The University of the State of New York

The State Education Department
State Review Officer
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No. 24-328

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 Lindsay VanFleet, 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 for direct funding of her son's unilaterally obtained special education teacher support services (SETSS) delivered by Higher Level Education Resources, LLC (HLER) at an enhanced hourly rate for the 2023-24 school year. The appeal must be sustained in part.

II. Overview—Administrative Procedures

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

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

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

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

III. Facts and Procedural History

The parties' familiarity with this matter is presumed and therefore, the facts and procedural history will not be recited in detail here. Briefly, on December 26, 2016 a CSE convened, found the student eligible for special education as a student with a speech or language impairment, and

developed an IESP (Parent Ex. B at p. 1).[1] The CSE recommended that the student receive five periods per week of group SETSS, one 30-minute session per week of group counseling services, two 30-minute sessions per week of individual speech-language therapy, two 30-minute sessions per week of individual occupational therapy (OT), and two 30-minute sessions per week of individual physical therapy (PT) (id. at p. 8).[2]

In a letter dated May 9, 2023, bearing a conformed signature of the parent, the district was informed that the student would be attending a nonpublic school for the 2023-24 school year and that the parent was requested the district provide the "educational services that [the student] [wa]s entitled to as a result of having an IEP/IESP" (Parent Ex. E). In a letter dated September 6, 2023 with a salutation directed at a "Chairperson," Prime Advocacy, LLC (Prime Advocacy) indicated it was authorized to communicate on the parent's behalf and advised the "Chairperson" that the district had failed to assign providers for the services mandated for the student for the 2023-24 school year, that the parent was requesting the district to "fulfill the mandate," and that, if the district did not do so, the parent would unilaterally obtain the student's mandated services through a private agency at an enhanced market rate (Parent Ex. D).

An undated document on HLER letterhead entitled "Enrollment Agreement for School Year 2023-2024," with the parent's name typed on the signature line, indicates that HLER agreed to provide services to the student pursuant to "the last agreed upon" IESP and set forth the rates for those services (Parent Ex. C). HLER delivered five hours of SETSS per week to the student at the nonpublic school during the 2023-24 school year (Parent Ex. F ¶¶ 6, 7).

A. Due Process Complaint Notice

In an April 17, 2024 due process complaint notice, the parent, through a lay advocate with Prime Advocacy, alleged that the district failed to offer the student a free appropriate public education (FAPE) by failing to develop an IESP for the student for the 2023-24 school year (Parent Ex. A. at p. 1). According to the parent, the district last developed an IESP for the student in December 2016, and failed to supply providers to deliver the services it recommended in the 2016 IESP to the student for the 2023-24 school year (id. at pp. 1-2). Further, the parent indicated that she was unable to "procure a provider" at the district's rates, and "[c]onsequently, . . . had no choice but to retain the services of an agency to provide the mandated services at an enhanced rate set by the provider" (id. at p. 2). As relief, the parent sought an award of direct funding for five periods of SETSS per week and related services, at the enhanced rates set by the providers (id. at p. 3).

B. Impartial Hearing Officer Decision

An impartial hearing convened before the Office of Administrative Trials and Hearings (OATH) on June 3, 2024, at which the district did not appear (Tr. pp. 1-25). In a decision dated

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

July 1, 2024, the IHO found that the district failed to implement the IESP services the student was entitled to and, as such, failed to offer the student equitable services for the 2023-24 school year (IHO Decision at p. 7). Next, citing a lack of credible evidence as to the student's progress and how the SETSS providers identified the student's needs and provided instruction to address those needs, the IHO concluded that the parent did not meet her burden of proving that the unilaterally obtained SETSS were appropriate (id. at pp 7-8). Accordingly, the IHO denied the parent's request for direct funding of the SETSS delivered by HLER at an enhanced rate (id. at p. 9).

Despite finding that the parent had not met her burden to prove the appropriateness of the student's SETSS, the IHO examined equitable considerations for completeness of the record (IHO Decision at p. 8). The IHO concluded that, while there was no evidence suggesting that the parent failed to cooperate with the district or timely request services for the student, the parent failed to establish "how and when the [t]en-[d]ay [n]otice was submitted to the [d]istrict" (id.). In addition, the IHO did not find the HLER enrollment agreement to be credible evidence of the parent's obligation to pay for the SETSS for the 2023-24 school year, because it was undated and the rate set forth therein, $205.00 per hour, was contradicted by the HLER educational supervisor (supervisor), who testified that the hourly rate was $192.00 (id. at pp. 8-9; see Parent Exs. C; F ¶ 16). Based on the foregoing, the IHO stated that a 20 percent reduction of the $192.00 SETSS hourly rate, or $153.60, "would be warranted, were an award to be ordered" (IHO Decision at pp. 8-9).

IV. Appeal for State-Level Review

The parent appeals, alleging that the IHO erred in finding that the parent did not meet her burden to show the appropriateness of the unilaterally obtained SETSS.[3, 4] The parent also appeals the IHO's denial of the request for direct funding of five periods of SETSS per week for the 2023-24 school year, and the reduction of the hourly rate for those services on equitable grounds.

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

[3] The parent did not pursue her claim of direct funding of the student's related services.

[4] State regulation requires a request for review to be verified by the petitioner (see 8 NYCRR 279.7[b]). Here, although the student's mother is named as the petitioner, the request for review was verified by an unknown individual who appears to have no relationship to the student in the matter. The parent's reply, on the other hand, was verified by the parent. While I will not exercise my discretion to dismiss this matter outright for the failing to submit a proper verification of the request for review, the parent's lay advocate is again strongly cautioned to take more care in ensuring accurate and complete appeal submissions in the future, for while a singular failure to comply with the practice requirements of Part 279 may not warrant an SRO exercising his or her discretion to dismiss a request for review (8 NYCRR 279.8[a]; 279.13; see Application of a Student with a Disability, Appeal No. 16-040), an SRO may be more inclined to do so after repeated failures to comply with the practice requirements (see Application of a Student with a Disability, Appeal No. 16-060; see also Application of a Student with a Disability, Appeal No. 17-015; Application of a Student with a Disability, Appeal No. 16-040).

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

However, under State law, parents of a student with a disability who have privately enrolled their child in a nonpublic school may seek to obtain educational "services" for their child by filing a request for such services in the district of location where the nonpublic school is located on or before the first day of June preceding the school year for which the request for services is made (Educ. Law § 3602-c[2]).[5] "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.).[6]

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85).

VI. Discussion

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 HLER 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

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

[6] State guidance explains that providing services on an "equitable basis" means that "special education services are provided to parentally placed nonpublic school students with disabilities in the same manner as compared to other students with disabilities attending public or nonpublic schools located within the school district" ("Chapter 378 of the Laws of 2007–Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the Individuals with Disabilities Education Act (IDEA) 2004 and New York State (NYS) Education Law Section 3602-c," Attachment 1 at p. 11, VESID Mem. [Sept. 2007], available at http://www.p12.nysed.gov/specialed/publications/policy/nonpublic907.pdf). The guidance document further provides that "parentally placed nonpublic students must be provided services based on need and the same range of services provided by the district of location to its public school students must be made available to nonpublic students, taking into account the student's placement in the nonpublic school program" (id.).

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]).[7] 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).

Here, the district did not cross-appeal from the IHO's findings that the student was entitled to services pursuant to the 2016 IESP and that it failed to provide the student with equitable services during the 2023-24 school year (IHO Decision at p. 7). Accordingly, these determination 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., March 21, 2013]).

The crux of the remaining dispute between the parties on appeal relates to the appropriateness of the parent's unilaterally obtained SETSS during the 2023-24 school year, whether equitable considerations favor direct funding of the parent's unilaterally obtained services at the enhanced hourly rate, and if so, the appropriate hourly rate.

A. Unilaterally Obtained Services

Turning to a review of the appropriateness of the unilaterally obtained SETSS, the federal standard for adjudicating these types of disputes is instructive. A private school placement must

[7] 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 HLER (Educ. Law § 4404[1][c]).

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 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

A brief discussion of the student's needs provides context for the issues to be resolved.[8]

The IHO found that the evidence did not show that the SETSS providers identified the student's academic needs (IHO Decision at p. 7). However, according to the supervisor, the student's decoding and reading comprehension skills were assessed at the beginning of the 2023-24 school year, and the student was informally assessed in math; the January 2024 SETSS progress report indicated that the student's reading, writing, and math skills were at a 10th grade level (Parent Exs. F ¶ 9; G at p. 1). The supervisor's testimony about the student's needs mirrored language from a January 2024 SETSS progress report, which indicated that the student's overall reading skills were "strong," and his fluency and decoding abilities were "solid"; however, his reading stamina "need[ed] work" and he often required reading assignments to be broken down into smaller segments (Parent Exs. F ¶ 10; G at p. 1). Additionally, while the student's reading comprehension skills were "adequate, he struggle[d] with inferential comprehension and achieving a deeper level of understanding" (Parent Exs. F ¶ 10; G at p. 1). In the area of writing, the supervisor testified that the student required instruction to plan his writing, and he struggled to construct essays with proper structure, he lacked the ability to organize his thoughts clearly on paper, and he needed to improve his ability to apply effective transition words and phrases between paragraphs and ideas (Parent Exs. F ¶ 11; G at p. 1). As for math, the supervisor testified that the student demonstrated strength in basic calculations, although he relied heavily on a calculator (Parent Exs. F ¶ 12; G at p. 2). The student required math lessons to be broken down into segments to understand them, and without the breakdown, the student could become frustrated and required positive reinforcement to stay motivated (Parent Exs. F ¶ 12; G at p. 2). Further, the student had difficulty with multi-step equations and math word problems, and struggled to remember mathematical procedures and formulas, which led to "uncertainty about their application" (Parent Exs. F ¶ 12; G at p. 1). Additionally, at times the student experiences academic frustration, required frequent redirection after becoming "disengaged," and struggled to clearly express himself verbally (Parent Exs. F ¶ 13; G at p. 1).

As such, and contrary to the IHO's finding, the evidence shows that HLER staff identified the student's special education needs, which were not in dispute. I also note that the parent was not the party with the obligation to evaluate the student (see A.D. v. Bd. of Educ. of City Sch. Dist. of City of New York, 690 F. Supp. 2d 193, 208 [S.D.N.Y. 2010] [finding that a unilateral placement was appropriate even where the private school reports were alleged by the district to be incomplete or inaccurate and finding that the fault for such inaccuracy or incomplete assessment of the student's needs lies with the district]).

2. SETSS From HLER

As noted above, to qualify for reimbursement under the IDEA, parents must demonstrate that the unilateral placement provided instruction specially designed to meet the student's unique

[8] The only IESP for the student in the hearing record is dated December 2016 (Parent Ex. B). As this IESP is approximately eight years old, and the hearing record does not contain any other evaluative information about the student, his needs will be described as identified by the HLER educational supervisor and in the HLER progress report (see Parent Exs. A-I).

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

There is no dispute among the parties that the student was eligible for special education during the 2023-24 school year. At that time, the student was in 12th grade at a nonpublic school where HLER delivered approximately five periods of individual SETSS per week beginning September 7, 2023 (Parent Exs. B at p. 1; F ¶¶ 6, 7; G at p. 1; I). According to the supervisor, the student's SETSS were delivered on an individual basis because "there were no other students with [the student's] disabilities to pair him with," and he focused better on an individual basis (Tr. pp. 18-19).

The IHO found that the evidence was insufficient to show that the SETSS providers delivered instruction to address the student's special education needs (IHO Decision at p. 7). However, in a January 31, 2024 progress report, one of the student's SETSS providers reported that, to address the student's reading skills, he "incorporated multisensory activities to engage different learning modalities," and, to address comprehension, the SETSS provider "taught and modeled various effective reading strategies" (Parent Ex. G at p. 1).[9] In writing, the SETSS provider reported that he "ha[d] taught and modeled essay structures and provided guidance on creating outlines," and "taught transitional words and phrases and modeled effective transitions" (id.). For math, the SETSS provider indicated that he broke down concepts into smaller steps, and provided concrete examples as well as "step by step guidance on solving equations and how to properly apply algebraic concepts" (id. at p. 2). The SETSS provider identified that the student "learn[ed] best when visual and auditory modalities" were used during instruction, that he "benefit[ted] from multi-sensory approaches," and that repetition, guided practice, and modeled responses were very effective for the student (id.). The progress report reflected goals developed for the student that included improving vocabulary, written language, and math skills (id. at p. 3).

Additionally, session notes prepared by one of the student's SETSS providers shows that the focus of those SETSS sessions was executive functioning skills (see Parent Ex. H at pp. 1-12). Specifically, from the beginning of the school year, one of the SETSS providers worked on "[s]etting up initial structures to ensure successful start to school" including "[r]outines, material management, time management and self-monitoring" to improve the student's executive functioning skills (id. at p. 1). Toward "the second half of the first semester" the focus of SETSS sessions was on improving the student's "academic independence," "participation in tasks that promote[d] socially appropriate self advocacy, including perspective taking skills, verbal pragmatics, code switching, and conflict resolution," and fostering "emotional regulation" (id. at pp. 2-3). To prepare for "upcoming finals" and midterm exams, SETSS sessions focused on executive functioning skills such as prioritizing time outside of school, task initiation, organization, and time management, and "[g]rit-[b]uilding [s]trategies" (id. at pp. 4-5). After exams, the student and SETSS provider conducted a "comprehensive error analysis of midterms"

[9] According to the supervisor, the student's SETSS was delivered by four different SETSS providers (Parent Ex. F ¶ 8; see Parent Ex. H). The supervisor testified that each of the SETSS providers held master's degrees and State certification (Tr. pp. 17-18).

(id. at p. 6). Subsequent sessions during the school year focused on "enhancing the student's peer-to-peer perspective taking skills" emphasizing use of appropriate language for different audiences and code-switching skills, increasing flexible thinking, pragmatic, and conflict resolution skills, and addressing executive functioning, avoidant behavior, and metacognitive awareness issues (id. at pp. 6-11). By April 2024, SETSS sessions focused on examining third quarter grades and preparing for Regents examinations (id. at pp. 11-12).

According to the remainder of the session notes, the other SETSS providers addressed improving the student's knowledge of social studies and Judaic studies concepts, and communication, public speaking, written language, math, reading comprehension, vocabulary, organization and time management, and career readiness skills (Parent Ex. H at pp. 13-34).

Further, to address the student's needs, during sessions, one of the SETSS providers reported using detailed time sheets to track study hours, instruction in note-taking and organizing materials, creating structured study schedules, using planners, digital apps, and study guides, practicing techniques to manage anxiety such as deep breathing and visualization, using interactive scenarios and role-playing various social situations, improving perspective-taking using visual aids, social stories, and video modeling, asking clarifying questions, summarizing information, and seeking out additional resources to improve metacognitive skills, and improving study skills using visual aids, interactive quizzes, and mnemonic devices (Parent Ex. H at pp. 1-12). Other SETSS providers used prompting techniques, advised the student on how "to use concise language, exude confidence . . . [and] provide a succinct demonstration," used visual aids, handout with step-by-step instructions, drills, passages for reading comprehension and written language instruction, graphic organizers, highlighters, templets for note-taking, modeling, breaking down problems into smaller steps, prompts and redirection, modeled responses, sample sentences, and guided practice (see id. at pp. 14-34).

Based on the foregoing, the evidence in the hearing record shows that HLER addressed the student's special education needs.

The IHO also determined that some of the annual goals from the progress report were identical to those from the 2016 IESP, which was "confounding" that those goals could still be applicable during the 2023-24 school year in light of the supervisor's testimony that the student had made progress (IHO Decision at p. 8).[10] I first note that the progress report included a vocabulary annual goal not from the 2016 IESP (compare Parent Ex. B at pp. 3-5, with Parent Ex. G at p. 3). Another annual goal indicated that the student would achieve the goal using "instructional level text," which at the time the progress report was developed, was a tenth grade level, certainly different than the student's instructional text level in 2016 (compare Parent Ex. B at pp. 1, 3, with Parent Ex. G at pp. 1, 3). While the other annual goals may have been repeated from the 2016 IESP, the IHO held the parent to procedural standards that a school district is obligated to follow when carrying out the terms of an IEP or IESP. As noted above, this is a unilaterally obtained services case and the question was whether the private services were appropriate under the Rowley standard, not whether the parent adequately complied with the district's obligations, such as to develop new annual goals (IHO Decision at pp. 7-8). As for the

[10] One of the student's annual goals appears twice in the progress report (Parent Ex. G at p. 3).

IHO's determination that the hearing record lacked evidence to establish that the SETSS providers "were working on any specific goals for [the s]tudent or how the services provided by [the SETSS p]roviders addressed any particular goals," these finding were not supported by the evidence described above, as the session notes identified the goals the student was working on, although they may have differed from those in the progress report (compare Parent Ex. G at p. 3, with Parent Ex. H).

In holding that the unilaterally obtained services were not appropriate, the IHO concluded that the HLER progress report failed to provide any information about the student's progress (IHO Decision at p. 7; see Parent Ex. G). Specifically, the IHO held that the progress report did not explain how the student was performing at the beginning of the 2023-24 school year as compared to how the student was performing at the time of the report, nearly five months after the SETSS began (IHO Decision at p. 7). However, 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 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]). Although not dispositive, the SETSS providers reported that the student exhibited progress with reading comprehension, written language, and math (Parent Ex. G at pp. 1, 2). Further, the supervisor testified that since the beginning of the school year, the student had made "significant improvement" with the SETSS provided (Tr. p. 19).

Having reviewed the evidence in the hearing record, I find that the parent has met her burden of establishing that the SETSS delivered by HLER, in view of the totality of the circumstances, tips in favor of the conclusion that they were specially designed to meet his unique needs.

B. Equitable Considerations

Having found that the SETSS delivered by HLER were appropriate, I now turn to consider the final criterion for a reimbursement or direct funding award, which is that the parent's claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]; L.K. v. New York City Dep't of Educ., 674 Fed. App'x 100, 101 [2d Cir. Jan. 19, 2017]). With respect to equitable considerations, the IDEA also provides that reimbursement may

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

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

Here, the district has not cross-appealed the IHO's findings that the parent's cooperated with the district (IHO Decision at p. 8); accordingly, this determination is final and binding and will not further discussed.

Regarding the IHO's conclusion that the parent failed to establish how and when the ten-day notice was submitted to the district (IHO Decision at p. 8), as noted above, the parent submitted into evidence a letter dated September 6, 2023, from Prime Advocacy, stating that, if the district did not implement services, the parent intended to unilaterally obtain private services at enhanced rates (Parent Ex. D). The letter does not set forth a mailing or email address to which it was purportedly sent and the salutation of the letter broadly reads "Dear Chairperson" (Parent Ex. D). The letter was not accompanied by an email or other documentation of transmittal.[11] There was no testimony or additional evidence regarding the transmittal of the letter. Under the circumstances, while the district did not appear at the impartial hearing and, therefore, did not directly deny or concede receipt of the letter, given the factors noted above, I agree with the IHO

[11] By way of comparison, the May 2023 letter requesting equitable services and the April 2024 due process complaint notice were submitted into evidence with accompanying copies of the transmittal emails (Parent Exs. A; E).

that the document alone is not sufficiently reliable evidence upon which to conclude that the letter was sent to the district.

Next, the IHO concluded that the enrollment agreement lacked credibility on the issue of the parent's obligation to pay for the SETSS services for the 2023-24 school year because it was undated and because the hourly rate set forth therein, $205.00, was contradicted by the testimony of the educational supervisor, who indicated that the rate for SETSS was $192.00 (IHO Decision at p. 8; compare Parent Ex. C, with Parent Ex. F ¶ 16). Regarding proof of financial risk, the Second Circuit has held that some blanks that the parties did not fill in in a written agreement would not render an entire contract void and indicated that in the case before it that "the contract's essential terms—namely, the educational services to be provided and the amount of tuition—were plainly set out in the written agreement, and we cannot agree that the contract, read as a whole, is so vague or indefinite as to make it unenforceable as a matter of law" (E.M. v. New York City Dep't of Educ., 758 F.3d 442, 458 [2d Cir. 2014]). In New York, a party may agree to be bound to a contract even where a material term is left open but "there must be sufficient evidence that both parties intended that arrangement" and an objective means for supplying the missing terms (Express Indus. & Terminal Corp. v. N.Y. State Dep't of Transp., 93 N.Y.2d 584, 590 [1999]; 166 Mamaroneck Ave. Corp. v. 151 E. Post Rd. Corp., 78 N.Y.2d 88, 91 [1991]).

Here, although the contract was undated, the school year was reflected in the title of the document, demonstrating the intended duration of the agreement; however, given the lack of a verifiable signature from the parent on the document, coupled with the contradictory testimony of the educational supervisor regarding the rate charged by the company, and the lack of the testimony from the parent confirming her legal obligation to the company, the IHO did not err in questioning the reliability of the evidence (see IHO Decision at p. 8; see also Parent Exs. C at p. 2; F ¶ 16).

The IHO stated that, considering these equitable factors, she would have found that a 20 percent reduction of the $192.00 hourly rate, or $153.60, would be warranted, were an award to be ordered (IHO Decision at pp. 8-9). The parent has not alleged a convincing basis to reverse the IHO's equitable reduction. On the other hand, the district does not cross-appeal the amount of the reduction and, therefore, I will not disturb the IHO's finding that a discretionary reduction of the rate for the SETSS delivered to the student by HLER to a rate of $153.60 was warranted.[12]

VII. Conclusion

Contrary to the IHO's decision, the evidence in the hearing record shows that the parent met her burden to prove that the unilaterally obtained SETSS delivered by HLER were appropriate. However, there is insufficient basis to disturb the IHO's reduction of the rate awarded on equitable grounds.

I have considered the parties' remaining contentions and find it unnecessary to address them in light of my determinations above.

[12] Even if the district's argument regarding the excessiveness of the rate charged by HLER was properly raised without a cross-appeal, I would not find a further reduction of the hourly rate for SETSS warranted on this ground as the district did not offer any evidence of reasonable market rates for the same or similar services.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the district shall directly fund up to five periods of SETSS per week that the student received from HLER during the 2023-24 school year at an hourly rate of $153.60 upon proof of service delivery.

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

SARAH L. HARRINGTON
STATE REVIEW OFFICER