



The University of the State of New York

The State Education Department

State Review Officer

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No. 22-027

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:

Law Offices of Martin Marks, attorneys for petitioner, by Martin Marks, Esq.

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

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which declined to award the parent all of the relief requested for a denial of equitable services by respondent (the district) for the 2020-21 school year. The district cross-appeals from the IHO's finding that oral transliteration services were an appropriate service for the student for the 2020-21 school year. The appeal must be dismissed. The cross-appeal must be sustained.

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 Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482), namely a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414 [d][1][A]-[B];

34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts related to IESPs, State law provides that "[r]eview of the recommendation of the committee on special education may be obtained by the parent or person in parental relation of the pupil pursuant to the provisions of [Education Law § 4404]," which effectuates the due process provisions called for by the IDEA (Educ. Law § 3602-c[2][b][1]). Incorporated among the procedural protections of the IDEA and the analogous State law provisions is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

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

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

III. Facts and Procedural History

In this proceeding, the hearing record is sparse with respect to the 2020-21 school year and the student's educational history.

On July 10, 2019, the CSE convened to conduct an annual review to develop the student's IESP for the 2019-20 school year (first grade) and classified the student as a student with a hearing impairment (Parent Ex. B at pp. 1-11). The July 2019 IESP indicated that the student was parentally placed in a nonpublic school (NPS) (*id.* at p. 10). According to the IESP, the student presented "with a moderately severe to moderately low frequency hearing loss" (*id.* at p. 1). The student "ha[d] a history of late development of speech and language skills" and he wore "binaural hearing aids with an FM receiver" to help with hearing and communication (*id.* at pp. 1-2). At the time of the July 2019 CSE meeting, the student's dominant language was reported as Yiddish; he was reported as being able to identify letters of the Yiddish alphabet and had not yet been exposed to letters of the English alphabet (*id.* at p. 1). The IESP noted that "[l]istening, discriminating sounds, and articulation [we]re extremely difficult, however, they [we]re of utmost importance as they are the building blocks of language, literacy and education" (*id.* at p. 2). Finding the student eligible for special education and related services, the July 2019 CSE recommended three periods per week of group special education teacher support services (SETSS) in Yiddish, four 30-minute sessions per week of individual speech-language therapy in Yiddish, two 30-minute sessions per week of individual hearing education services (HES) in Yiddish, and two 30-minute sessions per week of individual physical therapy (PT) in English (*id.* at p. 8). In addition, the CSE recommended full-time daily use of an FM unit for the student (*id.*).

In September 2020, the parent entered into a contract with Little Apple Services Agency (Little Apple Services) for the provision, during the 2020-21 school year, to the student of "an oral transliterator full time as per their IESP" (Parent Ex. K).

A. Due Process Complaint Notice

In a due process complaint notice, dated September 21, 2020, the parent alleged that the district failed to develop an IESP for the student for the 2020-21 school year (*see* Parent Ex. A at pp. 1-2). In addition, the parent contended that the district "failed to evaluate [the student] in all areas of suspected disability"; failed to ensure that individuals knowledgeable about the student were included at the CSE meeting; and failed to recommend the student receive the services of a "full time oral transliterator," which the parent argued was necessary for the student to access the curriculum (*id.* at p. 2).

As relief, the parent requested that the district continue to provide the student with SETSS by paying his provider at the rate of \$80 per hour (Parent Ex. A at p. 2). Additionally, the parent sought related service authorizations for the student to continue to receive his related services (*id.*). Lastly, the parent requested that the district pay for the services of an oral transliterator selected by the parent at the rate of \$80 per hour for the 2020-21 school year (*id.*).

B. Impartial Hearing Officer Decision

An impartial hearing convened on October 7, 2021, and concluded on January 6, 2022, after four days of proceedings (Tr. pp. 1-139).¹

After reviewing the testimony presented during the hearing, the IHO noted that the hearing record did not contain an IESP for the student for the 2020-21 school year (IHO Decision at p. 9).²

Next, the IHO reviewed the testimony regarding the service provided by the student's oral transliterator and noted that the oral transliterator testified that he "explain[ed] to the student what the teacher [wa]s teaching," he assisted the student in reading English, and he helped with social interactions (IHO Decision at p. 10). The IHO noted that the oral transliterator was "not a SETSS person" and the student's disability went beyond his difficulties in hearing (id.). The IHO held that "paying the oral transliterator to sit in the speech group, to sit with the student at lunch, to aid the student with his outside the classroom social interactions and to provide oral transliteration during religious instruction [wa]s not an obligation of the [district] in payment for such services" (id.). Next, the IHO determined that the student was "not being served by" the NPS as he was receiving at the most 12.25 hours of secular education out of a five and a half-day school week (Sunday though Friday) (IHO Decision at p. 11; see Parent Ex. H). The IHO found that the student was "struggling" in his secular classes and an oral transliterator was "not the full answer" (IHO Decision at p. 11). The IHO also found that at the NPS the student was not in a special education class, he was not taught by a special education teacher, and his classroom was too large (23-25 other students) for him (id.). However, the IHO noted that "the parent has every right to place her son in whatever educational environment she desires" (id.).

With respect to supervision of the oral transliterator, the IHO found that the oral transliterator's only function was to translate and as such the oral transliterator did not require supervision (IHO Decision at p. 11). Therefore, the IHO found that supervision should not be included in any expenses claimed by the parent or Little Apple Services (id.).

The IHO then moved on to the cost of the service, noting that while the owner of Little Apple Services was requesting \$80 per hour for the oral transliterator services, Little Apple Services only paid the oral transliterator \$30 per hour (id.). The IHO reviewed the testimony of the owner of Little Apple Services regarding the expenses used to justify the cost of the service, including training for the oral transliterators and expenses associated with loans used to pay the oral transliterators (id.). The IHO held that the district was not obligated to pay for the expenses related to the loans obtained by the owner of Little Apple Services (id. at p. 12).

¹ The same IHO was also appointed to hear another case involving the same student on October 20, 2021 (Interim IHO Decision at p. 2). The parent representative did not want the two cases consolidated and therefore, the IHO declined consolidation (id.).

² During the hearing, the district representative indicated that an IESP was developed for the student in July 2020 for the 2020-21 school year; however, a copy of the IESP was never submitted into the hearing record (Tr. pp. 27-31, 67).

Lastly, the IHO found the district "responsible" to pay for oral transliterator services for secular classes, but not for oral transliterator services provided during lunch, helping the student with social interactions, or for religious instruction (IHO Decision at p. 12). The IHO also found the student "should receive SETSS periods if he is struggling in his secular class" (id.). Finally, the IHO found that an appropriate rate for the oral transliterator services was \$50 an hour (id.). In total, the IHO held that the student received 12.25 hours of secular education per week for 38 weeks during the 2020-21 school year and therefore, ordered the district to pay Little Apple Services \$23,275 (id.). Finally, the IHO ordered the district to conduct an auditory processing evaluation and psychoeducational evaluation of the student and directed the district to develop a new IESP for the student within 45 days after the completion of both evaluations (id.).

IV. Appeal for State-Level Review

The parent appeals from the IHO's decision, asserting that the IHO erred by failing to award oral transliterator services for the student's entire school day at the rate requested by the parent for the 2020-21 school year.

First, the parent argues that the IHO erred in determining that the district is not required to pay for oral transliterator services during religious instruction, lunch, and speech-language therapy.

Second, the parent argues that the IHO erred in excluding parent's exhibits E-G from the hearing record. The parent contends that these documents "establish the services provided by an oral transliterator" and should have been admitted into evidence.³

Third, the parent argues that the IHO improperly reduced the rate for the oral transliterator from \$80 per hour to \$50 per hour without any basis in the hearing record. The parent also argues that the IHO erred in finding that the oral transliterator did not require supervision and asserts that the cost of supervision should factor into the hourly rate.

Fourth, the parent argues that she alleged in the due process complaint notice that the district failed to develop an IESP for the 2020-21 school year that would confer educational benefit to the student, failed to evaluate the student in all areas of suspected disability, and failed to develop an IESP with certain CSE members present. The parent argues that "there is no dispute

³ According to the hearing transcript, the IHO stated he did not "accept [program] descriptions" and therefore, parent exhibit E was not admitted into evidence (Tr. p. 43). The IHO further stated that exhibits F and G pertained to oral transliteration training, were undated, and not signed so those were also excluded from evidence (id.). The proposed parent exhibit E is a description of oral transliteration services. The proposed parent exhibit F is a general description of Little Apple Services. Of note the parent did not submit a complete copy of proposed exhibit F and instead the proposed exhibit excluded page 2. The proposed parent exhibit G is a power point presentation on transliterator training. Each of these proposed exhibits are general descriptions of oral transliteration services with no specifics pertaining to the student; however, as the hearing record contains little information regarding oral transliteration services, the parents' exhibits are accepted for the descriptions that they provide and will be accorded a small amount of weight for providing some background information as to the service obtained by the parent from Little Apple Services.

that the CSE did not convene a meeting for the 2020-[]21 school year or prepare a new IESP for said year" (Req. For Rev. at ¶ 34).⁴

For specific relief, the parent requests a reversal of the IHO's finding that the district is not required to pay for the oral transliterator services during speech-language therapy, lunch, and religious instruction. In addition, the parent seeks reversal of the IHO's finding that the oral transliterator does not require supervision and allowing supervision to be part of an award. Finally, the parent requests a finding that the hourly rate for the oral transliterator services should be \$80 per hour for the 2020-21 school year.

In an answer and cross-appeal, the district denies the parent's material allegations and requests that the parent's request for review be dismissed. The district seeks to uphold the IHO's decision to exclude the evidence submitted by the parent because the parent could not confirm that her witness would be able to authenticate the documents. The district further argues that the FAPE standard is not at issue in this case as the student was parentally placed at a NPS and the issue is whether the district provided appropriate services on an equitable basis. Next, the district argues that the oral transliterator rate was excessive and if an award for the services is upheld it should be at the rate of \$30 per hour.⁵

As for its cross-appeal, the district asserts that the IHO erred in awarding payment for the oral transliteration services as the parent failed to sustain her burden that the student required an oral transliterator for the 2020-21 school year. The district argues that the parent failed to demonstrate that the student required oral transliteration services to make progress or that an oral transliterator was an appropriate service to meet the student's needs. Additionally, the district asserts that "equitable considerations warrant a total bar to relief" because the parent failed to submit a 10-day notice to the district. The district also argues that if any relief is granted the relief should only be awarded as a reimbursement for expenses paid as the parent has "demonstrated an obligation to pay, but has not demonstrated a lack of financial resources."

The parent submits a reply and verified answer to the district's cross-appeal. In her reply the parent seeks to prevent the introduction of the July 2020 IESP as the district failed to offer it for evidence during the impartial hearing. Additionally, the parent claims that the district failed to submit any evidence that the cost of the oral transliterator was excessive and solely made the excessiveness argument in its closing statement. In answer to the district's cross-appeal, the parent argues that if the district had a teacher of the deaf and hearing impaired at the CSE meeting the

⁴ Since the district elected not to defend the 2020-21 IESP, the procedural issues raised need not be further addressed in this proceeding. Further, although the parent also asserts that the IHO failed to address the allegation that the district did not evaluate the student in all areas of suspected disability, the IHO ordered the district to conduct an auditory processing evaluation and psychoeducational evaluation of the student, which, in essence, addressed this issue, although without making any attendant findings (see IHO Decision at p. 12).

⁵ The district included a copy of the July 2020 IESP referred to during the hearing as additional evidence annexed to its answer and cross-appeal. During the hearing, the IHO had requested a copy of the July 2020 IESP, but it was not provided to him or made a part of the hearing record (Tr. p. 30-31). Considering that the July 2020 IESP was available at the time of the hearing and is not otherwise necessary to render a decision in this matter, I decline to exercise my discretion and will not accept the district's additional documentary evidence for consideration on appeal.

services of an oral transliterator would have been considered for the student. The parent lastly argues that she was not required to submit a 10-day notice for the oral transliterator services because it was "irrelevant" as the district failed to offer a public-school placement to the student for the parent to later reject.

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 district of location where the nonpublic school is located on or before the first day of June preceding the school year for which the request for services is made (Educ. Law § 3602-c[2]).⁶ "Boards of education of all school districts of the state shall furnish services to students who are residents of this state and who attend nonpublic schools located in such school districts, upon the written request of the parent" (Educ. Law § 3602-c[2][a]). In such circumstances, the district of location's CSE must review the request for services and "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an [IEP]" (Educ. Law § 3602-c[2][b][1]). The CSE must "assure that special education programs and services are made available to students with disabilities attending nonpublic schools located within the school district on an equitable basis, as compared to special education programs and services provided to other students with disabilities attending public or nonpublic schools located within the school district (id.).⁷ Thus, under State law an eligible New York State resident student may be voluntarily enrolled by a parent in a nonpublic school, but at the same time the student is also enrolled in the public school district for the purpose of receiving

⁶ State law provides that "services" includes "education for students with disabilities," which means "special educational programs designed to serve persons who meet the definition of children with disabilities set forth in [Education Law § 4401(1)]" (Educ. Law § 3602-c[1][a], [d]).

⁷ State guidance explains that providing services on an "equitable basis" means that "special education services are provided to parentally placed nonpublic school students with disabilities in the same manner as compared to other students with disabilities attending public or nonpublic schools located within the school district" ("Chapter 378 of the Laws of 2007—Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the Individuals with Disabilities Education Act (IDEA) 2004 and New York State (NYS) Education Law Section 3602-c," Attachment 1 at p. 11, VESID Mem. [Sept. 2007], available at <http://www.p12.nysed.gov/specialed/publications/policy/nonpublic907.pdf>). The guidance document further provides that "parentally placed nonpublic students must be provided services based on need and the same range of services provided by the district of location to its public school students must be made available to nonpublic students, taking into account the student's placement in the nonpublic school program" (id.).

special education programming under Education Law § 3602-c, 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, the district does not appeal from the IHO's determination that the district did not develop an IESP for the student for the 2020-21 school year. Accordingly, the focus of this decision turns to what relief the parent may obtain based on the district's failure to offer the student a program for the 2020-21 school year. Ultimately, the IHO found the district responsible for paying for oral transliterator services for the student's secular classes, but not for the services provided during lunch, speech-language therapy, social interactions, or religious instruction (IHO Decision at p. 12). While the parent requests payment for oral transliterator services for the student's full school day, the district contends that the parent did not meet her burden of proving that the services provided by the oral transliterator met the student's special education needs.

Prior to reaching the substance of the parties' arguments, some consideration must be given to the appropriate legal standard to be applied. In this matter, the student has been parentally placed in an NPS and the parent does not seek tuition reimbursement for the cost of the student's attendance therein. The parent alleged that the district did not develop an IESP for the 2020-21 school year and she unilaterally obtained private services from Little Apple Services for the student and then commenced due process to obtain remuneration for the services provided by Little Apple Services. Accordingly, the issue in this matter is whether the oral transliterator services obtained by the parent constituted appropriate unilaterally obtained services for the student such that the cost is reimbursable to the parent or, alternatively, should be directly paid by the district to Little Apple Services upon proof that the parent has paid for the services or is legally obligated to pay but does not have adequate funds to do so. "Parents who are dissatisfied with their child's education can unilaterally change their child's placement during the pendency of review proceedings and can, for example, pay for private services, including private schooling. They do so, however, at their own financial risk. They can obtain retroactive reimbursement from the school district after the [IESP] dispute is resolved, if they satisfy a three-part test that has come to be known as the Burlington-Carter test" (Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 526 [2d Cir. 2020] [internal quotations and citations omitted], cert. denied sub nom., Paulino v. NYC Dep't of Educ., 2021 WL 78218 [U.S. Jan. 11, 2021], reh'g denied sub nom., De Paulino v. NYC Dep't of Educ., 2021 WL 850719 [U.S. Mar. 8, 2021]; see Florence Cty. 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."]).

As for the substantive standard for assessing the services that are unilaterally obtained by a parent, 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 (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 252 [2d Cir. 2009]). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra, 427 F.3d at 192). "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).

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]). 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. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether a unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether the placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see 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 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).

Accordingly, the parent's request for oral transliteration services must be assessed under this framework; namely, having found that the district failed to offer or provide appropriate equitable services, the issue is whether the oral transliteration services obtained by the parent from Little Apple Services constituted appropriate unilaterally obtained services for the student such that the cost of the oral transliterator services is reimbursable to the parent upon presentation of proof that the parent has paid for the services or, alternatively, payable directly by the district to the provider upon proof that the parent is legally obligated to pay but does not have adequate funds to do so. It appears the parent's advocate was aware of this burden prior to the hearing as she indicated the parent would present witnesses "to explain what an oral transliterator is, and why [the student] desperately needs one" and further indicated that the parent would prove that the student could not "be appropriately educated unless an oral transliterator [wa]s present in his classroom" (Tr. pp. 12, 46-47). However, upon review of the documentation and testimony presented by the parent during the hearing, there is insufficient evidence to show that oral transliterator services were appropriate to address the student's special education needs.

Before reviewing the oral transliterator services, a review of the student's needs is necessary. The parent testified that she became aware that the student had a hearing impairment when he was "about age four" (Tr. pp. 49, 52). Within her September 2020 hearing request, the parent argued that the district failed to evaluate the student in all areas of suspected disability, and I note that the hearing record does not include evaluations, assessments, or reports which detail the student's needs (see Tr. pp. 1-139; see Parent Ex. A). However, the parent did submit into evidence the student's July 2019 IESP and because the accuracy of the student's present levels of performance identified in the July 2019 IESP are not in dispute and it contains the most recent evaluative information describing the student's needs within the hearing record, it is accordingly relied on, along with anecdotal information presented by the parent's witnesses, to determine the student's special education needs (Tr. p. 44; Parent Ex. A at pp. 1-3; see Parent Ex. B).

The present levels of performance in the student's July 2019 IESP reflected the results of an April 2018 administration of the Wechsler Preschool and Primary Scale of Intelligence – Fourth Edition (WPPSI-IV) which yielded a full scale IQ in the "[l]ow [a]verage" range with verbal comprehension and visuospatial indices scores in the "[a]verage" range and fluid reasoning, working memory, and processing speed indices scores in the "[v]ery [l]ow" range (Parent Ex. B at p. 1). The July 2019 IESP stated that the student's dominant language was Yiddish and noted that although the student was able to identify letters of the Yiddish alphabet, he was not yet able to blend letters into words (*id.*). The student had not been exposed to the letters of the English alphabet (*id.*). The July 2019 IESP indicated that the student's decoding skills were in the low

range, his reading comprehension skills were in the low average range, and he was able to identify colors and shapes (id.). The student's mathematical reasoning was in the low average range, and reportedly he was able to count appropriately "on a [one-to-one] basis" (id.). In the area of written language, the student was able to imitate lines and circles with a pencil when presented with a model (id.). The IESP indicated that the student had "a history of late development of fine and gross motor functioning" (id.). The student was described by the parent as a "very" visual learner (id. at p. 2).

The July 2019 IESP indicated that the student had started reading "this year," that his accuracy and pronunciation were not clear, that he struggled to fully understand and needed help and guidance with explanations and needed repetition and review (Parent Ex. B at p. 2). In the area of writing the student reportedly started learning how to write Hebrew letters, could write his first name and was "up to par with his writing" (id.). With regard to math, the IESP stated that the student understood how to add and subtract single digit numbers but struggled with "the abstract" and had poor listening comprehension skills (id.).

The July 2019 IESP stated that the student had "a history of late development of speech and language skills," had received speech-language services to address poor expressive language and vocabulary skills and although he had improved, he still displayed weak grammatical and articulation skills (Parent Ex. B at pp. 1-2). According to the July 2019 IESP, a June 2019 speech progress report stated that the student presented with a family history of hearing loss; that he required ongoing instruction in articulation, comprehension, auditory memory recall, and following directive tasks; and that he regressed and lost the mastery of previously achieved skills (id. at p. 2). In addition, the progress report noted that listening, discriminating sounds, and articulation were "extremely difficult," but that they were of utmost importance as they were the building blocks of language, literacy, and education (id.).

With respect to social development, the July 2019 IESP indicated that according to the speech progress report the student was unable to conduct a "three-turn dialogue," his sentence content was "poor," and his social skills were "very weak" (Parent Ex. B at p. 2). The IESP noted that the student was pleasant and engaging and well behaved, but it was also noted that he could be very "'boxed'" and was very rigid and did not initiate right away (id.).

In the area of physical development, the IESP stated that the student had diagnoses of "moderately severe to moderately low frequency hearing loss rising to normal hearing in the right ear and severe to moderate [hearing loss] rising to mild hearing loss in the left ear" and that he utilized bilateral hearing aids and a personalized FM system in his school setting (Parent Ex. B at p. 1). The IESP indicated that the student enjoyed being outdoors, was a picky eater, had "okay" fine motor skills, could come across as clumsy though his gross motor skills were "moving along," could ride a bicycle with training wheels, and received PT services for poor posture, balance, and gait (id. at p. 2).

The July 2019 IESP indicated that the student presented with delayed receptive and expressive language skills as well as weak gross motor skills and required support in order to make progress in the general education curriculum (Parent Ex. B at p. 3).

The July 2019 IESP identified the following supports needed to address the student's management needs: repetition and review of learned material, teacher modeling and scaffolding, chunking of information, use of visuals and hands on manipulatives, regular checks for understanding, extra time to complete assignments and answer questions, preferential seating in close proximity to the teacher away from distractions, multimodal approach to aid in comprehension and retention, and an FM unit (Parent Ex. B at p. 3).

The NPS principal testified that the student's teacher told him that with constant prompting the student could excel and could be "a student in the class" but that if he did not have the prompting "he would fall apart" (Tr. p. 95). According to the principal, when he observed the student in the classroom during the 2020-21 school year, the student needed to have concepts broken down and presented to him by looking him in the eye so that he could grasp them and that, without this, the student could get lost during class (Tr. pp. 100-01). The principal stated that "some concepts need[ed] to be broken down more than the norm" (Tr. pp. 101).

Turning to the services provided by the oral transliterator, the owner of Little Apple Services testified that an "oral transliterator is someone that sits in a classroom next to a child and transliterates to the child, transliterates to a hearing impaired child, what the child cannot hear from the teacher due to his hearing loss or impairment" (Tr. pp. 113-14).⁸ According to the program description provided by Little Apple Services, oral transliterators "facilitate spoken communication between individuals who are deaf or hard of hearing and individuals who are not" (Parent Ex. E). Additionally, the description notes that "[oral] transliterators . . . work within a continuum of service provision" and that services could consist of use of natural gestures, fingerspelling of particular words, signs to support words on the mouth, as well as providing a "voice" for the recipient of the services (*id.*). According to the description, oral transliterator services are used in communication settings where lipreading cannot be used effectively, including settings where there are multiple speakers, where the speech reader cannot see the speaker clearly, and where the speaker is not speech readable (*id.*).

According to an additional pamphlet produced by Little Apple Services, "[a]n educational interpreter must effectively communicate classroom information between the teacher, the deaf student and other hearing students according to the language level of the student" (Parent Ex. F at p. 1). The pamphlet further indicates that oral transliterators can assist students who have hearing impairments and hearing aids and "face the daily challenge of access to fast paced class discussions, groups, incidental learning, and even environmental awareness" (*id.*). According to the pamphlet, an oral transliterator allows a student to watch one person to receive all of the information coming from different speakers (*id.* at p. 2). An oral transliterator "uses clear enunciation, slightly slower speech than the original speaker, and expressive—not exaggerated—mouth and face movements" (*id.*).

The oral transliterator who provided services to the student during the 2020-21 school year testified that he was employed by Little Apple Services (Tr. p. 73; *see* Tr. pp. 120-21, 123). The oral transliterator had a high school diploma and received training as an oral transliterator (Tr. pp. 74, 87-88; *see* Tr. pp. 114-15). He testified that he was not a teacher but that he sat "right near"

⁸ Oral transliteration services are included in the definition of interpreting services under State regulation (8 NYCRR 200.1[nnn]).

the student and "privately" translated to the student what the teacher said in both English and Yiddish (Tr. pp. 75-76, 82). When asked what he did, the oral transliterator testified that "whatever the teacher is explaining in class,... I am explaining it to [the student] as a one-on-one, because due to his hearing, he does not hear one hundred percent instructions, and he gets lost, and...he cannot do the homework. It's not...possible for him to do the work in...class, because he just doesn't hear a hundred percent,... And by me...sitting near him and telling him instruction what the teacher says to do, he can follow with the class like everyone else" (Tr. pp. 75-76).⁹ The oral transliterator indicated that sometimes he translated word for word and sometimes he explained what the teacher said (Tr. p. 76).

According to the oral transliterator there were 23-24 students in the student's class and the student sat in the second row of the class (Tr. pp. 77-78, 85). Both the teacher and student used the FM system while in the classroom; however, the oral transliterator stated that he never assisted the student with the working of his FM unit (Tr. pp. 68-69, 78-79, 81, 85). The oral transliterator testified that he did help the student with his hearing aids in that he checked the fit and battery and encouraged the student to wear the hearing aids so that he would be successful in class (Tr. p. 81). The student used his hearing aids throughout the school day during the 2020-21 school year (Tr. pp. 53, 85-86). Besides translating, the oral transliterator testified that during recess he supported the student in interacting with other students and that he went with the student to lunch, the play yard, and the park (Tr. pp. 80, 83, 87).

The parent testified that as far as she knew, the student always had an oral transliterator (Tr. p. 55).¹⁰ The parent further testified that the student had an oral transliterator because he was hearing impaired and she explained that part of being hearing impaired, even if one was wearing hearing aids, was that "it's hard to follow" (Tr. p. 53). The parent explained that "if you miss a piece, like, if the teacher says which page we're up to, then ... you're off the ball" and she further explained that with that one person who is "checking and seeing" where the student was not following and right away "catches him on beat, and then he saves the day as opposed to totally being lost from misunderstanding important parts that follow through the day" (Tr. pp. 53-54). Additionally, the parent stated that there was a social piece, noting that it was very hard to listen

⁹ The oral transliterator testified that he helped the student with reading; however, because the oral transliterator initially testified that he did not help the student and was not a teacher, he was not allowed to further explain his answer (Tr. pp. 76, 79-80).

¹⁰ The parent contracted for the provision of oral transliteration services for the student for the 2020-21 school year with Little Apple Services in September 2021 (Parent Ex. K). However, as raised by the district, the parent did not provide the district with a 10-day notice letter. Indeed, reimbursement for a unilateral placement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to their removal of the student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (*Greenland Sch. Dist. v. Amy N.*, 358 F.3d 150, 160 [1st Cir. 2004]). While the parent's request for relief is denied on other grounds, the parent should be advised going forward of the purpose of the required 10-day notice letter and the traditionally equitable context in which such letter is considered (see *S.W. v New York City Dep't of Educ.*, 646 F. Supp. 2d 346, 361-63 [S.D.N.Y. 2009] [finding that parents of students enrolled in private school were not exempted from 10-day notice requirements]).

when there were multiple children talking at once, from different distances and that while an FM unit worked for teachers it did not work for social groups (Tr. p. 54). The parent opined that whether it was learning or social learning, which she described as learning how to interact with children, the oral transliterator was there to "fill in" and get the student to be part of whatever was expected of a child at that age such as "follow class routine and life routine" (*id.*).

During cross examination, the parent testified that she did not recall if she ever submitted medical documentation to the CSE regarding the student's need for an oral transliterator and she acknowledged that she did not request an oral transliterator as she did not know "this was the word" but that she did ask for services (Tr. p. 65). When asked if she requested oral transliterator services, the parent testified that she was unsure if she asked for these specific services, but she was concerned about her son's progress and functioning in the classroom and therefore, based on her concerns, her son received speech-language therapy and hearing education services (Tr. pp. 65-66).¹¹

Additionally, the parent testified that she was in contact with the oral transliterator "very often" throughout the year regarding how the student was doing and to discuss and work through any issues that "arose" (Tr. pp. 56-57). The parent stated that based on her conversations with the oral transliterator, she could not remember what the oral transliterator did in the classroom to assist the student "because this was last year" and stated that she could "just remember he was proactive" (Tr. pp. 58-59). The parent testified that she did not personally meet with the student's classroom teacher during the 2020-21 school year and that the oral transliterator "kind of was my middleman to figure things out for me" (Tr. pp. 59-61). When asked if she could recall what she spoke to the oral transliterator about regarding the student's classroom functioning, the parent stated that with respect to any anxiety the student experienced in response to being hearing impaired, she knew to call the oral transliterator and he would take care of the student's anxiety in understanding the teacher, following instructions, or social anxiety of integrating with children and she stated that the student "look[ed] much more at ease after those things were addressed" (Tr. pp. 62-63).

Considering the above, the parent did not meet her burden of showing that the services provided to the student during the 2020-21 school year met the student's special education needs. Although the IHO made no finding as to the appropriateness of the oral transliterator services, the IHO did note that "[t]he student [wa]s struggling with his secular classes and having an oral transliterator sitting next to him [wa]s not the full answer" (*see* IHO Decision at p. 11). More to the point, the hearing record does not explain why oral transliteration services were initially recommended for the student; the hearing record lacks consistent details as to how oral transliteration services were provided to the student; and the hearing record does not explain how such services met the student's special education needs related to his hearing loss, particularly given that the student's hearing impairment was addressed, in part, by his use of an FM device and hearing aids. Moreover, there was little in the way of explanation at the hearing as to how the oral transliteration services were incorporated with the student's other supports or met specific needs that were not otherwise addressed by the program provided to him at the NPS. While the program description produced by Little Apple Services and the brief testimony regarding what oral transliteration services consists of are indicative of a service that would be beneficial for some

¹¹ The parent testified that the student did not receive hearing education services because she was unable to locate a provider that was Yiddish speaking (Tr. pp. 67-68).

students suffering from hearing loss, it does not indicate that it is an appropriate service for all students suffering from hearing loss and the evidence in the hearing record does not sufficiently connect this student's needs to the provision of oral transliteration services in order to find that it was an appropriate service for the student for the 2020-21 school year (see L.K. v. Northeast Sch. Dist., 932 F. Supp. 2d 467, 491 [S.D.N.Y. 2013] [in reviewing the appropriateness of a unilateral placement, courts prefer objective evidence over anecdotal evidence]).

Finally, in connection with the student's needs, the parent asserts on appeal that reliance on the July 2019 IESP was problematic because the July 2019 CSE did not include a teacher of the deaf and hearing impaired (Req. for Rev. at ¶ 34). The parent elaborates on this argument in her memorandum of law stating that "a teacher of the deaf and hearing impaired may have recommended an oral transliterator," but since such teacher was not present there was no evidence that the July 2019 CSE discussed an oral transliterator (Parent Mem. of Law at p. 12). In support of this argument, the parent references the district's "Standard Operating Procedures Manual," which she asserts required the participation of a teacher of the deaf and hearing impaired at the student's CSE meeting because he was classified as having a hearing impairment (*id.*). In contrast, State regulations do not require the participation of a teacher of the deaf or hearing impaired when a student is classified as a student with a hearing impairment; however, a CSE should include "persons having knowledge or special expertise regarding the student" and as a special factor, for a student who is deaf or hard of hearing, a CSE should "consider the student's language and communication needs, opportunities for direct communications with peers and professional personnel in the student's language and communication mode, academic level, and full range of needs, including opportunities for direct instruction in the student's language and communication mode" (see 8 NYCRR 200.3[a]; 200.4[d][3][iv]). Having considered the above, there is no indication in the hearing record that the parent requested the participation of a teacher of the deaf and hearing impaired at the student's CSE meeting, the parent has not presented evidence to show what a teacher of the deaf and hearing impaired might have recommended for the student in terms of programming or services—generally indicating that they may have discussed oral transliteration services, and the parent did not include the lack of a teacher of the deaf and hearing impaired as a part of her due process complaint notice (see Parent Ex. A). While there are circumstances where a lack of evaluative information regarding a student's needs may be held against a district in terms of a failure to evaluate, under the circumstances of this matter, where the parent did not raise the issue of oral transliteration services—a service she testified that the student has always received—until the filing of the due process complaint notice, it would make little sense to shift the burden of proving the appropriateness of the service from the parent to the district.

Based on the above, the IHO's order directing the district to fund oral transliteration services for 12.25 hours of secular education per week for 38 weeks during the 2020-21 school year must be reversed. However, notwithstanding the findings above and considering the overall lack of information in the hearing record, it is possible that oral transliteration services may be an appropriate or even an important part of the student's educational programming. In order to determine the student's needs, the IHO directed the district to conduct an auditory processing evaluation and a psychoeducational evaluation of the student and to reconvene the CSE to review the results of those evaluations. At this point, those evaluations should have been conducted and the CSE should be reconvening to review them. When the CSE reconvenes, the parent may request that the CSE consider the provision of oral transliteration services and the CSE should be able to

provide the parent with a reasoned basis for why it decides to recommend or not recommend oral transliteration services for the student.

VII. Conclusion

Having found that the parent did not sustain her burden of demonstrating the appropriateness of her unilaterally obtained services, the decision of the IHO must be reversed.

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

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision, dated February 10, 2022, is modified by reversing that portion which ordered the district to directly pay Little Apple Services for the costs of the oral transliterator services delivered to the student during the 2020-21 school year.

Dated: **Albany, New York**
 May 20, 2022

STEVEN KROLAK
STATE REVIEW OFFICER