



The University of the State of New York

The State Education Department

State Review Officer

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No. 24-568

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

Appearances:

Liz Vladeck, General Counsel, attorneys for respondent, by Ezra Zonana, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from a decision of an impartial hearing officer (IHO) which denied her request that respondent (the district) fund the costs of her son's private services delivered by EDopt, LLC (EDopt) and Premier Therapy Solutions LLC (Premier) for the 2023-24 and 2024-25 school years. The district cross-appeals, raising equitable considerations. The appeal must be sustained in part. The cross-appeal must be sustained in part.

II. Overview—Administrative Procedures

When a student who resides in New York is eligible for special education services and attends a nonpublic school, Article 73 of the New York State Education Law allows for the creation of an individualized education services program (IESP) under the State's so-called "dual enrollment" statute (see Educ. Law § 3602-c). The task of creating an IESP is assigned to the same committee that designs educational 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

During the 2021-22 school year the student attended a nonpublic pre-kindergarten program and received special education itinerant teacher (SEIT) services, speech-language therapy, and occupational therapy (OT) due to cognitive, communication, and motor deficits (Parent Ex. B at

p. 1). A CSE convened on April 13, 2022, determined the student was eligible for school-age special education as a student with a speech or language impairment, and developed an IESP for the 2022-23 school year (id.).¹ The April 2022 CSE recommended that the student receive seven periods per week of group special education teacher support services (SETSS), two 30-minute sessions per week of individual speech-language therapy, and two 30-minute sessions per week of individual OT (id. at p. 9).² The hearing record does not contain any later IESP (see Parent Exs. A-Q; Dist. Exs. 1-4; IHO Exs. I-VI).

The parent's representative emailed the district a letter dated May 9, 2023, notifying the district that the parent intended to place the student in a nonpublic school for the 2023-24 school year and requested that the district provide special education services to the student (Parent Ex. E). On July 26, 2023, the parent signed a contract with EDopt for the provision of special education and related services for the 2023-24 school year (see Parent Ex. C). On August 23, 2023, the parent's representative submitted a letter to the district on the parent's behalf, which requested that the district "fulfill" the student's special education services mandate and informed the district that if it "failed to assign a provider, the parent w[ould] be compelled to unilaterally obtain the mandated services through a private agency at an enhanced market rate" (Parent Ex. D).

The student attended a nonpublic school for the 2023-24 school year (first grade) and EDopt began delivering SETSS to the student on September 11, 2023, and speech-language therapy to the student on October 12, 2023 (Parent Exs. G at p. 1; F ¶¶ 2, 3; I at p. 1). On October 10, 2023, the parent signed a contract with Premier for the provision of OT services (Parent Ex. P).

A. Due Process Complaint Notice

In a due process complaint notice dated July 15, 2024, the parent alleged that the district denied the student a free appropriate public education (FAPE) for the 2023-24 and 2024-25 school years (see Parent Ex. A). The parent asserted that the district failed to provide the student with a provider for the 2023-24 school year and that the parent was therefore obligated to procure a provider at enhanced rates (id. at p. 2). The parent argued the district denied the student a FAPE for the 2024-25 by not convening the CSE to conduct an annual review and create an updated IESP for the 2024-25 school year (id.). As relief, the parent requested funding for private SETSS,

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

² The term SETSS is not defined in the State continuum of special education services (see NYCRR 200.6), and the manner in which those services are treated in a particular case is often in the eye of the beholder. 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, and unless the parties and the hearing officer take the time to develop a record on the topic in each proceeding it becomes problematic (see Application of the Dep't of Educ., Appeal No. 20-125). For example, SETSS has been described in a prior proceeding as "a flexible hybrid service combining Consultant Teacher and Resource Room Service" that was instituted under a temporary innovative program waiver to support a student "in the general education classroom" (Application of a Student with a Disability, Appeal No. 16-056), and in another proceeding it was suggested that SETSS was more of an a la carte service that is completely disconnected from supporting the student in a general education classroom setting (Application of a Student with a Disability, Appeal No. 19-047).

speech-language therapy, and OT services at enhanced rates for the 2023-24 school year (id. at p. 3). For the 2024-25 school year, the parent requested an order that the district "provide" the student with services and supports set forth in the last plan developed for the student "at enhanced provider rates, to ensure the that the parent has the capacity to implement the ordered services" (id.).

B. Impartial Hearing Officer Decision

An impartial hearing convened before the Office of Administrative Trials and Hearings (OATH) on October 1, 2024 and concluded the same day (Tr. pp. 1-55). In a decision dated October 17, 2024, the IHO found that, for the 2023-24 school year, the district failed to provide the student with services mandated in the student's IESP but the parent failed to meet her burden to prove that EDopt and Premier provided an appropriate educational program to meet the student's unique needs and the equities did not weigh in favor of the parent's requested relief (IHO Decision at pp. 5-8). The IHO found that, for the 2024-25 school year, the parent failed to provide any proof that she had sent the district a written request for dual enrollment services by June 1 and therefore the parent was not entitled to equitable relief for the 2024-25 school year (id. at p. 11). The IHO further found that, had the student been entitled to equitable services for the 2024-25 school year, the parent failed to meet her burden to prove that special education and related services provided by EDopt and Premier were appropriate to meet the student's unique needs and that the equities do not favor the parent (id. at pp. 11-12).

IV. Appeal for State-Level Review

The parties' familiarity with the particular issues for review on appeal in the parent's request for review is presumed and, therefore, the allegations and arguments will not be recited in detail; however, some further discussion is needed regarding both parties' compliance with the practice regulations governing appeals before the Office of State Review.

The parent appeals, alleging that the IHO erred by holding the parent to a higher burden of proof than was proper regarding the appropriateness of EDopt and Premier in their provision of special education and related services. The parent argues that the hearing record establishes that special education and related services provided by EDopt and Premier were appropriate to meet the student's unique needs. The parent further argues that the equities favor the parent.

In an answer and cross-appeal, the district denies the material allegations contained in the request for review, asserts that the IHO's decision should be upheld in its entirety, and argues that, as an additional equitable consideration in the event the unilaterally obtained services are deemed appropriate, the rates charged by the private providers should be reduced based on the American Institutes for Research rate report (AIR report). The district also notes that the parent failed to challenge the IHO's decision denying the parent's claims for the 2024-25 school year and that that determination has become final and binding.

In a reply and answer to the cross-appeal, the parent argues that the district should be ordered to fund the student's SETSS, speech-language therapy and OT at the enhanced rates charged by EDOpt and Premier as contracted by the parent.^{3, 4}

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]).⁵ "Boards of education of all school districts of the state shall furnish services to students who are residents of this state and who attend nonpublic schools located in such school districts, upon the written request of the parent" (Educ. Law § 3602-c[2][a]). In such circumstances, the district of location's CSE must review the request for services and "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an [IEP]" (Educ. Law § 3602-c[2][b][1]). The CSE must "assure that special education programs and services are made available to students with disabilities attending nonpublic schools located within the school district on an equitable basis, as compared to special education programs and services provided to other students with disabilities attending public or nonpublic schools located within the school district (id.).⁶ Thus, under State law an eligible New

³ In an apparent typographical error, the reply is dated January 6, 2024; however, the parent's affidavit of verification is dated January 7, 2025.

⁴ Neither the request for review nor the reply conform to practice regulations governing appeals before the Office of State Review. The lay advocate "signed" the request for review. This is not permitted under State regulation which requires that "[a]ll pleadings shall be signed by an attorney, or by a party if the party is not represented by an attorney" (8 NYCRR 279.8[a][4]). While I decline to exercise my discretion to reject and dismiss the request for review or reply in this instance, the lay advocate is cautioned that failure to comply with the practice requirements of Part 279 of State regulations in future matters is far more likely to result in rejection of submitted documents (see 8 NYCRR 279.8[a]).

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

⁶ State guidance explains that providing services on an "equitable basis" means that "special education services are provided to parentally placed nonpublic school students with disabilities in the same manner as compared to

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

As an initial matter, neither party has appealed the IHO's determinations that the district failed to provide the student with a FAPE for the 2023-24 and 2024-25 school years or the IHO's denial of the parent's requested relief relating to the 2024-25 school year. These unappealed determinations have, therefore, become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992 (S.D.N.Y. March 21, 2013).

A. Legal Framework for the 2023-24 School Year

In this matter, the student has been parentally placed in a nonpublic school and the parents do not seek tuition reimbursement from the district for the cost of the student's placement in the nonpublic school. Instead, the parents alleged that the district failed to implement the student's mandated public special education services under the State's dual enrollment statute for the 2023-24 school year and, as a self-help remedy, they unilaterally obtained private SETSS and speech-language services from EDopt and OT services from Premier 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 parents are 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

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.

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 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]).⁷ In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

Turning to a review of the appropriateness of the unilaterally obtained services, the federal standard is instructive. A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998]). Citing the Rowley standard, the Supreme Court has explained that "when a public school system has defaulted on its obligations under the Act, a private school placement is 'proper under the Act' if the education provided by the private school is 'reasonably calculated to enable the child to receive educational benefits'" (Carter, 510 U.S. at 11; see Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 203-04 [1982]; Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see also Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] ["evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (id. at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool

⁷ State law provides that the parent has the obligation to establish that a unilateral placement is appropriate, which in this case is the special education services that the parent obtained from EDopt and Premier (Educ. Law § 4404[1][c]).

[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).

B. Unilaterally Obtained Services

1. Student's Needs

In finding the parent did not meet her burden to prove that the unilaterally obtained services were appropriate, the IHO reasoned, among other things, that "[t]he lack of evaluative data" about the student "rendered the contents of the Progress Report as unpersuasive," noting that the progress report contained "virtually no information regarding [the] Student's academic levels at the start or end of the year" (IHO Decision at p. 6). However, according to the available caselaw in this jurisdiction, it was not the parent's responsibility to evaluate the student and identify his needs if there are gaps in the record and the parent is seeking the costs of unilaterally obtained private services without the consent of school district officials (see A.D. v. Bd. of Educ. of City Sch. Dist. of City of New York, 690 F. Supp. 2d 193, 208 [S.D.N.Y. 2010] [finding that a unilateral placement was appropriate even where the private school reports were alleged by the district to be incomplete or inaccurate and finding that the fault for such inaccuracy or incomplete assessment

of the student's needs lies with the district]). Accordingly, the lack of data about the student must be held against the district, not the parent.

Moreover, the hearing record contains evidence of the student's needs as described in the April 2022 IESP which are not in dispute, and a review thereof provides context to determine whether the SETSS and speech-language services unilaterally obtained from EDopt and the OT services unilaterally obtained from Premier for the student by the parent were appropriate to address those needs.

At the time of the April 13, 2022 initial CSE meeting, the student was attending a nonpublic pre-kindergarten program and undergoing an evaluation as part of the mandated turning five process (Parent Ex. B at p. 1). The student was receiving five 60-minute sessions per week of SEIT services, two 30-minute sessions per week of speech-language therapy, and two 30-minute sessions per week of OT, all on an individual basis (id.).

According to the April 2022 IESP, the student exhibited cognitive, communication, and motor deficits, which needed to be addressed in order for him to participate in educational activities and function age appropriately in school and social settings (Parent Ex. B at p. 1). The student's cognitive delays included difficulty expressively labeling shapes, identifying body parts, counting, and completing tasks involving directional and positional concepts (id. at p. 2). Academically, the student "only" counted to five by rote, had difficulty identifying numbers, and did not complete tasks involving 1:1 correspondence past two, recognize letters that he had been taught, or write his name (id. at pp. 2, 3). Regarding communication skills, the student exhibited deficits in receptive language, expressive language, articulation, oral motor skills, social pragmatics, and communication (id. at p. 1). The student needed to develop skills in comprehending time and sequence concepts, compound sentences, and location words (id. at p. 2). He also had difficulty manipulating sounds, discriminating between sounds and words, and expressing himself in whole, grammatically correct sentences (id.).

In the area of social development, the April 2023 IESP indicated that the student was friendly, engaged in pretend play, shared, and followed classroom rules (Parent Ex. B at p. 3). He was shy and soft spoken but well-liked by peers and teachers (id.). He needed to improve his ability to interrupt appropriately, demonstrate and share feelings appropriately, keep 'on track' when communicating with others, provide relevant answers to questions, and repair listener misunderstandings (id.).

The student exhibited delays in fine motor skills, attention span, and sensory processing, impacting his participation in educational activities and age appropriate functioning (Parent Ex. B at p. 4). He struggled with maintaining finger stability, performing strength, endurance, and motor control activities, and staying on task (id.). Concerns from his parents and teachers focused on the student's motor skills, attention, and sensory processing (id.). The CSE identified strategies to support the student's classroom management needs including a multisensory approach, repetition, prompts, cues, and positive reinforcement (id.).

With respect to the student's needs during the 2023-24 school year at issue, progress reports from the private providers describe to some extent the student's functioning (see Parent Exs. G; N; O); however, to the IHO's point, it is difficult to discern whether the statements in the reports

describe the student as of the beginning of the 2023-24 school year, before the delivery of the private services, or at the end of the school year.

For example, in an EDopt SETSS progress report dated "School Semester 2023-2024," the student was reported to be functioning at a kindergarten level in reading, and at a "level C," which was below the expected "G/H" level for first graders (Parent Ex. G at p. 1). The report stated that the student continued to struggle with decoding vowel sounds, and, although he recognized some sight words, his vocabulary was limited, which further affected his comprehension skills (id.). Specifically, the report indicated the student had difficulty sounding out CVC words, decoding unfamiliar words, and answering "wh" questions (id.). The report further indicated that the student's speech and language impairments, particularly his difficulties with articulation and phonemic awareness, significantly impacted his reading skills (id.).

The SETSS report also indicated that the student faced significant challenges in writing, characterized by difficulty expressing his thoughts on paper due to limited vocabulary and struggles with basic sentence formation, which were compounded by poor fine motor skills (Parent Ex. G at p. 2). The report stated that student's work was often marred by errors in capitalization, punctuation, and grammar, he required constant reminders to use correct mechanics, and his handwriting was often illegible due to poor letter formation and spacing (id.). The SETSS provider also reported that the student's fine motor coordination skills made writing physically challenging (id.).

In math, the SETSS provider reported that the student was functioning at a kindergarten level, struggled with basic addition and subtraction concepts, and had difficulty recognizing mathematical symbols and applying problem solving strategies independently (Parent Ex. G at pp. 1, 2). According to the report, the student required substantial support to understand math problems and needed repetition of instructions (id. at p. 2).

According to a June 2024 speech-language therapy progress report, the student exhibited receptive language deficits including difficulty with age appropriate vocabulary, following complex directives, and answering questions involving temporal, quantitative, and sequential concepts (Parent Ex. N at p. 1). Expressively, the student's syntax and semantics were limited, he did not use prepositional phrases, compound sentences, or correct syntactical markers (id.). The student's articulation errors affected his speech intelligibility (id.). Additionally, the student's phonemic awareness was poor, impacting his reading comprehension and decoding skills (id.). The student often displayed defiant behavior, requiring firm limits during sessions (id.).

According to the May 2024 OT progress report, the student exhibited delays in visual perceptual skills, sensory processing, organization skills, spatial awareness, and sustaining attention (Parent Ex. O at p. 1). The student exhibited poor sitting posture, low muscle tone, and poor spatial awareness, often bumping into objects (id.). He was easily distracted by environmental stimuli and peers, affecting his focus and task completion (id.). The student was able to follow simple two-step directions but needed prompting for more complex tasks (id.). He became frustrated with challenging tasks and was "very self-directed" (id. at pp. 1-2).

While it is unclear whether the progress reports described the student's needs as of the beginning of the school year or the end, the district was responsible for the lack of evidence of

assessment information and functioning in terms of his skills and deficits. If the progress reports describe the student's needs prior to the delivery of services, the descriptions tend to align with the instruction described below. On the other hand, if they describe the student's needs at the end of the school year, they might have been relevant to assess the student's progress.⁸ Either way, under the scant case law on the topic in this jurisdiction, the IHO erred in placing the blame on the parent for the lack of clarity regarding the student's needs.

2. Specially Designed Instruction

The IHO determined that part of the reason the parent failed to meet her burden to show that the unilaterally obtained services were appropriate was because the parent did not testify, nor did any of the student's special education or related service providers (IHO Decision at p. 6). I agree with the IHO that the testimony presented during the impartial hearing from the administrator from EDOpt and the partner from Premier did not offer any detail regarding the services provided to the student during the 2023-24 school year (see Tr. pp. 22-39; Parent Exs. I; Q). I also agree that testimony from the parent and/or the student's providers could have offered useful and pertinent details about the student's services. However, as detailed below, in this instance, the documentary evidence in the hearing record provides the detail required. Moreover, to the extent the IHO expected the parent or providers to testify, the best practice would have been to state such an expectation at the outset or prior to the impartial hearing. The IHO was authorized to issue a subpoena for this purpose if necessary (8 NYCRR 200.5[j][3][iv]).⁹ In the event that the parent or provider(s) then refused to appear to testify in the face of a subpoena, the IHO would be on firmer ground in holding it against the parent.

While the testimony presented in this matter did not detail the instruction or services provided to the student, the administrator from EDOpt did testify that the company provided services to the student during the 2023-24 school year and named two providers, one for SETSS and one for speech-language therapy, and indicated that they were "certified as special education teachers" (Tr. p. 23; Parent Ex. F ¶ 2).¹⁰ Similarly, the partner from Premier testified that the

⁸ It is well settled that a finding of progress is not required for a determination that a student's unilateral placement is adequate (*Scarsdale Union Free Sch. Dist. v. R.C.*, 2013 WL 563377, at *9-*10 [S.D.N.Y. Feb. 4, 2013] [noting that evidence of academic progress is not dispositive in determining whether a unilateral placement is appropriate]; see *M.B. v. Minisink Valley Cent. Sch. Dist.*, 523 Fed. App'x 76, 78 [2d Cir. Mar. 29, 2013]; *D.D-S. v. Southold Union Free Sch. Dist.*, 506 Fed. App'x 80, 81 [2d Cir. Dec. 26, 2012]; *L.K. v. Ne. Sch. Dist.*, 932 F. Supp. 2d 467, 486-87 [S.D.N.Y. 2013]; *C.L. v. Scarsdale Union Free Sch. Dist.*, 913 F. Supp. 2d 26, 34, 39 [S.D.N.Y. 2012]; *G.R. v. New York City Dep't of Educ.*, 2009 WL 2432369, at *3 [S.D.N.Y. Aug. 7, 2009]; *Omidian v. Bd. of Educ. of New Hartford Cent. Sch. Dist.*, 2009 WL 904077, at *22-*23 [N.D.N.Y. Mar. 31, 2009]; see also *Frank G.*, 459 F.3d at 364). However, while not dispositive, a finding of progress is, nevertheless, a relevant factor to be considered in determining whether a unilateral placement is appropriate (*Gagliardo*, 489 F.3d at 115, citing *Berger*, 348 F.3d at 522 and *Rafferty v. Cranston Public Sch. Comm.*, 315 F.3d 21, 26-27 [1st Cir. 2002]).

⁹ In its response to the due process complaint notice, the district requested that the parent be ordered to appear at the next appearance in the matter (Response to Due Process Compl. Not. at p. 2), but there is no indication that the district pursued this request or attempted to subpoena the parent's testimony.

¹⁰ The IHO found that, while the EDOpt administrator "claimed" that the SETSS provider was New York State "certified as a special education teacher," there was "no testimony from [the] SETSS provider . . . to confirm this

company provided the student two 30-minute sessions per week of OT for the 2023-24 school year and named the occupational therapist who was providing the services to the student (Parent Ex. Q ¶ 4).¹¹ The partner testified that OT services were provided in the student's private school (Tr. p. 37). Time sheets included in the hearing record signed by the same providers named by the administrator list dates and times of sessions of SETSS and speech-language therapy delivered to the student during the 2023-24 school year and specify whether the services was delivered individually or in a group (Parent Exs. H-I). According to the timesheets, the company provided the student with SETSS between September 11, 2023, and June 10, 2024, during school hours at varied frequencies and durations but, generally, up to seven hours per week, initially as individual sessions, and later in the school year as a mix of individual and group sessions (Parent Ex. H). Between October 12, 2023 and May 30, 2024, the company provided 30-minute sessions of individual speech-language therapy during school hours at varied frequencies, but generally up to two sessions per week (Parent Ex. I).¹²

In the 2023-24 EDOpt SETSS progress report, the SETSS provider reported that the student's academic and cognitive development "deficits and delays [were] evident" and that he was mandated to receive seven periods per week of SETSS as well as twice weekly OT and speech-language therapy (Parent Ex. G at p. 1). According to the report, the student's educational services were "specially designed" to address his academic and cognitive needs through activities and strategies that were intended to remediate the student's deficits and support him in making progress towards age appropriate goals and objectives (id.).

The EDOpt SETSS report indicated that the services were designed to address the student's deficits in cognitive, communication, and motor skills that impacted his academic and social development (Parent Ex. G at p. 1). According to the report, the student's speech impairment, his difficulty following instructions, and tendency to become easily distracted hindered his ability to fully participate in educational activities (id.). The SETSS provider reported that the student had been making gradual progress but still faced significant challenges (id.). The student's services focused on improving his language processing, attention, and motor skills, ensuring that he could make meaningful progress towards his academic goals (id.).

To address the student's needs described above, SETSS sessions focused on building phonemic awareness through structured drills and phonics-based activities (Parent Ex. G at p. 2). The student practiced reading simple words, sounding out vowels, and using visual aids to

allegation or to establish [the] SETSS provider's education, training, or work experience," nor did the parent otherwise "submit documentary proof of the claimed [New York State] certification" (Parent Ex. F ¶ 4; IHO Decision at p. 4). However, review of the hearing record does not reflect evidence that contradicts the EDOpt administrator's testimony regarding the SETSS provider's certification, and, in any event, generally, privately-obtained special education services need not be delivered by teachers who are State-certified (Carter, 510 U.S. 7, 14 [noting that unilateral placements need not meet state standards such as state certification for teachers]).

¹¹ The affidavit of the partner from Premier was sworn before a notary public on February 5, 2024, before the end of the 2023-24 school year and, therefore, states that company "had the capacity to continue providing the[] services for the entire school year" (Parent Ex. Q ¶ 7).

¹² There is no explanation in the hearing record regarding why speech-language therapy sessions did not continue after the end of the May 2024.

associate sounds with letters (id.). The SETSS provider reported that despite these interventions, the student's progress remained slow, and consistent reinforcement was necessary to prevent regression (id.). According to the SETSS report, the use of multisensory strategies, such as picture-based story sequencing and repetition, helped the student improve gradually, but without ongoing support, his skills could regress (id.). Additionally, the student was reported to struggle with attention during reading sessions and often became frustrated, especially when faced with challenging tasks (id.).

To address the student's writing needs, the SETSS report indicated that interventions targeted sentence construction, wherein the student practiced writing simple sentence with visual prompts, verbal support, and sentence starters to improve his subject-verb agreement and proper punctuation (Parent Ex. G at p. 2). The student had demonstrated "some improvements," but he was sensitive to frustration when he could not express his ideas clearly, and the SETSS provider opined without "continuous 1:1 support," the student's writing "may regress" (id.).

During his 1:1 math sessions, the student practiced addition and subtraction with manipulatives and visual models, he responded well to hands on activities such as using counters, and practiced using math symbols (Parent Ex. G at p. 2). The SETSS provider reported that without ongoing support and individualized interventions, the student may struggle to keep pace with his peers (id.).

The SETSS report reflected that the student benefitted from a multisensory learning approach, relied "heavily" on visual cues, hands-on activities, and repetition to stay focused and retain information during his instruction (Parent Ex. G at p. 2). Additionally, the SETSS provider indicated that the student required constant redirection and prompting, learned best when tasks were broken down into smaller, manageable steps, and when he was provided with clear and explicit instructions, 1:1 individualized attention and reinforcement, and tactile supports (id. at pp. 2-4).

The SETSS provider recommended that the student continue to receive SETSS, speech-language therapy, and OT, with a focus on individualized instruction and positive reinforcement (Parent Ex. G at pp. 3-4).¹³

Turning to the unilaterally obtained speech-language therapy, according to the June 2024 speech-language therapy progress report, the student received two 30-minute sessions per week in English (Parent Ex. N at p. 1).¹⁴ The student's then-current annual goals included improving the production of identified, specific sounds in all positions of words in spontaneous speech, vocabulary comprehension, and phonemic awareness, with varying levels of assistance required

¹³ The report set forth specific goals for the student for the next school year, which included improving vowel sound recognition, sight word recognition, comprehension skills, sentence construction, handwriting, and math problem-solving skills (Parent Ex. G at p. 4).

¹⁴ The June 15, 2024 speech-language progress report letterhead reflects a company called Strivright (see Parent Ex. N). When questioned, the parent's attorney clarified that Strivright is "a staffing company, so EDOpt does oversee them" and that, when EDOpt doesn't "have enough providers, EDOpt does hire out . . . [and] use Strivright" (Tr. p. 47).

for progress (*id.* at pp. 1-2). The progress report noted improvement in the student's phonemic awareness and vocabulary use, although his syntax and vocabulary remained below grade level (*id.* at p. 2).

The speech-language therapy progress report reflected that the provider used various strategies, including structured language intervention and rewards, were used to engage the student and address his needs in the area of speech-language therapy (Parent Ex. N at p. 2). Traditional drill therapy and minimal contrasting pairs were used to improve the student's speech sound production (*id.*). In order to facilitate reading comprehension, information was broken down using story maps and implementing "the Rap strategy" that utilized a paraphrasing technique (*id.*). Using rewards such as playing a game of his choice during the session helped keep the student focused and engaged (*id.*). Recommendations included continued individual therapy sessions twice per week for 30 minutes to address the student's speech and language deficits (*id.*).¹⁵

A May 2024 OT progress report indicated that the student was receiving two 30-minute sessions per week of individual OT from Premier (Parent Ex. O at p. 1; *see* Parent Ex. Q ¶ 3). The occupational therapist reported that improvements were noted in the student's ability to write with minimal verbal cues, but that he still struggled with letter spacing and formation (Parent Ex. O at p. 1). The student used a four-finger grasp and needed prompts to use a static tripod grasp (*id.*). According to the report, the student also required assistance when completing visual perceptual tasks and moderate verbal prompts to form letters correctly, and write with appropriate letter spacing and sizing (*id.*). The occupational therapist reported that the student required moderate verbal cues for proper sitting posture and hand stabilization when writing and completing fine motor tasks (*id.*). The occupational therapist recommended that the student continue to receive two 30-minute sessions per week of individual OT services (*id.*).¹⁶

While the foregoing evidence could not be described as robust, taking into account the totality of the circumstances, the hearing record reflects that the parent met her burden to prove that the SETSS and speech-language therapy delivered by EDopt and the OT delivered by Premier provided the student with specially designed instruction to address his unique needs.

C. Equitable Considerations

The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; *see* Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be

¹⁵ The student's new annual goals focused on improving his sound production, expressive and receptive language skills, vocabulary comprehension, and phonological awareness, with progress measured quarterly (Parent Ex. N at pp. 2-3).

¹⁶ To address the student's difficulties, new annual goals for the student included improving his ability to attend to and complete activities with three-step directions, attend to "tabletop" tasks with minimal prompts, and write sentences with proper spacing and letter formation (Parent Ex. O at p. 2).

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"])).

The IHO indicated that, had he found that the parent met her burden to prove that the unilaterally obtained services were appropriate for the 2023-24 school year, equitable considerations would have warranted a "complete denial of an award or a reduction of the requested fees to the lowest rate set by the [district]" (IHO Decision at p. 8). The IHO did not detail the factors he weighed in reaching this conclusion for the 2023-24 school year (id.). However, there is no indication in the hearing record that the parent failed to cooperate with the district and, as the parent argues, she provided required notices to the district prior to the beginning of the 2023-24 school year (see Parent Exs. D; E).^{17, 18}

However, the district argues that the AIR report provides justification for reducing the rates requested by the parent. 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

¹⁷ The IHO made more detail findings related to equitable considerations relating to the 2024-25 school year, which is not at issue on appeal (see IHO Decision at p. 12). With respect to those findings, the district concedes in its answer that the IHO conflated factors relevant to weighing the appropriateness of the unilaterally obtained services and equitable factors. As the Second Circuit Court of Appeals has recently held, it is error for an IHO to apply the Burlington/Carter test by conducting reimbursement calculations that are based on the IHO's analysis of the appropriateness of the unilateral placement (A.P. v. New York City Dep't of Educ., 2024 WL 763386 at *2 [2d Cir. Feb. 26, 2024] [holding that the IHO should have determined only whether the unilateral placement was appropriate or not rather than holding that the parent was entitled to recover 3/8ths of the tuition costs because three hours of instruction were provided in an eight hours day]). The Court further reasoned that "once parents pass the first two prongs of the Burlington-Carter test, the Supreme Court's language in Forest Grove, stating that the court retains discretion to 'reduce the amount of a reimbursement award if the equities so warrant,' suggests a presumption of a full reimbursement award" (A.P., 2024 WL 763386 at *2 quoting Forest Grove Sch. Dist., 557 U.S. at 246-47).

¹⁸ The district argues that the parent's notice of her intent to unilaterally obtain private services was provided to the district after the parent entered into the contract with EDopt; however, it is the date of the student's removal from the district program that is controlling—the corollary here being the date that the student received private services to the exclusion of publicly provided services—rather than the contract date (see Reg'l Sch. Unit 51 v. Doe, 920 F. Supp. 2d 168, 210-12 [D. Me. 2013]; Sarah M. v. Weast, 111 F. Supp. 2d 695, 701-02 [D. Md. 2000]; see also Landsman v. Banks, 2024 WL 3605970, at *3 [S.D.N.Y. July 31, 2024] [in discussing timing of a 10 day notice, referring to the date of enrollment as the date the student began attending the unilateral placement separate from the date the contract was signed]; A.D. v. Creative Minds Int'l Pub. Charter Sch., 2020 WL 6373329, at *6-*7 [D.D.C. Sept. 28, 2020]).

(see E.M. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014] [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).

During the impartial hearing, the financial manager testified that EDOpt pays the SETSS provider between \$85 and \$95 per hour for individual services (Tr. pp. 20, 23). There was no testimony regarding what the SETSS provider was paid hourly for group services, despite there being evidence in the hearing record that SETSS were provided both individually and in group (Parent Ex. H). Further, the district did not elicit testimony regarding what the speech-language therapy provider was paid. When questioned why EDOpt charged \$195 per hour for individual SETSS but only paid the SETSS provider between \$85 and \$95 an hour, the financial manager testified that "if you're asking regarding the difference between the 85 and the 95, that is specific to each employee, which I don't have the information for this specific employee for" (Tr. pp. 23-24). When questioned about the \$195 per hour charged for individual services and the \$145 per hour charged for group services, the financial advisor testified that "the rates . . . are determined based on the cost that the company incurs to provide these services," which included "the lease, the insurance, the softwares, the books, the audit process, and so on and so forth" (Tr. p. 24). When questioned about the information in his affidavit regarding EDOpt's "survey of private special education and related service agencies in NYC, revealing that market rates for such services range between \$195 and \$215 per hour" the financial manager clarified that EDOpt "didn't determine our rates based on what the market is charging. We determine our rates internally. This survey is to give us the rubber stamp that we didn't miss anything" (Tr. p. 27; Parent Ex. F ¶ 9). In his affidavit, the financial manager further explained that "[a] significant portion of" the rates EDOpt charges for SETSS and speech-language services "is dedicated to the robust supervision provided by our team of Special Education Supervisors, who oversee the planning, execution, and quality of educational programs" (Parent Ex. F ¶ 7). The financial manager noted that "[s]ince the NYC DOE did not fund any of the services for this student, we have been compelled to take out loans at high interest rates to cover the costs of our providers and other fixed expenses" (id. ¶ 6).

A partner from Premier testified about the OT services provided to the student (Tr. pp. 29-40; Parent Ex. Q). He explained that the "company started around 18 months ago" and that his "role in the company is overseeing finance and operations" (Tr. pp. 31, 34). The partner verified that Premier's OT rate was \$300 per hour and that the rate was "determined at the beginning of the school year as a market rate that we were going to charge" (Tr. p. 36). The partner stated that Premier's "internal decision" to set the rates at \$300 "was based on what we need to pay a provider or overhead costs, borrowing costs associated with paying our therapist for . . . a time lag of getting paid for services" and also included Premier's "billing system" (Tr. pp. 36-37). The partner testified that the company paid the provider \$140 out of the \$300 charged (Tr. p. 37).

The district's attorney argued during closing statements that the rates charged by Premier were excessive (Tr. pp. 51). In its answer, the district argues that "[b]ased on the AIR study, the inflation-adjusted hourly rate in the NYC metro area for SETSS services provided to elementary school students is between \$71.51 and \$150.55 per hour" and asserts that "the study provides a

basis for awarding the Parent a rate of \$125 per hour for SETSS, reduced from the Parent's requested rate of \$195 per hour" (Answer & Cr.-App. ¶ 8).

With respect to fashioning appropriate equitable relief and its relevancy, I find that the AIR report and the district's arguments offer some basis to conclude that the SETSS rates charged by EDOpt are excessive, but not all of the AIR report and its methodologies are strictly applicable to a parent's decision to unilaterally obtain private special education services from a private company like EDOpt. First, 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 AIR Report 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.¹⁹ It was not inappropriate for the AIR to use such government-published data in its report. 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).²⁰ 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)" (Dist. Ex. 1 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.

¹⁹ 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 preceded the 2023-24 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.

²⁰ 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. 4 at p. 2).

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.²¹

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).²²

²¹ 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>). A larger file with all regions for May 2023, including the New York-Newark-Jersey City metropolitan region is also available (<https://www.bls.gov/oes/special-requests/oesm23ma.zip>).

²² 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 EDopt or Premier should fall in one of the different rows 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.

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.²³ I will take this into account when ordering equitable relief.

The financial manager testified that EDOpt was paying the independent contractor between \$85 and \$95 per hour (Tr. pp. 20, 23). A rate of \$85 or \$95 per hour annualized is \$99,450 or \$111,150, respectively, and those figures are only slightly above the 50th percentile, thus the \$85 or \$95 per hour portion of the rate is not excessive. However, the amount of indirect costs above the teacher's hourly wage is \$100 or \$110 per hour or approximately 51 or 56 percent of the \$195.00 hourly rate charged by EDOpt. This falls far above the 27.7 percent in the USBLS data.

When considering the testimony described above, in which EDOpt's administrator identified only general categories of indirect costs that factored into the hourly rate charged and did not present evidence of the actual costs or why such expenses would justify the amount of indirect costs included in the hourly rate charged, the evidence leads me to the conclusion that the parents arranged for services from EDOpt at excessive costs as the district argues and that it is more than what the district should be required to pay. On the other hand, some indirect or overhead cost is reasonable. Using 27.7 percent for overhead costs, when added to the salary results in a rate of \$108.55 or \$121.32 per hour for SETSS. As the district does not assert that the rate should be reduced to less than \$125 per hour based on its own student, I will order the district to fund the costs of SETSS at the rate of \$125 per hour as an equitable remedy.

As for related services, the district presented evidence during the impartial hearing reflecting the USBLS's May 2022 data presenting mean hourly and annual wages for several occupations including speech-language pathologists and occupational therapists (Dist. Ex. 4). However, again, I will take judicial notice of the updated data for May 2023. The USBLS data for special education teachers did not include hourly wages necessitating the additional computations set forth above. However, for speech-language pathologists and occupational therapists, the hourly wages are reported specifically by the USBLS and will be considered below.

For speech-language therapy, EDOpt charged \$195 per hour (see Parent Ex. C at p. 3). There was no testimony in the hearing record regarding what rate was paid to the speech-language provider. The hearing record reflects that EDOpt utilized a staffing company names Strivright to provide the student with speech-language services, and no one from Strivright or EDOpt testified regarding what Strivright pays its speech-language providers (Tr. p. 47). The USBLS indicated that in May 2023 data hourly wages for "Speech-Language Pathologists" in the New York City metropolitan region ranged from \$22.34 in the 10th percentile, \$34.11 in the 25th percentile, \$48.71 in the median, \$63.71 in the 75th percentile, to \$76.64 in the 90th percentile.²⁴ Taking into account 27.7 percent for indirect costs as describe above, an hourly rate to be charged for speech-language therapy based on the USBLS data would range from \$28.53 to \$97.87 (median \$62.20),

²³ 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.

²⁴ The Speech Language Pathologist wage data for New York City is located in the same USBLS Excel data file as described above for special education teacher wage data (see, e.g., <https://www.bls.gov/oes/special-requests/oesm23ma.zip>).

well below the \$195 charged by EDopt. Therefore, I find that the contracted rate to be excessive and I will order the district to fund the costs of speech-language therapy at the rate of \$62.20 per hour as an equitable remedy.

For OT, Premier charged \$300 per hour (see Parent Ex. P at p. 2). The USBLS indicated that in May 2023 data annual salaries for "Occupational Therapists" ranged from \$34.09 in the 10th percentile, \$42.11 in the 25th percentile, \$54.28 in the median, \$66.42 in the 75th percentile, to \$76.00 in the 90th percentile.²⁵ When using the USBLS data, a calculation leads to the conclusion that the \$140 per hour rate paid directly to the provider for OT falls significantly above the 90th percentile of hourly wages for the metropolitan region in which the district is located. Further, in addition to the excessive rate to the provider, the rate of \$300 per hour charged by the company reflects a charge of 53.33 percent for indirect costs, which is also well over the 27.7 percent indirect costs discussed above. Therefore, I find that the rate charged by Premier for OT services was excessive. Therefore, I will order the district to fund the costs of OT at the rate of \$69.32 (the median hourly rate plus 27.7 percent for indirect costs) as an equitable remedy.

VII. Conclusion

The evidence above does not support the IHO's determination that the parent failed to show that the private unilateral services obtained from EDopt and Premier without consent of the school officials were inappropriate for the student. However, the hearing record warrants a reduction in the SETSS rate charged by EDopt and the OT rate charged by Premier for the reasons explained above. Furthermore, the evidence did not support payment at the private rate sought by the parent for speech language services.

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

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision, dated October 17, 2024, is modified by reversing that portion which held that the parent failed to meet their burden of proving that the SETSS and speech-language services provided by EDopt and the OT services provided by Premier were sufficient to address the student's unique needs; and

IT IS FURTHER ORDERED that the district shall directly fund the SETSS services delivered by EDopt at a rate not to exceed \$125 per hour, and further shall directly fund the costs of the student's speech-language therapy services delivered by EDopt at a rate not to exceed \$62.20 per hour, upon the submission of proof of the delivery of the services to the student during the 2023-24 school year; and

²⁵ The OT wage data for New York City is located in the same USBLS Excel data file as described above for special education teacher wage data (see, e.g., <https://www.bls.gov/oes/special-requests/oesm23ma.zip>).

IT IS FURTHER ORDERED that the district shall directly fund the OT services delivered by Premier at a rate not to exceed \$69.32 per hour, upon the submission of proof of the delivery of the services to the student during the 2023-24 school year.

Dated: **Albany, New York**
 March 28, 2025

JUSTYN P. BATES
STATE REVIEW OFFICER