The University of the State of New York

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

No. 24-374

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

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

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from a decision of an impartial hearing officer (IHO) which denied in part her request that respondent (the district) fund the full costs of her daughter's private services delivered by Kinship Resources LLC (Kinship) for the 2023-24 school year. The district cross-appeals from those portions of the IHO's decision which found that the parent demonstrated the unilaterally obtained services were appropriate and granted relief. 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 CSE convened on September 30, 2021, determined the student was eligible for special education as a student with a learning disability, and developed an IESP to be implemented

beginning October 13, 2021 (Parent Ex. B at p. 1).[1] The CSE recommended that the student receive four periods per week of group special education teacher support services (SETSS) (id. at p. 7).[2]

In an April 3, 2023 letter to the parent, the district indicated that according to its records the student was parentally placed in a nonpublic school, and advised that if the parent wanted the district to provide the student with special education services while enrolled in the nonpublic school, the parent must request such services in writing prior to June 1 of that school year (Dist. Ex. 1). The parent completed the district form dated May 30, 2023 indicating that the parent placed the student in a nonpublic school at parental expense and was seeking special education services from the district (Parent Ex. D).

Via a letter dated August 27, 2023, the parent informed the district that it had not taken any action to implement the student's IESP for the upcoming 2023-24 school year, and that if the district did not provide the student with appropriate special education services, the parent would privately obtain special education services and seek reimbursement or direct payment from the district (Parent Ex. E). On October 17, 2023, the parent entered into a service agreement with Kinship to provide special education services to the student at enhanced rates (Parent Ex. F).[3]

On November 10, 2023, the CSE convened, reviewed a SETSS progress report dated November 10, 2023, and developed an IESP that recommended the student receive four periods per week of group SETSS (Parent Ex. C at pp. 1, 7).

A. Due Process Complaint Notice

In a due process complaint notice dated April 19, 2024,[4] the parent, through her representatives, alleged that the district denied the student a free appropriate public education (FAPE) for the 2023-24 school year (see Parent Ex. A). The parent asserted that prior to the start of the 2023-24 school year, the last time that the CSE convened was September 30, 2021 and that the September 2021 IESP was outdated (id. at pp. 1-2). According to the parent, when the CSE convened on November 10, 2023 to develop a new IESP for the student, the district ignored the recommendations of the parent and the nonpublic school staff and made the same recommendations as the September 2021 IESP (id. at p. 2). The parent asserted that, the student required six hours per week of SETSS for the 2023-24 school year instead of the four hours of

[1] The student's eligibility for special education as a student with a learning disability is not in dispute (see 34 CFR 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

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

[3] Kinship 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 due process complaint was composed on letterhead of the Law Offices of Leonard Ledereich & Associates but was signed by a non-attorney lay advocate (Parent Ex. A).

SETSS per week recommended by both the September 2021 and November 2023 CSEs (id. at p. 2). As relief, the parent sought an order from the IHO directing the district to fund a minimum of six hours of SETSS per week for the student for the 2023-24 school year from private providers at private "enhanced" rates due to the alleged inappropriate IEP and implementation failure and sought compensatory education for any missed SETSS hours (id. at pp. 2-3).

B. Impartial Hearing Officer Decision

An impartial hearing convened before the Office of Administrative Trials and Hearings (OATH) on July 18, 2024 and concluded the same day (Tr. pp. 1-36).[5] During the impartial hearing, the IHO ruled that the district waived its opportunity to cross-examine the parent's witnesses by failing to comply with the IHO's rules established at the prehearing conference to notify the opposing party of its intention to cross examine witnesses at least three days prior to the impartial hearing (Tr. p. 15; see IHO Ex. I). The IHO noted that the district timely raised its June 1 affirmative defense, but that the district failed to rebut the parent's evidence that she had complied with the June 1 notice and therefore rejected the district's defense (IHO Decision at p. 5). Although the district was precluded from cross-examining the parent during the impartial hearing, the IHO noted that the district "could have provided a SESIS log showing the absence of [the p]arent's notice or even present[ed] a witness who could testify about the regular business practice of collecting such notices" (id.). The IHO held that

> There were no changes from the 2021 to the 2023 IESP. There was also insufficient evidence to support any changes to the [s]tudent's 2023 IESP. Parent believed that [s]tudent should receive SETSS 6 times per week, but there was no evidence to support six nor five nor any random number of SETSS. Since [p]arent agreed that the 2021 IESP was the last agreed upon IESP and the 2023 IESP recommended the same services, I find that [s]tudent's November 10, 2023 IESP offered Student a FAPE. However, the [d]istrict's failure to implement this IESP denied [s]tudent with a FAPE. Therefore, the [district] has failed to meet its burden as to prong 1 of the Burlington Carter standard

(id.).

Next, the IHO found that the parent met her burden to show that the services provided by Kinship were sufficient to address the student's unique needs (IHO Decision at pp. 6-7). Regarding equitable considerations, the IHO determined that partial direct funding of the unilaterally obtained services was appropriate but that a reduction was warranted, based on the lack of sufficient evidence in the hearing record regarding the methodology Kinship used to determine its rates and that they were "unsubstantiated and excessive" (id. at p. 7). The IHO ordered reimbursement "at

[5] The hearing record reflects that a status conference was held on May 21, 2024 and that the case was originally scheduled for an impartial hearing on June 17, 2024, but that the district failed to appear on both dates (Tr. pp. 13-14). The IHO summarized the May 21, 2024 omnibus status conference in an email of the same date, including directions for the parties to notify each other three days before the impartial hearing if they were planning on cross-examining any witnesses (IHO Ex. I).

a reasonable market rate set by the [d]istrict's Implementation unit" (id.). Additionally, the IHO noted that pendency was uncontested, and that an order of pendency had been issued on July 22, 2024 based on the September 2021 IESP (id.).

With regard to the parent's request for compensatory education, the IHO reasoned that

> the [d]istrict did not present any evidence that they provided SETSS to [s]tudent during the 2023-2024 school year. However, the [p]arent and [a]dministrator testified that [s]tudent was receiving SETSS. Since [s]tudent was receiving SETSS based on pendency, [s]tudent is not entitled to a compensatory bank of hours for SETSS. Student is therefore not entitled to a compensatory bank of hours for SETSS during the 2023-2024 school year

(IHO Decision at p. 8).

IV. Appeal for State-Level Review

The parent appeals through her lay advocate, alleging that the IHO erred by denying the parent's claim that the four hours of SETSS per week contained in the September 2021 and November 2023 IESPs were insufficient to meet the student's needs, arguing that the evidence showed that the student required more than four hours per week and the district failed to present any evidence on the issue. The parent also asserts that the IHO erred in reducing the rate to be paid to Kinship from $195 per hour to a "reasonable market rate set by the [d]istrict's Implementation unit." The parent further contends that the IHO erred in failing to provide the student with a bank of compensatory education services.

In an answer, the district responds to the parent's allegations and generally requests that the parent's appeal be dismissed. As a cross-appeal, the district asserts that the IHO erred by finding that the parent proved that she complied with the June 1 notice requirement. The district further cross-appeals from the IHO's determination that the parent met her burden of proving that the SETSS delivered by Kinship were appropriate to meet the student's unique needs. Regarding equitable considerations, the district argues that the IHO's holding that the district was responsible for direct funding of SETSS was in error and that the parent failed to prove that she has a legal obligation to pay Kinship for the SETSS provided to the student.

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]).[6] "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.).[7] Thus, under State law an eligible New York State resident student may be voluntarily enrolled by a parent in a nonpublic school, but at the same time the student is also enrolled in the public school district, that is dually enrolled, for the purpose of receiving special education programming under Education Law § 3602-c, dual enrollment services for which a public school district may be held accountable through an impartial hearing.

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

VI. Discussion

Initially, the district has not appealed from the IHO's determinations that the district waived its right to cross-examine the parent's witnesses or that the district failed to prove that it offered the student a FAPE for the 2023-24 school year (IHO Decision at p. 3). Accordingly, these findings have become final and binding on the parties and will not be reviewed on appeal (34 CFR

[6] 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]).

[7] 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 website and the paginated pdf versions of the documents previously available do not currently appear there, having been updated with web based versions.

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. The 2023-24 School Year

1. June 1 Deadline Defense

Turning first to the district's cross-appeal, the district argues that the IHO erred in failing to dismiss the due process complaint notice on the basis that the parent failed to comply with the June 1 deadline and that the student was not entitled to equitable services under Education Law § 3602-c. The State's dual enrollment statute requires parents of a New York State resident student with a disability who is parentally placed in a nonpublic school and for whom the parents seek to obtain educational services to file a request for such services in the district 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]).

The issue of the June 1 deadline fits with other affirmative defenses, such as the defense of the statute of limitations, which are required to be raised at the initial hearing (see M.G. v. New York City Dep't of Educ., 15 F. Supp. 3d 296, 304, 306 [S.D.N.Y. 2014] [holding that the limitations defense is "subject to the doctrine of waiver if not raised at the initial administrative hearing" and that where a district does "not raise the statute of limitations at the initial due process hearing, the argument has been waived"]; see also R.B. v. Dep't of Educ. of the City of New York, 2011 WL 4375694, at *4-*6 [S.D.N.Y. Sept. 16, 2011] [noting that the IDEA "requir[es] parties to raise all issues at the lowest administrative level" and holding that a district had not waived the limitations defense by failing to raise it in a response to the due process complaint notice where the district articulated its position prior to the impartial hearing]; Vultaggio v. Bd. of Educ., Smithtown Cent. Sch. Dist., 216 F. Supp. 2d 96, 103 [E.D.N.Y. 2002] [noting that "any argument that could be raised in an administrative setting, should be raised in that setting"]). "By requiring parties to raise all issues at the lowest administrative level, IDEA 'affords full exploration of technical educational issues, furthers development of a complete factual record and promotes judicial efficiency by giving these agencies the first opportunity to correct shortcomings in their educational programs for disabled children.'" (R.B. v. Dep't of Educ. of the City of New York, 2011 WL 4375694, at *6 [S.D.N.Y. Sept. 16, 2011], quoting Hope v. Cortines, 872 F. Supp. 14, 19 [E.D.N.Y. 1995] and Hoeft v. Tucson Unified Sch. Dist., 967 F.2d 1298, 1303 [9th Cir. 1992]; see C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at *12 [S.D.N.Y. Sept. 22, 2011]).

In this case, the IHO found that because the parent submitted evidence during the impartial hearing that she had provided the requisite June 1 notice to the district, and the district failed to rebut such evidence, the district had not proven its affirmative defense. During the hearing, the parent submitted request on a district letterhead dated May 30, 2023 which stated that she sought continued special education services from the district for her son for the 2023-24 school year, and the district did not rebut the parent's evidence (Parent Ex. D). Accordingly, the IHO correctly rejected the district's defense that the parent did not timely request special education services by June 1st for the 2023-2024 school year.

2. Adequacy of the November 2023 IESP

In her request for review the parent alleges that the IHO erred in concluding that the amount of SETSS in the November 2023 IEP should have been increased from four hours per week to six hours per week due to a lack of evidence. Upon review of the evidence in the hearing record, I find the IHO's reasoning was deficient.

The IHO reasoned that the November 2023 IESP was adequate because the student's September 2021 IESP was the "last agreed upon" IESP between the parties and that there were no changes made at the time of the November 2023 CSE meeting; however, the IHO's analysis was flawed in one respect because it merely conflated the standard for a pendency determination and the standard for a substantively appropriate IESP. Furthermore, the district had the burden of production and persuasion to explain why the November 2023 IESP was adequate and, as the IHO had already noted, the district did not present any evidence at all on the topic. On the other hand, the parent presented unrebutted evidence that she raised these points during the November 2023 CSE meeting that the student had not been making progress with four hours of SETSS. Thus the IHO's determination that the parent failed to present sufficient evidence on the adequacy of the November 2023 IESP was error. However, as further described below, the parent engaged in the self-help remedy of unilaterally obtaining private services, and I agree with the IHO's ultimate determination that further compensatory education services beyond the equitable relief related to Kinship is not warranted in this case.

B. Unilaterally Obtained SETSS

The district cross-appeals from the IHO's award of funding for four hours per week of SETSS for the 2023-24 school year, arguing that the evidence in the hearing record does not support that the parent proved that Kinship provided services specially designed to address the student's unique needs.

It is well settled that "[p]arents 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]). 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).

Turning to a review of the appropriateness of the unilaterally-obtained SETSS in this matter, 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

While not in dispute, a discussion of the student's needs provides context to resolve the issue on appeal regarding the appropriateness of the unilaterally obtained services delivered to the student by Kinship.

The student's September 2021 IESP indicated that she was in third grade at a nonpublic school, and teacher reports reflected that she presented with "weaknesses in many areas of cognitive development, including oral language skills, visual spatial skills, fluid reasoning/problem solving skills, memory and processing speed" (Parent Ex. B at pp. 1, 3). According to the IESP, the student also exhibited weaknesses in receptive and expressive language and social/pragmatic language skills (id. at p. 1). Parent and teacher reports reflected in the IESP indicated that the student "struggle[d] significantly with distractibility in all areas of her life," and that she was "unfocused" (id. at p. 3). The November 2023 IESP expanded on this theme, indicating that the student easily became distracted and struggled to remain on task and focus on her work, which combined with her cognitive struggles, made it difficult for the student to remain in the classroom (Parent Ex. C at pp. 1, 2). According to this IESP, the student required 1:1 instruction to address her weaknesses, as in a large group setting she quickly lost focus and was "unable to comprehend anything" that was taught (id. at p. 1).

Academically, the teacher reports in the September 2021 IESP indicated that the student was "weak in all areas of reading, including sight word recognition, decoding, vocabulary, comprehension and reading fluency" (Parent Ex. B at p. 1). According to the November 2021 IESP, the student's reading skills were below grade level, as she had difficulty concentrating while reading, and her distractibility impeded her comprehension skills (Parent Ex. C at p. 2). Although the student did well with decoding, she had difficulty with analyzing, inferencing, and predicting text, and with identifying character emotions and motives (id.).

The September 2021 IESP reflected reports that the student's writing skills were below a first grade level, and that she struggled with all areas associated with writing (Parent Ex. B at p. 1). By November 2023, the IESP indicated that the student tended to have "issues with spacing words," made spelling errors, and had difficulty writing an answer from the text in her own words (Parent Ex. C at p. 2).

According to the September 2021 IESP, the student's math skills were reportedly at a third grade level, with "application" skills at a second grade level (Parent Ex. B at p. 1). Although the student completed basic math computation problems, she reportedly struggled with new concepts, word problems, math fluency, and understanding math concepts (id.). The November 2023 IESP

indicated that the student's math skills were below grade level, and she struggled with computation and problem solving (Parent Ex. C at p. 1). Additionally, the student had difficulty determining which operation to perform, multiplying decimals, and converting measurements (id.).

Socially, the September 2021 IESP indicated that the student had friends, was "well-behaved and motivated" (Parent Ex. B at p. 2). The November 2023 IESP described the student as "a bit [on] the quiet side and tend[ed] to be shy" with peers, and that she had "some trouble lately both making and keeping friends" (Parent Ex. C at p. 3). As of November 2023, the student received counseling, and at times became frustrated when she had a hard time learning what the class was learning (id.).[8] Results of a May 2021 OT evaluation reflected in the September IESP indicated that the student did "not present with significant OT concerns," although "her hand skills" were a relative weakness (Parent Ex. B at pp. 1, 3-4). The student's sensory motor, movement and life skills were areas of strength (id. at p. 4). According to the November 2023 IESP, the parent did not have any concerns about the student's physical development (Parent Ex. C at p. 3).

The CSEs identified strategies to address the student's management needs that included multisensory instruction, manipulatives, teacher modeling, flash cards, checks for understanding, information repeated, frequent positive feedback, visual/verbal/gestural cues, graphic organizers, and checklists (Parent Exs. B at p. 4; C at pp. 3-4). Annual goals for the student included improving reading decoding skills, reading fluency skills to support comprehension, and ability to use inferencing skills and answer "wh" questions about text; her ability to produce written narratives and use of graphic organizers to write paragraphs; and her math computation skills for various math concepts (Parent Exs. B at pp. 5-6; C at pp. 4-5). Both CSEs recommended that the student receive four periods per week of SETSS (Parent Exs. B at p. 7; C at p. 8).

2. SETSS from Kinship

Turning to the SETSS delivered by Kinship, a June 2024 progress report prepared by two SETSS providers described the student as "a sweet and good-natured sixth grader" who "love[d] to please teachers and peers alike" (Parent Ex. G at pp. 1, 3).[9]

According to the progress report, the student was "below grade level" in reading, and administration of "the Fountas and Pinnell assessment" to the student indicated her skills were "on level R with 80% accuracy" (Parent Ex. G at p. 1).[10] The progress report indicated that the student had difficulty with reading fluency, evidenced by pauses and hesitations when reading, which hindered her ability to read smoothly and comprehend texts effectively (id.). The student also had difficulty keeping her attention on the reading task, recalling what she had read, and had a tendency

[8] Neither of the student's IESPs mandated counseling, and the evidence does not otherwise provide information about and counseling services the student may have received (see Tr. pp. 1-36; Parent Exs. A-K).

[9] One of the student's SETSS providers holds New York State students with disabilities Birth-Grade 2 and Grades 1-6 professional certificates (compare Parent Ex. G at p. 3, with Parent Ex. H at p. 2). It is unclear whether the other SETSS provider who prepared the June 2024 SETSS progress report is the same person named in parent exhibit I, as the last names are not the same (compare Parent Ex. G at p. 3, with Parent Ex. I).

[10] The hearing record does not include evidence that describes Fountas and Pinnell level R (see Tr. pp. 1-36; Parent Exs. A-K).

to substitute a similar word using the context when reading (id.). The SETSS providers reported that the student's fluency and reading comprehension difficulties prevented her from keeping up with the general curriculum at grade level, and developed annual goals to improve her ability to implement reading comprehension strategies to improve recall of text details and improve her reading fluency skills by using appropriate pronunciation, pacing and intonation (id. at pp. 1, 2).

In the area of writing, the SETSS progress report indicated that the student had difficulty organizing her thoughts and writing complete paragraphs, which hindered her ability to communicate her ideas in effectively in written form (Parent Ex. G at p. 1). Additionally, the student tended to leave out details in paragraphs (id.). The SETSS providers developed annual goals for the student to use graphic organizers or other visual aids to organize her thoughts, and to improve the structure, coherence, and logical flow of her written work (id. at p. 2).

With regard to math, the SETSS progress report reflected that the student needed a lot of review and practice to retain information, she became very frustrated when she did not recall how to complete an example, and tests could be "incredibly frustrating for her as they accumulate[d] many lessons" (Parent Ex. G at p. 1). The student had difficulty with solving word problems as reading comprehension was "tricky for her" (id.). Math annual goals for the student included improving her ability to solve two step word problems and equations with one variable (id. at p. 2).

Regarding specially designed instruction, the SETSS progress report stated that the student was below grade level in reading and math but that "[s]trategies and interventions help [the student] gain the necessary math and reading skills to reach grade level" (Parent Ex. G at p. 1). According to the SETSS providers, the student needed "support to organize and express her thoughts clearly in her writing" (id.). In math, the SETSS providers reported using large posters stating key words and operations, "[l]ots of repetition," daily drills, and manipulatives with new number concepts such as percents, decimals, fractions, polygons, area, and perimeter (id.). Additionally, during math instruction the SETSS providers reported using visual aids, hands-on projects, songs, and cue cards" (id.). The SETSS providers also reported that the student "learn[ed] best in a small group without many distractions," required "lots of practice and repetition," and benefited from teacher modeling of reading and writing strategies, and use of graphic organizers to organize/clarify her writing (id. at p. 2).[11] Based on the foregoing, review of the evidence in the hearing record supports the IHO's finding that the SETSS provided by Kinship were appropriate to meet the student's unique needs.

C. Equitable Considerations

The parent appeals from the IHO's reduction in the SETSS rate awarded, and the district cross-appeals, asserting that the evidence in the hearing record did not establish that the parent had a legal obligation to pay for the unilaterally obtained SETSS delivered by Kinship. 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

[11] It is not clear whether the student's SETSS were delivered individually or in a group (see Tr. pp. 1-36; Parent Exs. A-K).

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

1. Financial Obligation

In the cross-appeal, the district argues that the equities do not favor the parent on the issue of direct funding for the unilaterally-obtained services because she did not sign a contract with Kinship until approximately six weeks after the agency began providing the student with SETSS and, therefore, failed to establish that she had a financial obligation to Kinship. With respect to the district's contention regarding the date the parent signed the agreement with Kinship, in Burlington, the Court stated that "[p]arents who unilaterally withdraw their child from the public school and thereafter seek tuition reimbursement for the[ir] child's private placement do so at their own peril," because they bear the financial risk, both as to tuition and legal expense, and the burden of demonstrating the appropriateness of their relief (471 U.S. at 373-74). Congress thereafter took action to emphasize the need for parents to be invested in the process of developing a public school placement for eligible students with disabilities by placing limitations on private school reimbursements under the IDEA (20 U.S.C. § 1412[a][10][iii]). This statutory construct is a significant deterrent to false or speculative claims (see Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 543 [2007] [Scalia, J., dissenting] [noting that "actions seeking reimbursement are less likely to be frivolous, since not many parents will be willing to lay out the money for private education without some solid reason to believe the FAPE was inadequate"]).

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]).

Here, the agreement, signed by the parent on October 17, 2023, included a sufficient statement of the parent's intent to be legally bound to pay the costs of the services from Kinship consisting of "special education teacher services and/or related services and supports included in the last-agreed upon IEP or IESP" at specified rates delivered during the 2023-24 school year (Parent Ex. F). Thus, the statement signed by the parent is sufficient to establish that she was

financially obligated to fund the unilaterally-obtained SETSS regardless of the date on which it was signed.

2. Excessiveness of Costs

The IHO reduced the funding to be paid to Kinship because "[t]here was no clear explanation or evidence to support [Kinship's] methodology to determine its rates" (IHO Decision at p. 7). The evidence shows that Kinship and the parent contracted for SETSS at a rate of $195 per hour for ongoing payments and $225 per hour if the payment was deferred by the parent (Parent Ex. F at p. 4). The parent testified that the cost was $195 an hour and that she had not made any payments (Parent Ex. J at p. 3).[12] Among the factors that may warrant a reduction in tuition under equitable considerations is whether the frequency of the services or the rate for the services were excessive (see E.M., 758 F.3d at 461 [noting that whether the amount of the private school tuition was reasonable is one factor relevant to equitable considerations]). The IHO may consider evidence regarding whether the rate charged by the private agency was unreasonable or regarding any segregable costs charged by the private agency that exceed the level that the student required to receive a FAPE (see L.K. v. New York City Dep't of Educ., 2016 WL 899321, at *7 [S.D.N.Y. Mar. 1, 2016], aff'd in part, 674 Fed. App'x 100). More specifically, while parents are entitled to reimbursement for the cost of an appropriate private placement when a district has failed to offer their child a FAPE, it does not follow that they may take advantage of deficiencies in the district's offered placement to obtain all those services they might wish to provide for their child at the expense of the public fisc, as such results do not achieve the purpose of the IDEA. To the contrary, "[r]eimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71 [emphasis added]; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148). Accordingly, while a parent should not be denied reimbursement for an appropriate program due to the fact that the program provides benefits in addition to those required for the student to receive educational benefits, a reduction from full reimbursement may be considered where a unilateral placement provides services beyond those required to address a student's educational needs (L.K., 674 Fed. App'x at 101; see C.B. v. Garden Grove Unified Sch. Dist., 635 F. 3d 1155, 1160 [9th Cir. 2011] [indicating that "[e]quity surely would permit a reduction from full reimbursement if [a unilateral private placement] provides too much (services beyond required educational needs), or if it provides some things that do not meet educational needs at all (such as purely recreational options), or if it is overpriced"]; Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ., 790 F.2d 1153, 1161 [5th Cir. 1986] ["The Burlington rule is not so narrow as to permit reimbursement only when the [unilateral] placement chosen by the parent is found to be the exact proper placement required under the Act. Conversely, when [the student] was at the [unilateral placement], he may have received more 'benefit' than the EAHCA [the predecessor statute to the IDEA] requires"]).

Generally, an excessive cost argument for hourly services focuses on whether the hourly rate charged for service was reasonable and requires, at a minimum, evidence of not only of the rate charged by the unilateral placement, but evidence of reasonable market rates for the same or similar services.

[12] This is the hourly rate that the parent seeks on appeal.

With regard to the hourly rate paid to the unilaterally-obtained SETSS provider, the evidence shows that the administrator of Kinship (administrator) provided written testimony regarding the hourly rates paid to the two individuals providing SETSS services to the student (Parent Ex. K). The administrator's testimony establishes that one SETSS provider's hourly rate is $100 per hour and the hourly rate for the second SETSS provider is $90 per hour (id. ¶¶ E, F). Furthermore, the administrator testified that Kinship's rate for SETSS services for the student is $195 per hour and made a broad statement that the hourly rate was similar to rates charged by other agencies providing SETSS (id. ¶¶ H, I). The parent did not provide any further information explaining the rates charged by Kinship for SETSS.

Although the IHO did not discuss the American Institutes for Research October 2023 rate study (AIR report) in her decision, it was admitted into the hearing record (see Dist. Ex. 2). The AIR report draws data published by the United States Bureau of Labor Statistics (USBLS), a U.S. government agency, and it is well settled that judicial notice may be taken of such tabulations of data published by government agencies (Canadian St. Regis Band of Mohawk Indians v. New York, 2013 WL 3992830 (N.D.N.Y. Jul. 23, 2013]; Mathews v. ADM Milling Co., 2019 WL 2428732, at *4 [W.D.N.Y. June 11, 2019]; Christa McAuliffe Intermediate School PTO, Inc. v. de Blasio, 364 F.Supp.3d 253 [2019]). I find that the wage information contained in the data from the USBLS is relevant to the question of how much special education teachers are paid in the New York City metropolitan region in a given year in which the data is published.[13] It was not inappropriate for the AIR to use such government-published data in its report, nor was it in error for the district to include the New York wage excerpt as an exhibit. The data set in the New York, New Jersey and Pennsylvania region can be further limited and refined to the New York City, Newark, and Jersey City metropolitan region. It is reasonable to find that most teachers (public and private) working with special education students in New York City fall within this subset of data that is the greater metropolitan region specified in USBLS data ("May 2023 Metropolitan and Nonmetropolitan Area Occupational Employment and Wage Estimates New York-Newark-Jersey City, NY-NJ-PA," available at https://www.bls.gov/oes/current/oes_35620.htm).[14] Furthermore, the geographic data in this metropolitan subset does not have to be perfect in order to be sufficiently reliable for use when weighing equitable considerations.

The AIR report appears to address a question of what kind of approach "NYC DOE can use to determine a fair market rate for its Special Education Teacher Support Services (SETSS)"

[13] The Occupational Employment and Wage Statistics data is published by the USBLS starting in May of each calendar year, and the AIR report in evidence used May 2022 data, which shortly preceded the 2022-23 school year at issue in this proceeding and would be relevant thereto (see https://www.bls.gov/oes/tables.htm); however, I note that May 2023 data is the most recent annual data published by the USBLS as of the date of this decision. While the AIR report presented a snapshot in time, I do not share any concern that the data itself is "fixed in perpetuity" because it is updated annually, which is particularly relevant when considering due process claims under IDEA and Article 89 are almost always related to a specific annual time period.

[14] The New York wage excerpt shows a mean wage of $117,120 from the USBLS' May 2022 data for the same occupation in the same New York metropolitan region, but because this case relates to the 2023-24 school year, the undersigned has taken judicial notice of the USBLS' data from May 2023, which is closer in time to the events of this case (Dist. Ex. 3 at p. 2). I also note that when using a similar analysis in Application of a Student with a Disability, Appeal No. 24-132, the undersigned also used May 2023 wage figures, but inadvertently referred to them as USBLS' May 2022 figures, and there is a slight difference between the two years.

(Dist. Ex. 2 at p. 4). If the district were to offer hourly rates that were formulated on a negotiated basis (i.e. to employees paid on an hourly basis), it would understandably try to do so in a similar manner to the way it used its bargaining power in negotiations with both the United Federation of Teachers and other entities for fringe benefits and incidental costs that result in the pay scales for public school employees.

However, a parent facing the failure of the district to deliver his or her child's IESP services and who is left searching for a unilaterally selected self-help remedy would be unable to hire teachers already employed by the district (unless a teacher is "moonlighting" and thus dually employed), and the parent facing that situation would therefore not be able to negotiate for private teaching services with the same bargaining power that the district holds. Thus, while the AIR report's reliance on the salary schedules negotiated with the United Federation of Teachers that include provisions for steps, longevity, and criteria for additional experience and education, these provisions serve a different purpose—they are designed to ensure fair treatment among union members who are operating in public employment. But the fair treatment among district employees is of little or no interest to a parent who is trying to contract for services with private schools or companies after the district has failed in its obligations to deliver the services using its employees, and thus the district negotiated provisions are not particularly relevant to equitable considerations in a due process proceeding involving the funding of unilaterally obtained services.

Fortunately, the USBLS data does not indicate that it is limited to district-employed teachers. It covers wages in the entire metropolitan region, which would include teachers from across the spectrum including private schools, charter schools, and district special teachers. The USBLS indicated that in May 2023 data annual salaries for "Special Education Teachers, All Other" ranged from $49,000 in the 10th percentile, $63,740 in the 25th percentile, $97,910 in the median, $146,200 in the 75th percentile, to $163,670 in the 90th percentile.[15] In my view this is consistent with the fact that some local and private employers within the metropolitan region pay less than those in the district, and it leaves room for the fact that a few employers may have paid more. As for fringe benefits and incidental costs, private employers who offer benefits and have overhead costs are not necessarily the same as those costs cited in the AIR report, which is premised upon the district's costs, not the parent's costs. Reliance on such costs may be permissible when the district is managing its own operations and negotiating with a labor organization, but it is not relevant to the private situation in a Burlington/Carter unilateral private placement. Again, the USBLS provides data for indirect and fringe benefit costs for civilian, government employees and private industry expressed as a percentage of salary and for private industry such educational services costs were 27.7 percent, which tends to show that government benefits are often slightly better (and more expensive) than those offered in private industry (see Employer Costs For Employee Compensation (ECEC) – June 2023, available at https://www.bls.gov/news.release/archives/ecec_09122023.pdf).[16]

[15] The 2023 data for the metropolitan area is available in a downloadable Excel format, or the most recent statics offered can be searched using the USBLS Query System for "Multiple occupations for one geographical area" (see https://data.bls.gov/oes/#/home).

[16] The ECEC covers the civilian economy, which includes data from both private industry and state and local government. One could make an argument that a company like Kinship should fall in one of the different rows

The undersigned had little difficulty with the explanation in the AIR report that children must be educated for 180 days per year in this state and that school days are typically between six and seven hours long.[17] When using the USBLS data, a calculation leads to the conclusion that the $195 per hour rate for SETSS falls above the 90th percentile of salary for the metropolitan region in which the district is located, using indirect and fringe benefit costs of 27.7 percent. I will take this into account when ordering equitable relief.

The $90.00 per hour and $100 per hour costs for SETSS teachers' hourly wage was within the USBLS data in between the median and 75th percentile. When considering the testimony described above, in which Kinship's administrator was unable to provide any explanation at all as to why indirect employer costs above the staff's hourly wages were approximately 48 to 53 percent for the SETSS teachers, all of which were far in excess of the 27.7 percent in the USBLS data, and the evidence leads me to the conclusion that the parent arranged for services from Kinship at excessive costs as the district argues and that it is more than what the district should be required to pay. The $90 per hour and $100 per hour when adding indirect costs supported by USBLS data would yield a result of approximately $115 to $127 per hour in costs. The parent argues in her request for review that there were far more costs in conducting Kinship's business, but the parent did not present any evidence of those costs at all during the impartial hearing. Accordingly, those arguments are rejected.[18]

Based on the foregoing, I find that the evidence in the hearing record supports a finding that the parent is entitled to district funding for the costs of SETSS for up to four periods per week, at a rate of $125 per hour for the 2023-24 school year, and that the parent unjustifiably contracted for rates that far exceeded that amount.

D. Compensatory Education

On appeal, the parent argues that the IHO erred by denying her request for a compensatory award of two additional sessions per week of SETSS for the student for the 2023-24 school year. 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

---

of private employers, but it would result in only nominal differences in calculation, and the parent did not avail herself of the opportunity to develop the record further regarding the indirect costs beyond that of the teacher's hourly wage.

[17] Using 6.5 hours results in approximately 1170 hours of instruction time for students during a school day, and similar to teachers, related services are typically provided to students on a similar schedule during the school day.

[18] As for the parent's arguments that other administrative decisions demonstrate higher market rates, such cases involved matters where the district failed to present any evidence-based arguments to the contrary. In this case, the shoe is on the other foot, and it is the parent who has not rebutted the district's evidence and arguments.

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"]).

Regarding the parent's assertion in the April 2024 due process complaint notice that four periods per week of SETSS were insufficient to address the student's academic delays, and that "[a]t a minimum, the [s]tudent require[d] 6 periods of SETSS per week to remediate her deficits" (Parent Ex. A at p. 2), review of the evidence does not indicate how many periods per week of SETSS Kinship delivered to the student during the 2023-24 school year (see Parent Exs. A-K). While not a sworn witness, I note that the parent's advocate stated during the hearing that the student received four periods of SETSS per week (Tr. pp. 24, 30). With respect to progress, the SETSS providers reported that the student had "progressed this year" including in reading, where they reported she "attempt[ed] to go deeper into the text and analyze, inference[e], and predict" (Parent Ex. G at p. 1). In math, the SETSS providers reported that the student had demonstrated progress in her ability to line up decimals when computing, convert measurements, and multiply/divide multi-digit numbers by single digits (id.). Further, the student "mastered percentages and fractions using cue cards," and "[h]er understanding of converting fractions to decimals [wa]s getting better daily" (id.). As the evidence shows that the SETSS the student received from Kinship were appropriate and she made progress, review of the hearing record does not require a departure from the IHO's ultimate decision to deny funding for an additional two sessions per week of SETSS for the 2023-24 school year as compensatory education (IHO Decision at p. 5).

VII. Conclusion

The evidence in the hearing record supports the IHO's conclusion that the SETSS delivered to the student by Kinship during the 2023-24 school year were appropriate to address the student's special education needs. Furthermore, the hearing record supports the IHO's determination that the equities favored a reduction in the rates charged by Kinship.

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

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's decision, dated July 23, 2024, is modified by reversing those portions which directed the district to fund SETSS at a reasonable market rate as set by the district's implementation unit, and

IT IS FURTHER ORDERED that, upon the parent's submission of proof of attendance and delivery of services, the district shall directly fund the costs of up to four periods of SETSS per week to Kinship a rate not to exceed $125 per hour.

Dated: **Albany, New York**
October 4, 2024

JUSTYN P. BATES
STATE REVIEW OFFICER