The University of the State of New York

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

No. 22-046

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:
The 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 2021-22 school year. The district cross-appeals from the IHO's finding that oral transliteration services were an appropriate service for the student for the 2021-22 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 programing for students with disabilities under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482), namely a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414 [d][1][A]-[B];

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

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

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

III. Facts and Procedural History

The student in this case has been the subject of a prior State-level administrative appeal with respect to the student's educational programming for the 2020-21 school year (see Application of a Student with a Disability, Appeal No. 22-027). Accordingly, the parties' familiarity with the facts and procedural history through the prior administrative appeal is presumed and will not be repeated in detail.

Briefly, on July 10, 2019, the CSE developed an IESP, determining that the student was eligible for special education as a student with a hearing impairment (Parent Ex. B at p. 1). The student's dominant language is Yiddish (id.). 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 in Yiddish, two 30-minute sessions per week of individual physical therapy (PT) in English, together with full-time daily use of an FM unit (id. at p. 8).[1] The July 2019 IESP indicated that the student was parentally placed in a nonpublic school (id. at p. 10).

There is scant information in the hearing record regarding the student's educational programming for the 2021-22 school year. A retainer agreement signed by the parent on September 2, 2021 contains a notation that the student "had a new IEP in the summer" (Parent Ex, C at p. 2). However, the hearing record does not include any further information.

In September 2021, the parent entered into a contract with Little Apple Services for the provision of a full-time oral transliterator for the student during the 2021-22 school year (Parent Ex. K).[2]

A. Due Process Complaint Notice

By due process complaint notice dated October 19, 2021, the parent alleged that the district failed to develop an IESP for the student for the 2021-22 school year (see Parent Ex. A). More specifically, the parent contended that the district failed to hold an annual review for the 2021-22 school year; "failed to evaluate [the student] in all areas of suspected disability," failed to provide the student with a full-time oral transliterator, and failed to recommend 12-month services (id. at pp. 1-2). The parent argued that an oral transliterator was "necessary" for the student to "access the school curriculum in an appropriate manner" (id. at p. 2). The due process complaint notice also included allegations listed under a section titled the proposed resolution, asserting that the district failed to develop an appropriate IESP, that the IESP was not developed in an appropriate manner due to a lack of personnel knowledgeable about the student, that the student "is entitled to

[1] State regulations do not contain a definition for hearing education services and the parties do not define it; however, the district defines hearing education services under related services as helping "students who are deaf or hard of hearing improve their communication skills" (https://www.schools.nyc.gov/learning/special-education/supports-and-services/related-services).

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

receive an oral transliterator as per his IESP for the entire 2021-2022 school year," that the parent has been unable to locate an oral transliterator at the district rate, and that the district must pay for an oral transliterator obtained by the parent at a specified rate (id. at pp. 2-3).

B. Impartial Hearing Officer Decision

After a prehearing conference took place on December 1, 2021, an impartial hearing convened and concluded on February 10, 2022 (Tr. pp. 1-76).[3] In a decision dated March 13, 2022, the IHO found that the district was required to fund a portion of the oral transliterator services for the student for the 2021-22 school year (IHO Decision at pp. 10-11).

Initially, the IHO addressed the testimony of the student's speech-language pathologist who the IHO found "credible" with respect to her testimony that the student required the services of an oral transliterator (IHO Decision at p. 6). However, the IHO did not find credible the speech-language pathologist's testimony that she provided the oral transliterator training during the 2021-22 school year (id.). Next, the IHO found no evidence in the hearing record that the student required a 12-month program (id. at p. 7).

The IHO determined that he did not believe that the oral transliterator was present during the student's individual speech-language therapy sessions, yet the parent was seeking payment for the oral transliterator during those periods of time (IHO Decision at p. 7). In connection with the provider's attendance records, the IHO found the submitted document was "just a list of dates and hours" and "not a credible document" as it was not signed, notarized, and no one testified as to its contents (id. at pp. 7, 9; see Parent Ex. J). Further, the IHO found that the document failed to list any hours of services beyond December 26, 2021 (IHO Decision at p. 7). Additionally, the IHO referenced the fact that the oral transliterator did not testify at the impartial hearing and drew "a negative inference from" the parent's decision not to call the oral transliterator as a witness to testify "as to the actual time the oral transliterator spen[t] during the school day translating to the student" (id.). Overall, the IHO determined that the there was no evidence showing that the oral transliterator was with the student during speech-language therapy, lunch and recess, or during school prayer (id.).

The IHO also determined that the district was not required to pay for the services of an oral transliterator for the student during periods of prayer or religious instruction (IHO Decision at p. 8). According to the IHO's review of the hearing record, the IHO determined that the student received only 11.05 hours of secular instruction during the week (id. at pp. 8, 10).

The IHO also questioned the expenses used to justify the hourly cost of the oral transliterator services, including the training that was allegedly provided to the oral transliterator (IHO Decision at pp. 8-9). The IHO noted that the "oral transliterator [wa]s not a psychologist, not a social worker, not a special education teacher, not a teacher, he [wa]s a person who repeat[ed] what [wa]s stated by the teacher or other students" (id. at p. 8). In connection with the evidence

[3] The same IHO was appointed to hear the parent's due process complaint notice regarding the 2020-21 school year (see Application of a Student with a Disability, Appeal No. 22-027; Interim IHO Decision at p. 2). The parent's representative did not want the two cases consolidated and, therefore, the IHO declined consolidation (Interim IHO Decision at p. 2).

pertaining to training of the oral transliterator, the IHO referenced the testimony of the owner of Little Apple Services detailing the training but held that the parent failed to provide documentary evidence regarding the training (id.). The IHO found that a description of what training was provided to the oral transliterator was absent from the hearing record (id.). Additionally, the IHO discussed the testimony of the owner of Little Apple Services pertaining to expenses related to taking out loans to pay his employees (id. at pp. 8-9). The IHO also noted that the witness testified that the oral transliterator had a supervisor; however, the IHO noted that there was no evidence as to the supervisor's role (id. at p. 9).

In addition, the IHO examined the affidavit of the owner of Little Apple Services, which stated the hourly rate of the oral transliterator services and, based thereon, calculated a total owed for the 2021-22 school year based on 43 hours per week for 39 weeks (IHO Decision at p. 9). Since the affidavit was signed on December 20, 2021, the IHO called into question how the owner knew the student's attendance over the next six months after notarizing the document (id.).

Although the IHO recognized that businesses like Little Apple Services had expenses beyond paying its employees, based on the IHO's findings regarding the agency's expenses, the IHO calculated what he deemed a reasonable rate based on agency expenses on top of the hourly rate paid to the oral transliterator (IHO Decision at p. 10).

As relief, the IHO ordered the district to pay Little Apple Services a set weekly rate for the oral transliterator calculated based on her findings above, "only after receiving a notarized document from the oral transliterator as to the days he was with the student as well as a notarized document with a legible signature from the principal of the Yeshiva as to the days the student was in fact in school and the school was open" (IHO Decision at pp. 10-11). The IHO directed that the district shall make no payments until the notarized documents were received (id. at p. 11).

IV. Appeal for State-Level Review

The parent appeals from the IHO's decision, asserting that the IHO erred by failing to award oral transliteration services for the student's entire school day at the rate requested by the parent for the 2021-22 school year.

The parent first argues that the IHO erred in determining that the district was not required to pay for oral transliteration services during the student's religious instruction. Initially, the parent argues that, following Zobrest v. Catalina Foothills School District, 509 US 1, 2 (1993), the IHO should have ordered payment of oral transliterator services during religious instruction. Further, the parent asserts that the IHO's reasoning regarding the hours the student spent receiving religious rather than secular instruction was misguided.

Second, the parent asserts that the IHO's findings regarding the rate charged by the agency providing the student's oral transliteration services was not based on evidence in the hearing record. In connection with the training of the oral transliterator, the parent contends that the IHO's denial of the introduction of certain documents was in error as those documents would have described "the role of the transliterator, the transliteration program and a brief overview of the trainings." Additionally, the parent argues that the IHO incorrectly discredited the testimony of the owner of Little Apple Services regarding the training of the oral transliterators and improperly reduced the

oral transliterator's hourly rate because of the interest rate paid by the owner of Little Apple Services on loans used to pay his employees. The parent contends that the IHO made a reference to the interest rate being 34 percent which was not evidence in this impartial hearing, but evidence elicited in the prior hearing.[4] Based on the foregoing, the parent argues that the IHO erred in reducing the hourly rate (id.).

Third, the parent argues that the IHO failed to rule on allegations raised in the due process complaint notice, specifically, that the district: failed to develop an IESP for the 2021-22 school year that would confer an educational benefit to the student; failed to evaluate the student in all areas of suspected disability; and failed to develop an IESP with a teacher of the deaf and hearing impaired. The parent requests a remand on these specific issues not ruled on by the IHO.

As relief, the parent requests an order reversing the IHO's finding that the student was "not entitled" to oral transliteration services during religious instruction. If the award rendered is only for oral transliteration services provided during secular instruction, the parent seeks a remand for a determination of the actual hours the student spent receiving secular instruction. The parent also seeks a reversal of the IHO's reduction of the oral transliterator's hourly rate and an award of the full costs of the oral transliteration services provided to the student during the 2021-22 school year.

The district responds in an answer with cross-appeal. As for an answer, the district denies the material allegations contained in the parent's request for review and requests that it be dismissed. The district seeks to uphold the IHO's decision to exclude the evidence submitted by the parent (parent exhibits E-G) because the parent could not confirm that her witnesses would be able to authenticate the documents.[5] The district attaches to its answer and seeks the introduction of a June 21, 2021 IESP and prior written notice "for the sole purpose of informing the record as to the [s]tudent's then-current levels of performance, academic and functional needs."[6] Next, the district argues that the IHO properly denied the parent's request for oral transliterator services at

[4] The owner of Little Apple Services testified that the interest rate for the loans was up to 34 percent (see Tr. p. 62).

[5] As in the previous decision (see Application of a Student with a Disability, Appeal No. 22-027), the IHO excluded from evidence the same parent exhibits E-F for the reason that he does "not accept . . . descriptions" (Tr. pp. 14-15). 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. The proposed parent exhibit G is a power point presentation on oral transliterator training. Each of the 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 parent's 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.

[6] At the impartial hearing, the district representative stated that an IESP was developed for the 2021-22 school year and further represented that she would disclose it to the IHO and redisclose it to the parent representative (Tr. pp. 3-4). However, no IESP for the 2021-22 school year was placed into evidence during the impartial hearing and the district indicated that it was not presenting a case (Tr. pp. 22, 43). The district fails to offer any explanation as to why the June 2021 IESP and prior written notice were unavailable at the time of the impartial hearing and does not argue that they are otherwise necessary to render a decision in this matter (see Answer ¶6). Therefore, I decline to exercise my discretion and will not now accept the district's additional documentary evidence for consideration on appeal.

the rate requested, asserting that the hourly rate is excessive. The district argues that the parent "failed to submit documentary evidence" of the services provided by the oral transliterator or Little Apple Services' expenses pertaining to the oral transliterator. Further, the district argues that the IHO properly held that the district is not responsible for paying for the oral transliterator services during religious instruction.

As for a 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 of proving that the oral transliterator services were appropriate to meet the student's needs for the 2021-22 school year. The district argues that the parent failed to demonstrate that the student required oral transliteration services to make progress or 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 of the oral transliterator services. The district also argues that if any relief is granted it should be based on reimbursement as the parent "demonstrated an obligation to pay, but has not demonstrated a lack of financial resources," and therefore, reimbursement is the appropriate remedy.

The parent submits a reply and verified answer to the district's cross-appeal. The parent objects to the introduction of the June 2021 IESP and prior written notice as the district failed to introduce the IESP at the hearing and, therefore, the parent did not have the opportunity to cross-examine any witnesses pertaining to the IESP. In an 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 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]).[7] "Boards of education of all school districts of the state shall furnish

[7] State law provides that "services" includes "education for students with disabilities," which means "special

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.).[8] 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 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 with the prior proceeding, the hearing record is sparse with respect to the 2021-22 school year and the student's educational history (see Application of a Student with a Disability, Appeal No. 22-027). Here, the only evidence of the student's needs came from a July 2019 IESP as the parent asserted that the district failed to develop an IESP for the student for the 2021-22 school year and the district failed to submit any evidence during the impartial hearing. The parent testified that for the 2019-20 and 2020-21 school years the student had an oral transliterator because he needed a "person sitting nearby" to help him "follow in a classroom setting," but it was not recommended by the district (Tr. pp. 36-41).[9] The district elected not to defend the 2021-22

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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]).

[8] 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.).

[9] The parent has contracted for oral transliteration services since the 2019-20 school year, 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

school year and decided not to submit the student's IESP for the 2021-22 school year (see Tr. pp. 3-4, 22).

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 a nonpublic school and the parent does not seek tuition reimbursement for the cost of the student's attendance there. The parent alleged that the district did not develop an IESP for the 2021-22 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 . . . 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 (Carter, 510 U.S. 7; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 252 [2d Cir. 2009]). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the

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]).

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 Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 207 [1982]). 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 as she stated at the hearing that "whether this student requires an oral transliterator . . . the [p]arent has the burden to prove that the student needs the service" (Tr. pp. 2-3, 22). 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.

The record contains limited information pertaining to the student's needs other than what is described in the July 2019 IESP which was already discussed in Application of a Student with a Disability, Appeal No. 22-027 (see Tr. pp. 15-70; see generally Parent Ex. B). The July 2019 IESP, which is over two years old, is not ideal for describing the student's present levels of performance for the 2021-22 school year; however, as both parties have declined to enter the student's more recent IESPs or other evaluative information regarding the student, the July 2019 IESP has to serve as the only document containing a general description of the student.[10]

According to the July 2019 IESP, the student presented with "moderately severe to moderate low frequency hearing loss rising to normal hearing in the right ear and severe to moderate rising to mild hearing loss in the left ear" and that he utilized bilateral hearing aids (Parent Ex. B at pp. 1, 2). The July 2019 IESP included results from 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 low average range (id. at p. 1). Administration of the Woodcock Johnson-Fourth Edition to the student indicated that his decoding skills were in the low range, his reading comprehension and math reasoning skills were in the low average range, and with regard to written language, the student had "a history of late development of fine and gross-motor functioning" (id.). Additionally, a June 2019 speech-language progress report noted that the student required "ongoing instruction in articulation, comprehension, auditory memory recall and following directive tasks" (id. at p. 2). The student benefitted from management needs including repetition and review of learned material, teacher modeling, scaffolding, chunking of information, use of visuals, manipulatives, checks for understanding, extra time for assignments and answering

[10] The parent continues to assert in this appeal that reliance on the July 2019 IESP is problematic because the July 2019 CSE did not include a teacher of the deaf and hearing impaired; the parent alleges that if the speech-language pathologist or a teacher of the deaf and hearing impaired had attended the July 2019 CSE meeting "the services of an oral transliterator would have been included in the IESP" (Req. for Rev. ¶ 38; Parent Mem. of Law at pp. 10-11). The July 2019 CSE, which the parent is alleging was not properly composed, occurred over two years prior to the parent filing her due process complaint notice and the parties have both opted during the hearing not to enter any documentary information about the student's needs during the 2020-21 and 2021-22 school year (see Tr. pp. 3-4; Parent Ex. C at p. 2; Answer with Cross-Appeal Ex. 1; Reply ¶¶ 2-4; see also Application of a Student with a Disability, Appeal No. 22-027). Ultimately, the July 2019 IESP is relied upon for background only and the substance of the student's relevant needs are largely gleaned from the hearing testimony summarized below.

questions, preferential seating, and a multi-model approach for comprehension and retention (id. at p. 3). 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 to make progress in the general education curriculum (id.).

The student's speech-language pathologist and teacher of the deaf testified that she had provided speech-language therapy to the student for four years and at the time of the impartial hearing worked with him individually for four 30-minute sessions per week (Tr. pp. 24-25, 34).[11] She also testified that she had "served as a coach and trainer for [the student's] other professionals that work[ed] with him" (Tr. p. 25). The speech-language pathologist explained that as a coach she "gives over the knowledge of how a deaf and hard-of-hearing student works in a mainstream school to professionals and other people that work with the student" (id.). Additionally, she testified that she provided the student's oral transliterator with training consisting of how to speak to the student so that he was able to listen, and "different strategies and techniques of how to repeat the said information" in order for the student to "follow along and participate to the best of his ability and learn new information" (Tr. pp. 28-29).

According to the speech-language pathologist, students with hearing aids "have equal amplification of all noises in the classroom" and it was "difficult to filter out and to follow the signal of the teacher and students in the classroom during the lesson" (Tr. p. 28). She confirmed that the oral transliterator listened to the teacher and then repeated what the teacher said to the student (Tr. p. 29). The speech-language pathologist was asked why the student who has hearing aides also needed an oral transliterator, and she testified that a classroom is noisy, and the hearing aids amplified "sounds in the classroom equally" from all areas of the classroom including for example when the teacher was talking, or a student crumpled paper (Tr. p. 30). She testified that the oral transliterator sat next to the student and repeated "everything, all information that's happening in the classroom," which allowed the student to follow along with the teacher, participate in class, listen easier, and enabled the student to learn (Tr. p. 31).[12]

Further, the student had an FM unit, worn by both the teacher and the student, which the speech-language pathologist testified was "mostly to counteract environmental ambience noises . . . such as the . . . acoustics of the classroom, the traffic outside, noise in the hallways" as the unit helped direct the teacher's voice (Tr. pp. 32-33). She concluded that the "FM unit just takes care of the environmental noises that is impossible to control in a mainstream setting" (Tr. p. 33). Upon questioning about why the student required both an FM unit and an oral transliterator, the speech-language pathologist testified that the FM unit would take care of the environmental noise and the oral transliterator would "take care of the academic curriculum that [wa]s spoken in the classroom" (id.).

[11] The speech-language pathologist clarified on cross-examination that she provided three of the sessions in school in a private speech therapy room and one session outside of school (Tr. p. 34).

[12] The speech-language pathologist testified that there were approximately 25-28 students in the student's classroom and that the student sat in the second row (Tr. p. 32).

The owner of Little Apple Services testified that the agency provides "oral transliterators for hearing impaired children" and particularly to this student (Tr. p. 54).[13] The owner of Little Apple Services testified about the rate charged for the oral transliterator services, the training provided to oral transliterators, supervision of the oral transliterator, and the agency's expenses to justify the hourly rate (Tr. pp. 54-66). The owner confirmed in his testimony that the "oral transliterator listens to the teacher and then repeats what the teacher says to the student" (Tr. p. 61). The student's mother opined that the student needed the oral transliterator as "[a] supporting person sitting nearby, so [the student] [could] follow in a classroom" (Tr. p. 36). She testified that she spoke with the oral transliterator who provided her with "updates" regarding the student's academics, and feedback about what was going on in the classroom and how the student was doing (Tr. pp. 36-37). According to the parent, the student had received oral transliterator services in prior school years and at the time of the hearing "[i]n order to follow in a mainstream class, which is a big class with a lot of noise going on there" (Tr. pp. 36-40).

Despite the information above that generally described the service and discussed the parent's position that oral transliterator services benefitted the student, detrimental to the parent's case is the lack of evidence regarding the actual oral transliterator services specifically provided to the student. The IHO raised several concerns about the parent's evidence in this matter, albeit in the context of considering whether the rate charged by the private agency was unreasonable or regarding any segregable costs charged by the 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 [2d Cir. Jan. 19, 2017]). The IHO's observations raise more fundamental issues with the evidence in this matter. For example, while the IHO found that the testimony of the speech-language pathologist supported finding that oral transliterator services were appropriate for the student, the IHO was so concerned with the parent's failure to call the student's oral transliterator as a witness "as to the actual time the oral transliterator spen[t] during the school day translating to the student," such that he drew "a negative inference from the failure to call such an important witness" (IHO Decision at pp. 6, 7). Compounding the lack of testimony by the oral transliterator, the IHO found that the timesheet submitted by the parent to show the number of hours that the student received the services of an oral transliterator was not credible, as it was not signed or notarized, and did not list any service delivery hours beyond December 26, 2021 (IHO Decision at p. 7; see Parent Ex. J).[14] The IHO also expressed concern about the fact that the parent contracted for the oral transliterator services "for every hour that the student is in school," even, for example, during lunch or when the student was receiving speech-language therapy services (IHO Decision at p. 7). That is, the parent has requested district funding

[13] According to the general description regarding oral transliteration provided by Little Apple Services, oral transliterators "facilitate spoken communication between individuals who are deaf or hard of hearing and individuals who are not" and an oral transliterator, among other things, needed "to have knowledge of speech production and the speech reading process to enable them to identify speech sounds or words that are not easily visible on the lips" (Parent Ex. E at p. 1). An oral transliterator "repeats in an inaudible whisper everything that is being said" but with slower speech and expressive mouth and face movements, repeating words "verbatim" or paraphrasing the original message (Parent Ex. F at p. 3). The "sole responsibility" of the oral transliterator "is to pass along to the student everything that is said in class" (id.).

[14] The timesheet lists purported service delivery hours on dates between September 1, 2021 and December 26, 2021 (Parent Ex. J). The services were reportedly delivered either three, six, or eight hours per day, but the hearing record does not offer an explanation for the variation (id.).

of transliterator services delivered to the student during the entire school day, which tends to be in contradiction to the rationale articulated by the witnesses that the services were to ensure the student's access to the academic curriculum and to repeat what the teacher says (see Tr. pp. 33, 36 61). As the IHO observed, there is no explanation about the delivery of the services during the remainder of the school day (IHO Decision at p. 7). In addition, although the parent testified that the oral transliterator provided her updates and feedback about what was happening in the classroom (Tr. pp. 36-37), no such information was included in the hearing record to reflect how the student fared with the oral transliterator servcies.

Considering the above, the parent did not meet her burden of showing that the transliterator services provided to the student during the 2021-22 school year were specially designed to meet the student's unique special education needs. The IHO made no finding as to the appropriateness of the oral transliterator services delivered but held the testimony of the speech-language pathologist was credible such that the student (who wore bilateral hearing aids and used an FM system) "necessitate[d] an oral transliterator" (see IHO Decision at pp. 6-10).[15] However, similar to what occurred in the prior proceeding, 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. While the hearing record in this matter does include the opinion of the student's speech-language pathologist indicating that oral transliteration services are appropriate for the student even with the student's use of an FM device and hearing aids (Tr. p. 33), 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 nonpublic school. Overall, 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 2021-22 school year (see L.K. v. Ne. 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]; L.Q. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 490 [S.D.N.Y. 2013] [rejecting parents' argument that counseling services met student's social/emotional needs where "[t]here was no evidence . . . presented to establish [the counselor's] qualifications, the focus of her therapy, or the type of services provided" and, further, where "[the counselor] did not testify at the hearing and no records were introduced as to the nature of her services or how those services related to [the student's] unique needs"]; R.S. v. Lakeland Cent. Sch. Dist., 2011 WL 1198458, at *5 [S.D.N.Y. Mar. 30, 2011] [rejecting the parents' argument that speech-language therapy services met student's needs where parents "did not offer any evidence as to the qualifications of the provider of the therapy, the focus of the therapy, or when and how much therapy was provided"], aff'd sub nom, 471 Fed. App'x 77 [2d Cir. June 18, 2012]).

Accordingly, the IHO's order directing the district to fund oral transliteration services during the 2021-22 school year must be reversed.

[15] It is also unclear from the hearing record whether the student also received hearing education servcies, which were a service recommended in the June 2019 IESP (Parent Ex. B at p. 8).

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 March 13, 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 2021-22 school year.

Dated: **Albany, New York**
July 5, 2022

SARAH L. HARRINGTON
STATE REVIEW OFFICER