and the IHO found that the parent had no intention to have the student receive OT services for the 2023-24 school year (id.). Therefore, the IHO found that the parent would not have accepted the services if the district offered them and that the hearing record did not establish the need for OT or any harm that resulted to the student by not receiving these services (id.).

IV. Appeal for State-Level Review

The parent appeals. The parent argues that the IHO erred by denying all relief to the student. The parent contends that the district failed to implement the services and the parent was constrained to find services on her own. The parent asserts that her unilateral actions "should be adjudged as to whether they were reasonably calculated to provide specially designed individualized instruction that was designed to engendered progress towards age-appropriate goals." The parent asserts that the hearing record shows that the student made solid progress. The parent contends that the IHO was wrong to focus solely on the provider's stylistic choices than the progress made by the student. The parent argues that the issue of how many periods of SETSS the student received during the first month of services was "unimportant." The parent contends that the record is clear that the student received the SETSS at the frequency recommended in the IESPs during the periods that those IESPs were in effect.

Moreover, the parent argues that the IHO erred in finding that equitable considerations would have warranted a reduction in the relief ordered despite the district's failure to implement services and pendency. The parent asserts that the district never attempted to implement services and the failure were "so egregious as to render any weighing of the equities superfluous." The parent notes that the contract does have an "out clause," and the parent could have terminated the contract at any point. The parent also indicates that the district was put on notice of her intent to unilaterally obtain services for the student and the district did nothing at all. Next, the parent contends that the IHO erred by faulting her for obtaining services that were delivered individually rather than in a group. Regarding her financial obligation, the parent contends that the contract was a binding agreement. For relief, in addition to funding for the services privately obtained, the parent requests compensatory SETSS and OT, asserting that the district owes the student for the failure to implement services.

In an answer with cross-appeal, the district argues that the IHO correctly held that the parent failed to meet her burden to demonstrate the appropriateness of the unilaterally obtained services. As for its cross-appeal, the district asserts that the IHO should have denied all relief on equitable grounds; namely, because the parent's notice of her intent to obtained private services was untimely. The district alleges the parent sent the notice on September 11, 2023 and the student's services started the next day. Further, the district argues that the parent did not demonstrate a legal obligation to pay as the contract was not binding given that it lacked essential terms and the rate for services. The district asserts that the IHO properly denied compensatory relief for both SETSS and OT services. Lastly, the district argues that the order that the district implement SETSS for the remainder of the 2023-24 school year is moot, as the school is over and the parent obtained SETSS for the entire school year. Also, the district asserts that the IHO exceeded his authority with this order.

V. Applicable Standards

A board of education must offer a FAPE to each student with a disability residing in the school district who requires special education services or programs (20 U.S.C. § 1412[a][1][A]; Educ. Law § 4402[2][a], [b][2]). However, the IDEA confers no individual entitlement to special education or related services upon students who are enrolled by their parents in nonpublic schools (see 34 CFR 300.137[a]). Although districts are required by the IDEA to participate in a

consultation process for making special education services available to students who are enrolled privately by their parents in nonpublic schools, such students are not individually entitled under the IDEA to receive some or all of the special education and related services they would receive if enrolled in a public school (see 34 CFR 300.134, 300.137[a], [c], 300.138[b]).

However, under State law, parents of a student with a disability who have privately enrolled their child in a nonpublic school may seek to obtain educational "services" for their child by filing a request for such services in the public school district of location where the nonpublic school is located on or before the first day of June preceding the school year for which the request for services is made (Educ. Law § 3602-c[2]).[7] "Boards of education of all school districts of the state shall furnish services to students who are residents of this state and who attend nonpublic schools located in such school districts, upon the written request of the parent" (Educ. Law § 3602-c[2][a]). In such circumstances, the district of location's CSE must review the request for services and "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an [IEP]" (Educ. Law § 3602-c[2][b][1]). The CSE must "assure that special education programs and services are made available to students with disabilities attending nonpublic schools located within the school district on an equitable basis, as compared to special education programs and services provided to other students with disabilities attending public or 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]).

---

[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]).

[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.

VI. Discussion

Initially, it is noted that neither party appealed from the IHO's finding that the district failed to offer the student a FAPE and equitable services (IHO Decision at p. 6). Accordingly, these findings have become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

A. Unilaterally-Obtained Services

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

Generally, districts that fail to comply with their statutory mandates to provide special education can be made to pay for special education services privately obtained for which a parent paid or became legally obligated to pay, a process that is essentially the same as the federal process under IDEA. Accordingly, the issue in this matter is whether the parent is entitled to public funding of the costs of the private 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

[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 Kinship Resources (Educ. Law § 4404[1][c]).

student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

Turning to a review of the appropriateness of the unilaterally-obtained services, the federal standard for adjudicating these types of disputes is instructive. A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129). Citing the Rowley standard, the Supreme Court has explained that "when a public school system has defaulted on its obligations under the Act, a private school placement is 'proper under the Act' if the education provided by the private school is 'reasonably calculated to enable the child to receive educational benefits'" (Carter, 510 U.S. at 11; see Rowley, 458 U.S. at 203-04; Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see also Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] ["evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (id. at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G., 459 F.3d 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 description of the student's needs provides context for the issue to be resolved on appeal, namely whether the SETSS delivered by Kinship Resources were appropriate.

The student was evaluated in 2017 and at that time, was "found to be functioning within the [a]verage range of intellectual abilities" (Dist. Ex. 9 at p. 2). Formal assessments of the student's academic skills in 2018 indicated that his academic abilities were in the average range with the exception of math facts fluency, which were in the low range (id.).

A June 2023 SETSS progress report indicated that the student, who attended eighth grade at a nonpublic school for the 2022-23 school year, read fiction texts "almost on grade level," and that he became frustrated with difficult vocabulary and comprehending many nonfiction texts (Dist. Ex. 6 at p. 1; see Parent Ex. F at p. 1). According to the progress report, the student needed frequent prompting to answer many comprehension questions, and he needed to use graphic organizers to help with summarizing the story, questioning, story elements, predicting, and inferencing (Dist. Ex. 6 at p. 1). The student also became distracted and needed refocusing, gave up easily, and was hard to "get back on track" (id.). With regard to writing, the progress report indicated that the student had difficulty organizing his thoughts, needed many prompts to initiate writing tasks, had a hard time expressing his ideas, and was only able to write using a graphic organizer (id. at p. 2). Additionally, the progress report stated that when writing the student did not use appropriate spaces, capitalization, or punctuation (id.). In math, the progress report indicated that the student could multiply and divide, but had difficulty with larger numbers, and that his biggest challenge was multi-step word problems (id. at p. 1). The student also struggled to "decode and solve multistep regular problems," because it was difficult for him to break down the steps to solve, and he also had difficulty with algebraic equations, rounding, and decimals (id.).

In the area of social development, the September 2023 IESP indicated that the student was generally cooperative, friendly, and socially appropriate, had friends, and was respectful to others (Parent Ex. B at p. 2). Regarding physical development, a February 2023 OT update report reflected the student's diagnosis of attention deficit hyperactivity disorder (ADHD) and indicated that therapy sessions focused on decreasing the student's impulsivity, and improving his attention to task and executive functioning skills (Dist. Ex. 8 at p. 1).[10] According to the report, the student generally exhibited difficulty staying on topic in conversations, organizing his thoughts, initiating

[10] The parent testified that, although the student had received both OT and SETSS during prior school years, during the 2023-24 school year he only received SETSS as he needed to get "settled and acclimated to high school" (Tr. pp. 30, 42). The parent testified that her contract with Kinship Resources was only for SETSS and not OT (Tr. p. 45).

tasks, managing his time, and multitasking, and he demonstrated low frustration tolerance, task refusal, and reluctance to use strategies (id. at pp. 1-2).

2. Services from Kinship Resources and Progress

The IHO made the determination that the parent did not meet her burden to prove that SETSS from Kinship Resources were appropriate after assessing the credibility of the witnesses, noting various contradictions between the testimony and the documentary evidence regarding to how long the company had provided the student services and at what weekly frequency and regarding whether the company sent the parent invoices (see IHO Decision at pp. 6-7). Generally, an SRO gives due deference to the credibility findings of an IHO, unless non-testimonial evidence in the hearing record justifies a contrary conclusion or the hearing record, read in its entirety, compels a contrary conclusion (see Carlisle Area Sch. v. Scott P., 62 F.3d 520, 524, 528-29 [3d Cir. 1995]; P.G. v. City Sch. Dist. of New York, 2015 WL 787008, at *16 [S.D.N.Y. Feb. 25, 2015]; M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 330 [E.D.N.Y. 2012], aff'd 725 F.3d 131 [2d Cir. 2013]; Bd. of Educ. of Hicksville Union Free Sch. Dist. v. Schaefer, 84 A.D.3d 795, 796 [2d Dep't 2011]; Application of a Student with a Disability, Appeal No. 12-076). Here, while I may not have come to the same conclusions, the IHO was in a better position to assess the credibility of the witnesses, and neither the documentary evidence as a whole nor the hearing record read in its entirety justifies a different finding regarding the witnesses' credibility. Accordingly, I defer the IHO's findings.

After assessing the witnesses' credibility, the IHO also reviewed the documentary evidence regarding the SETSS provided by Kinship Resources, noting that the student's needs and goals listed in the May 2024 progress report were in large part carried over from the June 2023 progress report (see IHO Decision at p. 7; compare Dist. Ex. 6, with Parent Ex. F). The IHO also noted that the progress report included incorrect pronouns and referenced a different student in the sections of the report that set forth recommended support services and goals (IHO Decision at p. 7; see Parent Ex. F). Based on these factors, the IHO questioned whether the provider tracked or analyzed the student's progress or alternatively whether the student had made progress and opined that a portion of the May 2024 progress report appeared to have been "copied and pasted from another Student's progress report" (IHO Decision at pp. 7-8 & nn. 10-11).

The parent contends that the SETSS provider carried over language from the June 2023 progress report to reflect the student's baseline and then added information to demonstrate the student's progress (see Req. for Rev. ¶ 13). The parent also contends that the annual goals were meant to be worked on until the next CSE meeting (see id. ¶ 14). However, the parent points to no evidence to support these interpretations as the progress report itself does not reflect the distinction and there was no testimony to that effect.

The district also correctly points out that the IHO's determinations about the teacher's credentials and the delivery of the services individually instead of in a group, although referenced as equitable considerations, instead would be relevant to consider in assessing the appropriateness of the unilaterally-obtained servcies. While it is well-settled that a parent need not engage the services of a certified special education teacher—or, as here, a SETSS provider—in order to qualify for reimbursement or direct funding of those services (Carter, 510 U.S. 7, 14 [noting that unilateral placements need not meet state standards such as state certification for teachers]), the

provider must nevertheless be properly qualified. Here, the student's SETSS providers held teaching certificates for students with disabilities for first through sixth grade (see Tr. p. 75), whereas the student in this matter was a ninth-grade student (Tr. p. 85; Parent Ex. F; Dist. Ex. 5). While this factor on its own would likely not be determinative, the providers qualifications are not otherwise elaborated upon in the hearing record and that is an additional factor to consider. Further, the administrator indicated that he thought the SETSS were delivered in the provider's home (Tr. pp. 70-72). The purpose of providing special education services to a student attending a nonpublic school is to support his or her meaningful access to the general education curriculum and classroom setting in a way that is reasonable under the circumstances. I am not convinced that delivery of the SETSS in a different environment removed from the school and classroom environment would be appropriate for the student under the totality of the circumstances.

Therefore, under the totality of the circumstances, I find insufficient basis to disturb the IHO's determination that the parent failed to prove the appropriateness of the SETSS delivered by Kinship Resources.

B. Compensatory Relief

Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). The purpose of an award of compensatory education is to provide an appropriate remedy for a denial of a FAPE (see E.M., 758 F.3d at 451; P. v. Newington Bd. of Educ., 546 F.3d 111, 123 [2d Cir. 2008] [holding that compensatory education is a remedy designed to "make up for" a denial of a FAPE]; see also Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 456 [2d Cir. 2015]; Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005] [holding that, in fashioning an appropriate compensatory education remedy, "the inquiry must be fact-specific, and to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"]; Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1497 [9th Cir. 1994]). Accordingly, an award of compensatory education should aim to place the student in the position he or she would have been in had the district complied with its obligations under the IDEA (see Newington, 546 F.3d at 123 [holding that compensatory education awards should be designed so as to "appropriately address[] the problems with the IEP"]; see also Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1289 [11th Cir. 2008] [holding that "[c]ompensatory awards should place children in the position they would have been in but for the violation of the Act"]; Bd. of Educ. of Fayette County v. L.M., 478 F.3d 307, 316 [6th Cir. 2007] [holding that "a flexible approach, rather than a rote hour-by-hour compensation award, is more likely to address [the student's] educational problems successfully"]; Reid, 401 F.3d at 518 [holding that compensatory education is a "replacement of educational services the child should have received in the first place" and that compensatory education awards "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA"]).

Here, there is insufficient basis in the hearing record to disturb the IHO's denial of compensatory relief. First, there is no merit to the parent's contention that, having failed to meet her burden to establish the appropriateness of the unilaterally-obtained SETSS, the student is entitled to alternative relief in the form of compensatory SETSS from the district.

Some courts have held that compensatory education is not available as an additional or alternative remedy when reimbursement for the costs of a unilateral placement is also at issue for the same time period (see D.F. v. Collingswood Borough Bd. of Educ., 694 F.3d 488, 498 [3rd Cir. 2012] [holding that "[b]ecause compensatory education is at issue only when tuition reimbursement is not, it is implicated only where parents could not afford to 'front' the costs of a child's education"]; P.P. v. West Chester Area Sch. Dist., 585 F.3d 727, 739 [3rd Cir. 2009] [holding that "compensatory education is not an available remedy when a student has been unilaterally enrolled in private school"]). However, the Second Circuit Court of Appeals has not directly addressed this question and, generally, appears to have adopted a broader reading of the purposes of compensatory education than the Third Circuit (compare P.P., 585 F.3d at 739 [finding that "[t]he right to compensatory education arises not from the denial of an appropriate IEP, but from the denial of appropriate education"], with E. Lyme, 790 F.3d at 456-57 [treating compensatory education as an available equitable remedy for a denial of a FAPE so as to effectuate the purposes of the IDEA and put a student in the same position he or she would have been in had the denial of a FAPE not occurred]). Unlike the Third Circuit, the Second Circuit's approach to compensatory education thus far may have left room for unique circumstances where an award of compensatory education may be warranted where, for example, a student is unilaterally placed but additional related services are required in order for the placement to provide the student with a FAPE (see V.W. v. New York City Dep't of Educ., 2022 WL 3448096, at *5–7 [S.D.N.Y. Aug. 17, 2022] [finding that awards of tuition reimbursement and compensatory education are not mutually exclusive and that an award of "both education placement and additional services may be necessary to provide a particular student with a FAPE"]). One court has recently endorsed a combined award of tuition reimbursement and compensatory education based on a denial of FAPE for the same time period (V.W., 2022 WL 3448096, at *5-*6).

However, where a parent elected to engage in self help and chose a remedy to pursue through due process, I am not convinced that allowing an alternative remedy when the parent fails to meet his or her burden is what the Second Circuit intended in its approach on this topic thus far. Moreover, there is no evidence in the hearing record that such an award would be appropriate.

As to OT, the IHO did not err in denying the relief given evidence that the parent did not arrange for the services for the student because she did not want them. The parent testified that she chose not to obtain OT services for the 2023-24 school year even though she had obtained the services in prior school years (Tr. pp. 29-30). Specifically, the parent explained that, since the student was starting high school during the 2023-24 school year, he was having a hard time, needed to focus on his work and get acclimated to high school (Tr. p. 30). Further, the student was giving the parent "push back with OT" so the parent decided to give the student "a little bit of a break" (id.). She acknowledged multiple other times that she did not obtain OT services for the 2023-24 school year or contract with Kinship Resources for those services (Tr. pp. 30, 42, 43). The parent later indicated that the prior OT provider was located "a little too far" away for her and she could not "swing it anymore" and, therefore, if she got the service, she would have to find a new provider (Tr. pp. 33-34). The Kinship administrator could not remember the particulars around OT for this student (Tr. pp. 60-61). As such, the parent affirmatively did not choose to obtain the OT services for the 2023-24 school year and therefore, is not entitled to compensatory services.

VII. Conclusion

Having found insufficient basis in the hearing record to disturb the IHO's conclusion that the parent did not meet her burden to prove that the unilaterally obtained SETSS from Kinship Resources were appropriate for the student, the necessary inquiry is at an end and there is no need to reach the issue of whether equitable considerations support an award of funding for the services. There is also no basis for a finding that the IHO erred in denying the parent's request for compensatory OT services.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

Dated: **Albany, New York**
August 16, 2024

SARAH L. HARRINGTON
STATE REVIEW OFFICER