



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 24-435

**Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability**

**Appearances:**

Liz Vladeck, General Counsel, attorneys for petitioner, by Abigail Hoglund-Shen, 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 district) appeals from a decision of an impartial hearing officer (IHO) which denied its motion to dismiss respondent's (the parent's) due process complaint notice based on a lack of subject matter jurisdiction and ordered the district to directly fund the costs of the student's privately-obtained special education teacher support services (SETSS) delivered by Yes I Can Services, Inc. (YIC) for the 2023-24 school year. The 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 programming for students with disabilities under the IDEA (20 U.S.C. §§ 1400-1482), namely a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, State law provides that "[r]eview of the recommendation of the committee on special education may be obtained by the

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

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

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

### **III. Facts and Procedural History**

The parties' familiarity with this matter is presumed and, therefore, the facts and procedural history of the case and the IHO's decision will not be recited here in detail. Briefly, a CSE convened on November 17, 2023, determined the student was eligible for special education as a

student with a learning disability, and formulated an IESP for the student with a projected implementation date of December 5, 2023 (see generally Parent Ex. B).<sup>1</sup> The CSE recommended that the student receive four periods per week of group SETSS, one 30-minute session per week of group counseling, and one 30-minute session per week of individual counseling (id. at pp. 11-12).

On or around December 18, 2023, the student began receiving SETSS from YIC for the 2023-24 school year (see generally Parent Ex. G ¶ 37).<sup>2</sup> On December 28, 2023, the parent electronically signed a document on YIC's letterhead indicating that she was requesting SETSS at a rate of \$200 per hour and agreed to pay the balance of any fee that was not covered by the district's prospective payment (Parent Ex. D).

In a letter dated January 29, 2024, the parent, through her attorney, informed the district that she had placed the student in a nonpublic school at her expense, that she consented to all services recommended in the student's November 2023 IESP but was unable to locate providers at the district's standard rate, and that she intended to implement those recommendations on her own and would seek reimbursement or direct payment from the district (Parent Ex. C).

#### **A. Due Process Complaint Notice**

In a due process complaint notice dated July 15, 2024, the parent, through an attorney, alleged that the district denied the student a free appropriate public education (FAPE) for the 2023-24 school year (see Parent Ex. A). The parent asserted that the district failed to provide the special education services recommended in the student's November 2023 IESP, which included direct group SETSS, individual counseling, and group counseling (id. at p. 2). The parent further alleged that she was unable to locate SETSS and related service providers on her own (id.). The parent sought an award of direct funding at the providers' contracted rates for services delivered by providers who were located by the parent and an order directing the district to fund a bank of compensatory periods of SETSS and related services not provided to the student for the 2023-24 school year at the agency's contracted rate (id. at p. 3).

#### **B. Impartial Hearing Officer Decision**

An impartial hearing convened before an IHO appointed by the Office of Administrative Trials and Hearings (OATH) on August 29, 2024. During the hearing, the IHO denied a motion by the district to dismiss the matter due to a lack of subject matter jurisdiction over the parent's equitable service implementation claims because of an emergency amendment to State regulation (Tr. pp. 15-20). In a decision dated August 30, 2024, the IHO found that the district failed to provide the student with a FAPE for the 2023-24 school year (IHO Decision at pp. 4-5). Next, the IHO determined an appropriate equitable remedy for a denial of a FAPE could include an award of compensatory education and briefly recited legal standards and cases for determining a

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<sup>1</sup> 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]).

<sup>2</sup> YIC is a private corporation and has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

compensatory education award (*id.* at pp. 5-6). Regarding the parent's request that the district directly fund the costs of the student's SETSS delivered by YIC, the IHO determined that such relief requested by the parent was appropriate (*id.* at p. 7). However, the IHO concluded that the provider's hourly rate of \$200 was excessive and reduced the award to \$155 (*id.*). The IHO further noted that the November 2023 IESP recommended individual and group counseling and that the parent was unable to find providers for the recommended counseling services for the 2023-24 school year (*id.* at p. 8).

As relief, the IHO ordered the district to directly fund individual SETSS provided by YIC from December 5, 2023 until the end of the 2023-24 school year at a rate not to exceed \$155 per hour (IHO Decision at p. 8). Additionally, the IHO ordered the district to fund a compensatory bank of counseling services not provided to the student between December 5, 2023 until the end of the 2023-24 school year provided by a qualified provider of the parent's choosing at a reasonable market rate (*id.*).

#### **IV. Appeal for State-Level Review**

The district appeals, alleging that the IHO erred in denying its motion to dismiss the due process complaint notice due to a lack of subject matter jurisdiction. Should that portion of the appeal be denied, the district seeks an order reversing so much of the IHO's decision which found that the SETSS provided to the student by YIC for the 2023-24 school year were appropriate and denying direct funding thereof, or in the alternative, further reducing the awarded hourly SETSS rate.

The parent did not interpose an answer.

#### **V. Applicable Standards**

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

However, under State law, parents of a student with a disability who have privately enrolled their child in a nonpublic school may seek to obtain educational "services" for their child by filing a request for such services in the 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]).<sup>3</sup> "Boards of education of all school districts of the state

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<sup>3</sup> 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]).

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.*).<sup>4</sup> 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**

### **A. Subject Matter Jurisdiction**

At the outset it is necessary to address the issue of subject matter jurisdiction raised by the district for the first time in a motion to dismiss submitted to the IHO one day prior to the IHO hearing and then addressed at that hearing (Tr. pp. 14-20).

The district argues that that there is no federal right to file a due process claim regarding services recommended in an IESP and that neither Education Law § 360-c, nor § 4404, confers IHOs with jurisdiction to consider enhanced rate claims from parents seeking implementation of equitable services" (Req. for Rev. ¶¶ 10-12).

In reviewing the district's arguments, the differences between federal and State law must be acknowledged. Under federal law, all districts are required by the IDEA to participate in a

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<sup>4</sup> State guidance explains that providing services on an "equitable basis" means that "special education services are provided to parentally placed nonpublic school students with disabilities in the same manner as compared to other students with disabilities attending public or nonpublic schools located within the school district" ("Chapter 378 of the Laws of 2007—Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the Individuals with Disabilities Education Act (IDEA) 2004 and New York State (NYS) Education Law Section 3602-c," Attachment 1 (Questions and Answers), VESID Mem. [Sept. 2007], available at <https://www.nysed.gov/special-education/guidance-parentally-placed-nonpublic-elementary-and-secondary-school-students>). The guidance document further provides that "parentally placed nonpublic students must be provided services based on need and the same range of services provided by the district of location to its public school students must be made available to nonpublic students, taking into account the student's placement in the nonpublic school program" (*id.*). The guidance has recently been reorganized on the State's web site and the paginated pdf versions of the documents previously available do not currently appear there, having been updated with web based versions.

consultation process with nonpublic schools located within the district and develop a services plan for the provision of special education and related services to students who are enrolled privately by their parents in nonpublic schools within the district equal to a proportionate amount of the district's federal funds made available under part B of the IDEA (20 U.S.C. § 1412[a][10][A]; 34 CFR 300.132[b], 300.134, 300.138[b]). However, the services plan provisions under federal law clarify that "[n]o parentally-placed private school child with a disability has an individual right to receive some or all of the special education and related services that the child would receive if enrolled in a public school" (34 CFR 300.137 [a]). Additionally, the due process procedures, other than child-find, are not applicable for complaints related to a services plan developed pursuant to federal law.

Accordingly, the district's argument under federal law is correct; however, the student did not merely have a services plan developed pursuant to federal law and the parent did not argue that the district failed in the federal consultation process or in the development of a services plan pursuant to federal regulations.

Separate from the services plan envisioned under the IDEA, the Education Law in New York has afforded parents of resident students with disabilities with a State law option that requires a district of location to review a parental request for dual enrollment 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]). For requests pursuant to § 3602-c, 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.*). Thus, the State law dual enrollment option confers an individual right to have the CSE design a plan to address the individual needs of a student who attends a nonpublic school (*see* Educ. Law § 3602-c[2][b][1]; *Bd. of Educ. of Bay Shore Union Free Sch. Dist. v. Thomas K.*, 14 N.Y.3d 289, 293 [2010]). This provision is separate and distinct from the State's adoption of statutory language effectuating the federal requirement that the district of location "expend a proportionate amount of its federal funds made available under part B of the individuals with disabilities education act for the provision of services to students with disabilities attending such nonpublic schools" (Educ. Law § 3602-c[2-a]).

Education Law § 3602-c, concerning students who attend nonpublic schools, provides that "[r]eview of the recommendation of the committee on special education may be obtained by the parent, guardian or persons legally having custody of the pupil pursuant to the provisions of section forty-four hundred four of this chapter" (Educ. Law § 3602-c[2][b][1]). It further provides that "[d]ue process complaints relating to compliance of the school district of location with child find requirements, including evaluation requirements, may be brought by the parent or person in parental relation of the student pursuant to section forty-four hundred four of this chapter" (Educ. Law § 3602-c[2][c]).

However, the district asserts that neither Education Law § 3602-c nor Education Law § 4404 confers IHOs with jurisdiction to consider enhanced rates claims from parents seeking implementation of equitable services and that the State Education Department made this "carve-

out" of jurisdiction explicit by adopting, by emergency rulemaking, an amendment of 8 NYCRR 200.5 (Req. for Rev. ¶¶ 13-14).

Section 4404 of the Education Law concerning appeal procedures for students with disabilities, and consistent with the IDEA, provides that a due process complaint may be presented with respect to "any matter relating to the identification, evaluation or educational placement of the student or the provision of a free appropriate public education to the student" (Educ. Law §4410[1][a]; see 20 U.S.C. § 1415[b][6]). State Review Officers have in the past, taking into account the legislative history of Education Law § 3602-c, concluded that the legislature did not intend to eliminate a parent's ability to challenge the district's implementation of equitable services under Education Law § 3602-c through the due process procedures set forth in Education Law § 4404 (see Application of a Student with a Disability, Appeal No. 23-121; Application of the Dep't of Educ., Appeal No. 23-069; Application of a Student with a Disability, Appeal No. 23-068). When faced with the question of the status of students attending nonpublic schools and seeking special education services under § 3602-c, the New York Court of Appeals has already explained that:

[w]e conclude that section 3602–c authorizes services to private school handicapped children and affords them an option of dual enrollment in public schools, so that they may enjoy equal access to the full array of specialized public school programs; if they become part-time public school students, for the purpose of receiving the special services, the statute directs that they be integrated with other public school students, not isolated from them. The statute does not limit the right and responsibility of educational authorities in the first instance to make placements appropriate to the educational needs of each child, whether the child attends public or private school. Such placements may well be in regular public school classes and programs, in the interests of mainstreaming or otherwise (see, Education Law § 4401–a), but that is not a matter of statutory compulsion under section 3602–c.

Bd. of Educ. of Monroe-Woodbury Cent. Sch. Dist. v. Wieder, 72 N.Y.2d 174, 184 [1988] [emphasis added]). Thus, according to the New York Court of Appeals, the student in this proceeding, at least for the 2023-24 school year, was considered a part-time public school student under State law. It stands to reason then, that the part-time public school student is entitled to the same legal protections found in the due process procedures set forth in Education Law § 4404.

However, I am mindful that the number of due process cases involving the dual enrollment statute statewide, which were minuscule in number until only a handful of years ago, have now increased to tens of thousands of due process proceedings per year within certain regions of this school district in the last several years. That increase in due process cases almost entirely concerns services under the dual enrollment statute, and public agencies are attempting to grapple with how to address this colossal change in circumstances, which is a matter of great significance in terms of State policy. Policy makers have attempted to address the issue.

Recently in July 2024, the Board of Regents adopted, by emergency rulemaking, an amendment of 8 NYCRR 200.5, which provides that a parent may not file a due process complaint notice in a dispute "over whether a rate charged by a licensed provider is consistent with the program in a student's IESP or aligned with the current market rate for such services" (8 NYCRR 200.5[i][1]). The amendment to the regulation does not apply to the present circumstance for two reasons. First, as correctly noted by the IHO, the amendment to the regulation applies only to due process complaint notices filed on or after July 16, 2024 (Tr. p. 17; 8 NYCRR 200.5[i][1]).<sup>5</sup> Second, since its adoption, the amendment has been enjoined and suspended in an Order to Show Cause signed October 4, 2024 (Agudath Israel of America v. New York State Board of Regents, No. 909589-24 [Sup. Ct., Albany County, Oct. 4, 2024]). Specifically, the Order provides that:

pending the hearing and determination of Petitioners' application for a preliminary injunction, the Revised Regulation is hereby stayed and suspended, and Respondents, their agents, servants, employees, officers, attorneys, and all other persons in active concert or participation with them, are temporarily enjoined and restrained from taking any steps to (a) implement the Revised Regulation, or (b) enforce it as against any person or entity

(Order to Show Cause, O'Connor, J.S.C., Agudath Israel of America, No. 909589).<sup>6</sup>

The district acknowledges the limitations on applicability of the regulation amendments relating to the date of the due process complaint notice and the temporary restraining order but contends that the emergency regulation "merely codif[ies] NYSED's preexisting position on implementation claims" (Req. for Rev. ¶¶ 14 n.1, 15). Consistent with the district's position, State guidance issued in August 2024 noted that the State Education Department had "conveyed" to the district that:

parents have never had the right to file a due process complaint to request an enhanced rate for equitable services or dispute whether a rate charged by a licensed provider is consistent with the program in a student's IESP or aligned with the current market rate for such services. Therefore, such claims should be dismissed on jurisdictional grounds, whether they were filed before or after the date of the regulatory amendment.

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<sup>5</sup> A statutory or regulatory amendment is generally presumed to have prospective application unless there is clear language indicating retroactive intent (see Ratha v. Rubicon Res., LLC, 111 F.4th 946, 963-69 [9th Cir. 2024]). The presence of a future effective date typically suggests that the amendment is intended to apply prospectively, not retroactively (see People v. Galindo, 38 N.Y.3d 199, 203 [2022]).

<sup>6</sup> On November 1, 2024, Supreme Court issued a second order clarifying that the temporary restraining order applied to both emergency actions and activities involving permanent adoption of the rule until the petition was decided.



("Special Education Due Process Hearings - Rate Disputes," Office of Special Educ. [Aug. 2024]).<sup>7</sup>

However, acknowledging that the question has publicly received new attention from State policymakers as well as at least one court at this juncture and appears to be an evolving situation, given the implementation date set forth in the text of the amendment to the regulation and the issuance of the temporary restraining order suspending application of the regulatory amendment, the amendment to the regulation may not be deemed to apply to the present matter regardless of the guidance document. Accordingly, the district's appeal seeking reversal of relief granted by the IHO on the ground that the IHO and SRO lack subject matter jurisdiction to determine the merits of the parent's claims must be denied.

## **B. Unilaterally Obtained Services**

Notably, the district does not challenge that it failed to offer a FAPE or equitable services for the 2023-24 school year and does not challenge the IHO's award of compensatory counseling services. Therefore, these determinations have become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see Bd. of Educ. of the Harrison Cent. Sch. Dist. v. C.S., 2024 WL 4252499, at \*12-\*15 [S.D.N.Y. Sept. 20, 2024]; M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at \*6-\*7, \*10 [S.D.N.Y. Mar. 21, 2013]). Thus, the remaining issue to address is the district's challenges to the IHO's award of direct funding for the privately-obtained SETSS delivered by YIC.

### **1. Legal Standard**

The district argues on appeal that the IHO used an incorrect legal standard to evaluate the parent's request for SETSS direct funding. Specifically, the district asserts that the IHO characterized the parent's request as one for compensatory education rather than applying the Burlington/Carter analysis (Req. for Rev. ¶ 19).

In this matter, the student has been parentally placed in a nonpublic school and the parent does not seek tuition reimbursement 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 dual enrollment statute for the 2023-24 school year and, as a self-help remedy, she unilaterally obtained private SETSS from YIC for the student without the consent of the school district officials, and then commenced due process to obtain remuneration for the costs thereof. Generally, districts who fail to comply with their statutory mandates to provide special education can be made to pay for special education services privately obtained for which a parent paid or became legally obligated to pay, a process that is essentially the same as the federal process under IDEA. Accordingly, the issue in this matter is whether the parent is entitled to public funding of the costs of the private services. "Parents who are dissatisfied with their child's education can unilaterally change their child's placement . . . and can, for example, pay for private services, including private schooling. They do so, however, at their own financial risk. They can obtain

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<sup>7</sup> For reasons that are not apparent, the guidance document is no longer available on the State's website. A copy is, however, included in the hearing record as an exhibit to the district's motion to dismiss.

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 privately obtained SETSS delivered by YIC must be assessed under this framework. That is, a board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Carter, 510 U.S. 7; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 252 [2d Cir. 2009]).<sup>8</sup> 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).

While some courts have fashioned compensatory education to include reimbursement or direct payment for educational expenses incurred in the past, the cases are in jurisdictions that place the burden of proof on all issues at the hearing on the party seeking relief, namely the parent, making the distinction between the different types of relief perhaps less consequential (Foster v. Bd. of Educ. of the City of Chicago, 611 Fed App'x 874, 878-79 [7th Cir. 2015]; Indep. Sch. Dist. No. 283 v. E.M.D.H., 2022 WL 1607292, at \*3 [D. Minn. 2022]). In contrast, under State law in this jurisdiction, the burden of proof has been placed 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 Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.F. v. New York City Dep't of Educ., 746 F.3d 68, 76 [2d Cir. 2014]; R.E., 694 F.3d at 184-85

Here, the IHO's characterization of the parent's request as one for compensatory education constitutes harmless error as the same results are reached under the Burlington/Carter analysis.

Turning to a review of the appropriateness of the unilaterally obtained services, the federal standard for adjudicating these types of claims is instructive. A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998]). Citing the Rowley standard, the Supreme Court has explained that "when a public

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<sup>8</sup> State law provides that the parent has the obligation to establish that a unilateral placement is appropriate, which in this case is the special education services that the parent obtained from YIC for the student (Educ. Law § 4404[1][c]).

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

## 2. Student's Needs

While the student's needs are not in dispute, a brief discussion thereof provides context for the issue to be resolved on appeal, namely, whether the parent's unilaterally-obtained SETSS were appropriate to meet the student's needs.<sup>9</sup>

The student's November 2023 IESP summarized the student's needs for the 2023-24 school year (Parent Ex. B). The IESP reflected that, when recommending the student's special education program and services, the November 2023 CSE used a September 2023 social history, a September 2023 psychoeducational evaluation report, an October 2023 occupational therapy (OT) evaluation report, an October 2023 teacher progress report, and parent input (Parent Ex. B at p. 1).

The November 2023 IESP reported that the student's full scale IQ was 101 (53rd percentile) as measured by the Wechsler Intelligence Scale for Children-Fifth Edition (WISC-V), which fell in the average range (Parent Ex. B at pp. 1, 2). The student's verbal comprehension and fluid reasoning skills were also in the average range (*id.* at p. 2).<sup>10</sup>

With regard to the academics, the IESP indicated that, as measured by the Wechsler Individual Achievement Test-Fourth Edition (WIAT-IV), the student's performance was in the average range on the reading, reading comprehension, word reading, pseudoword decoding and spelling subtests and in the low average range on the mathematics, math problem solving, and numerical operations subtests (Parent Ex. B at p. 2).

Speaking to the student's reading needs, the November 2023 IESP related that the student decoded "nonsense words by applying knowledge of letter-sound relationships in recognizing familiar words quickly and figuring out words she ha[d] [not] seen before," and demonstrated "average" ability to quickly read a set of words when timed (Parent Ex. B at p. 2). Although the student had "some difficulty decoding more complex words," reading appeared to be a strength for her (*id.* at p. 3). The November 2023 IESP noted that, according to the teacher progress report, the student made pronunciation errors when reading and had "weak" comprehension of written text (*id.*). The November 2023 IESP further noted that during the CSE meeting, the student's teacher reported that the student struggled to read and resisted trying to complete an assignment (*id.*).

The November 2023 IESP related that writing appeared to be a strength for the student as the student demonstrated average skills on the spelling subtest, spelling increasingly difficult words by understanding the context and spelling most one- and two-syllable words (Parent Ex. B at p. 3). The November 2023 IESP noted that, according to the teacher progress report, the student

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<sup>9</sup> While the district admitted at the hearing, "And there's really no dispute that the provider is appropriate for this student. So this comes do an issue of equities," out of an abundance of caution, I have conducted an independent analysis of the appropriateness of the services (Tr. p. 35).

<sup>10</sup> The student's IESP stated that the student exhibited verbal abilities "within the [l]ow [a]verage range" (standard score 89, 23rd percentile) and that the student performed in the average range on the verbal comprehension index of the WISC-V (composite score 103, 58th percentile) (*see* Parent Ex. B at pp. 1-2). Notably, the IESP indicated that the student performed in the "[e]xtremely [l]ow [r]ange on the visual spatial index of the WISC-V (Parent Ex. B at p. 1).

was a good writer, was creative, and was on grade level, but struggled with punctuation (id.). The November 2023 IESP further reflected that, according to the OT report, the student had difficulty expressing her thoughts in writing, and demonstrated challenges with punctuation, run-on sentences, and spelling errors, and her writing rate was "below the expected average for her grade level" (id.).

The November 2023 IESP additionally related that the student demonstrated "below average" skills in solving math calculations and math word problems (Parent Ex. B at p. 3). She was unable to solve simple multiplication problems or multidigit addition and subtraction problems and had difficulty answering questions related to problem-solving skills for basic concepts, everyday applications, geometry, and algebra (id.). The November 2023 IESP indicated that, according to a teacher progress report, the student was good at "mental math" but struggled to learn new concepts, especially word problems, and the student's teacher reported that the student needed repetition and extra time to acquire new information (id.). The November 2023 IESP also noted the parent's concerns regarding the student's "consistent resistance to doing reading and math" and related that the student had expressed that she did not understand what she read, which affected her ability to enjoy reading (id. at p. 4). According to the IESP, the student's mother reported the student needed extra help with math, had low confidence, and could be self-critical when she did not understand something on the first try (id.).

Turning to the student's social/emotional skills, the November 2023 IESP reported that, based on the Behavior Assessment System for Children-Third Edition (BASC-3) parent report, the student was in the "acceptable" range for somatization, externalizing, behavioral symptoms, and adaptive skills, and in the "at-risk" range for internalizing problems (anxiety, depression) (Parent Ex. B at p. 4). Based on teacher report, the student was in the "acceptable" range for externalizing problems, somatization, school problems, behavioral symptoms, and adaptive skills, in the "at-risk" range for internalizing problems and social skills, and in the "clinically significant" range for anxiety and depression (id.). The student "appear[ed] nervous and, at times, [could] be withdrawn" (id.). The student's teacher reported that, in the classroom, the student came across as "bossy" to her peers and pointed out their mistakes, which deterred any interest from other student's to be paired with her during classroom activities, and noted that she could tell that the student wanted to be liked but did not understand how to interact with others (id.). The November 2023 IESP also reported that, according to the OT evaluation report, the student demonstrated appropriate affect, indicating her understanding of social cues and emotional expression, and thereby her ability to engage and interact effectively during tasks (id. at p. 5). She consistently maintained good eye contact and respected personal space during the evaluation (id.). According to the parent, the student was "hypersensitive" to peers' comments and interpreted them negatively, was often self-conscious and worried what others would think of her, was afraid to try new things for fear of what others might say, and did not socialize comfortably (id.).

Finally, the November 2023 IESP noted that the student exhibited age-appropriate sensory processing skills, "commendable" fine motor control, and a high level of independence in self-care activities (Parent Ex. B at p. 6).

### 3. SETSS Provided By YIC

Turning to the appropriateness of the unilaterally obtained SETSS, the district argues that the student's June 2024 progress report "contain[ed] few specifics about how the [SETSS] addressed [the student's] needs." A review of the June 2024 progress report reveals that, while not robust, the progress report provided sufficient information regarding the specially designed instruction provided by YIC to address the student's identified needs (see Parent Ex. E).

In an affidavit dated June 20, 2024, the associate director of educational services for YIC (associate director) testified that the agency provided individual SETSS to the student for the 2023-24 school year beginning on December 18, 2023 (Parent Ex. G ¶¶ 24, 35, 36, 37). She further reported that the SETSS provider was certified by New York State to teach students with disabilities and was trained and experienced in teaching literacy and comprehension to school-aged children and adolescents (Parent Exs. F; G ¶ 38).<sup>11</sup>

The June 2024 progress report identified "common core goals" to "help the student achieve grade level," that were similar to the goals contained in the November 2023 IESP (compare Parent Ex. E at pp. 2-4, with Parent Ex. B at pp. 7-10). The reading and comprehension goals identified in the June 2024 progress report indicated that the student worked on decoding regularly spelled one-syllable words, reading grade-level text with purpose and understanding, asking and answering questions about key details in a text, and describing characters, settings, and major events in a story using key details (Parent Ex. E at pp. 1-2). These goals were similar to annual goals for identifying the main idea, supporting details, sequential order, and predicted outcomes, and reading aloud with accuracy and fluency using phonics and context cues to determine pronunciation and meaning identified in the November 2023 IESP (compare Parent Ex. E at pp. 1-2, with Parent Ex. B at pp. 7-8). The June 2024 progress report noted that the SETSS provider used the Read-Bright, Lively Letters, and Orton-Gillingham curriculums and phonemic awareness activities to address the student's reading needs, and "think alouds," metacognition, the "somebody-wanted-but-so" method, and graphic and semantic organizers to support the student's comprehension (Parent Ex. E at p. 2).

The June 2024 progress report also included math goals for using addition and subtraction within 20 to solve word problems, adding and subtracting within 20, and demonstrating fluency for addition and subtraction within 10 (Parent Ex. E at p. 3). These math goals were in line with the student's needs identified in the November 2023 IESP, which noted that the student was unable to solve multi-digit addition and subtraction problems and "struggle[d] to learn new concepts, especially word problems," and consistent with a November 2023 IESP goal for solving one-step word problems involving addition or subtraction within 100 (compare Parent Ex. E at p. 3, with Parent Ex. B at pp. 3, 8). While the June 2024 progress report did not identify any specific math curriculum used with the student, it reflected that the provider used visuals and manipulatives to address the student's math needs (Parent Ex. E at p. 3).

Social/emotional goals identified in the June 2024 progress report focused on building on conversations by responding to comments through multiple exchanges and asking and answering

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<sup>11</sup> The SETSS provider's New York State teaching certificate was for students with disabilities (birth-grade 2) (Parent Ex. F).

questions about key details in a text read aloud or information presented orally or through other media that were consistent with the student's social needs identified in the November 2023 IESP (compare Parent Ex. E at pp. 3-4, with Parent Ex. B at pp. 4-5). In addition, the social/emotional goals in the June 2024 progress report were similar to the goal for demonstrating improved social interaction skills included in the November 2023 IESP (compare Parent Ex. E at pp. 3-4, with Parent Ex. B at p. 9). The June 2024 progress report related that, to assist the student with these goals, the provider used a "[r]ed/[g]reen behavior system, the "Nurture Heart Approach," role playing, modeling, and "naturalistic environment teachings" (Parent Ex. E at pp. 3-4).

Finally, the June 2024 progress report included "language goals" for appropriate capitalization, and using common, proper, and possessive nouns (Parent Ex. E at p. 4). These goals addressed the student's difficulty with punctuation, run-on sentences, and spelling errors identified in the November 2023 IESP and were similar to an IESP goal (compare Parent Ex. E at p. 4, with Parent Ex. B at pp. 3, 8-9). The June 2024 progress report stated that the SETSS provider used "a systematic approach to teaching spelling patterns, games and workbooks from Super Duper Publications, and Language Builders curriculum to address the student's language goals" (Parent Ex. E at p. 4).

Based on the totality of the circumstances, the parent has established that the unilaterally obtained SETSS during the 2023-24 school year were appropriate.

### **C. Equitable Considerations**

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

As an initial matter, I note that the parent has not cross-appealed the IHO's determination that the \$200 per hour rate charged by YIC was excessive and that, therefore, a reduction to \$155 per hour was warranted. The district, however, argues that the IHO should have further reduced

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

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

Regarding the reasonableness of the \$200 hourly rate that YIC charged the parent, the IHO noted that the associate director testified that only \$100 of the \$200 per hour charge was paid to the individual service provider (IHO Decision at p. 7; see Tr. p. 32). The associate director testified that YIC arrived at the rate based on conversations with other agencies that provide similar services and that the portion of the rate above what the provider was paid was "used for programs that are used with the student and books and materials that are used with the student," as well as for "assessment programs," "the onsite supervisor and professional development [for] the special education teachers," and "overhead administrative costs" (Tr. pp. 32-33; Parent Ex. G ¶¶ 33-34). In terms of programs used with the student, the associate director indicated the agency specifically purchased a "writing grammar program" that was "consumable" and, therefore, not able to be re-used with other students (Tr. pp. 33-34).

In considering the reasonableness of the rate charged by YIC, the IHO declined to rely on the October 2023 final report from a study conducted by the American Institutes for Research (AIR report), which the district offered into evidence, but noted that the \$100 per hour rate paid directly to the provider was within the range identified in the report (IHO Decision at p. 7; see Dist. Ex. 4). Instead, the IHO cited reimbursement rates set by the State Education Department for providers operating school-age State-approved nonpublic schools, special act schools, or Board of Cooperative Educational Services (BOCES) programs to be funded by public tuition funding sources, which limits reimbursable nondirect costs to 35 percent of the reimbursable direct costs after adjustments (IHO Decision at p. 7).<sup>12</sup> Based on this source, the IHO awarded SETSS at an hourly rate of \$155 (id.).

The district does not challenge the base rate of \$100 paid to the provider and, therefore, the only issue is the reasonable percentage of nondirect costs. In addition, the IHO's reliance on the State Education Department's memorandum is not directly challenged, although the district argues that the IHO should have relied on a 27.7 percent cap on nondirect costs derived from U.S. Bureau

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<sup>12</sup> In terms of process, the IHO's approach of taking notice of the SED memorandum might have worked better had he discussed it with the parties and allowed them an opportunity to be heard. In his decision, the IHO provided a link to the website to access the memorandum (see IHO Decision at p. 7, n.2; "Tuition Setting Methodology for 2023-24 Rates for School-Age Providers Serving Students with Disabilities," Rate Setting Unit Mem. [June 2023], available at [https://www.oms.nysed.gov/rsu/Rates\\_Methodology/MethodLetters/documents/2023-24%20School-Age%20Methodology%20MemoFINAL.pdf](https://www.oms.nysed.gov/rsu/Rates_Methodology/MethodLetters/documents/2023-24%20School-Age%20Methodology%20MemoFINAL.pdf)).



of Labor Statistics data appearing in the AIR report analysis (see Dist. Ex. 4). While the district's proposal may be sound, I note that, during the impartial hearing, the district did not explain to the IHO the calculation sought or point to the 27.7 percent figure cited on appeal. Instead, during the impartial hearing, the district argued that the rate should be limited to the \$100 per hour paid directly to the provider without any nondirect costs included and without citing the AIR report or the U.S. Bureau of Labor Statistics data or explaining to the IHO how it believed such sources should be relied upon to determine a reasonable rate (see Tr. p. 37). As the parent's attorney noted during closing argument, the AIR report in evidence included a "wide range of rates" and the district did not argue which rate should apply (see Tr. pp. 39-40; see also Dist. Ex. 4). Given the discretion afforded an IHO in weighing equitable consideration, and given that the district did not identify during the impartial hearing what percentage cap on nondirect costs it believed should apply, I find insufficient basis to disturb the IHO's reduction of the rate to be funded by the district to an hourly rate of \$155.

## **VII. Conclusion**

The IHO correctly denied the district's motion to dismiss the due process complaint notice based on a lack of subject matter jurisdiction. In addition, the evidence in the hearing record supports a finding that the parent met her burden to prove that the unilaterally obtained SETSS delivered to the student by YIC during the 2023-24 school year were appropriate, and equitable considerations do not warrant further reduction of the hourly rate for SETSS from YIC beyond the \$155 per hour ordered by the IHO.

**THE APPEAL IS DISMISSED.**

**Dated: Albany, New York  
November 8, 2024**

**SARAH L. HARRINGTON**  
**STATE REVIEW OFFICER**