The University of the State of New York

The State Education Department
State Review Officer
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No. 23-066

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

Appearances:
Law Office of Philippe Gerschel, attorneys for petitioner, by Philippe Gerschel, 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 denied her request for district funding of the costs of special education teacher and speech-language therapy services for her daughter delivered by Enhanced Support Services Inc. (Enhanced) during the 2022-23 school year. The appeal must be dismissed.

II. Overview—Administrative Procedures

When a student who resides in New York is eligible for special education services and attends a nonpublic school, Article 73 of the New York State Education Law allows for the creation of an individualized education services program (IESP) under the State's so-called "dual enrollment" statute (see Educ. Law § 3602-c). The task of creating an IESP is assigned to the same committee that designs educational programing for students with disabilities under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482), namely a local CSE that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law §§ 3602-c; 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

On July 8, 2020, a Committee on Preschool Special Education (CPSE) convened and developed an IEP for the student for the 2020-21 school year to be implemented beginning September 2020 (Parent Ex. B at pp. 1-2, 7). Having found the student eligible for special education as a preschool student with a disability, the July 2020 CPSE recommended that the

student attend a bilingual Yiddish program at a "childhood location selected by [the] parent" and receive five one-hour sessions per week of special education itinerant teacher (SEIT) services in a group of "up to" 2:1 and three 30-minute sessions per week of individual speech-language therapy (id. at pp. 1, 7).

The student was parentally placed in a nonpublic school, and on April 1, 2022, a CSE convened and developed an IESP for the student for the 2022-23 school year (kindergarten) (Parent Ex. D at pp. 1, 13; see Tr. p. 60). The April 2022 CSE found the student eligible for special education as a student with a speech or language impairment and recommended that the student receive three periods per week of special education teacher support services (SETSS) in Yiddish in a group and three 30-minute sessions per week of speech-language therapy in Yiddish, with two sessions delivered individually and one session delivered in a group (id. at pp. 1, 10).[1] Within the IESP, the CSE noted that the district could provide the student with monolingual services until a bilingual provider could be found (id. at p. 4).

On August 11, 2022, the parent executed a contract with Enhanced for the provision of "intensive special services" to the student during the 2022-23 school year beginning on July 1, 2022, in an amount to "be determined" by the parent, the agency, and the provider (Parent Ex. G).

In a letter to the district, dated August 28, 2022, the parent, through her attorney, stated her concern that the April 2022 CSE reduced the student's recommended services (Parent Ex. C at p. 2). The parent, through her attorney, stated her intent to place the student at a nonpublic school, "provide his [sic] special education program and services" at that school, and seek funding from the district for the costs of the special education program and related services (id. at p. 3).

A. Due Process Complaint Notice

In a due process complaint notice, dated September 8, 2022, the parent alleged that the district denied the student a free appropriate public education (FAPE) for the 2022-23 school year (Parent Ex. A at p. 3). The parent invoked pendency and asserted that the student's stay-put placement lay in the July 2020 preschool IEP and included five one-hour sessions per week of SEIT services in English in a group of 2:1 and three 30-minute sessions per week of individual speech-language therapy services in English (id. at p. 2).

The parent asserted that the April 2022 CSE's recommendation for three periods per week of group SETSS in Yiddish was insufficient and represented a reduction in services compared to the five periods per week of individual SEIT services that the student had been receiving and with which she had made progress (Parent Ex. A at p. 2). According to the parent, SETSS was a "more limited service that d[id] not address the broader organizational, executive functioning, [and] social skills" that were needed for the student to meet her goals (id. at pp. 2-3). The parent contended that the student "require[d] either a continuation of the broader SEIT program or an appropriate placement in a hybrid special education/general education program that [w]ould address [the student's] special education needs in a mainstream environment" (id. at p. 2).

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

The parent alleged that, due to the district's failure to recommend appropriate services for the student, the parent had "no choice but to implement the SEIT program" privately and seek reimbursement for the costs thereof from the district (Parent Ex. A at p. 3). For relief, the parent requested that the July 2020 IEP continue in effect for the 2022-23 school year (id.). In addition, the parent requested that, in the event the parent was unable to "locate service providers" to deliver the student's services under pendency, the district be required to fund a bank of compensatory education services equivalent to the missed services (id.).[2]

B. Impartial Hearing Officer Decision

On November 2, 2022, the parties proceeded to an impartial hearing, which concluded on February 6, 2023, after five days of proceedings (see Tr. pp. 1-109).[3] In an interim decision dated November 10, 2022, the IHO found that the student's stay-put placement for the pendency of the proceedings, retroactive to the date of the due process complaint notice, lay in the student's last-agreed upon IEP and consisted of five hours per week of SEIT services in a group of "up to 2:1" to be delivered "in a childhood location selected by [the] parent" and three 30-minute sessions per week of individual speech-language therapy (Interim IHO Decision at p. 4).[4] The IHO noted that, although the matter had been pending for two months at that time, the district had not implemented the student's pendency or executed a "Pendency Implementation Form (also known as a Pendency Agreement)" (id. at pp. 3-4).

In a final decision the IHO noted that the district did not present evidence to defend its IESP services offered under Educ. Law § 3602-c (IHO Decision at p. 11). The IHO addressed "blunderbuss" legal statements made by the district that it did not owe the student a "FAPE" and noted that the district's arguments failed to acknowledge the obligation imposed by State law to provide a dually enrolled student with special education services through an IESP that are individualized to the student's needs (id. at p. 10). Relying on principles akin to a "Burlington/Carter analysis" the IHO first found that the district failed to meet its burden to prove that the April 2022 IESP offered appropriate services to meet the student's special education needs (id. at pp. 9, 11, 12). However, the IHO next determined that the parent also failed to meet her burden to show that the unilaterally-obtained services from Enhanced constituted specially designed instruction to meet the student's needs (id. at p. 12). In particular, the IHO found that the hearing record lacked evidence of what the providers did to address the student's needs and how the services benefited the student (id. at pp. 7, 12). The IHO indicated that broad statements that the services provided to the student were individualized, included specialized instruction, and

[2] The parent also stated that "[d]ue to the difficulties in locating a SETSS and related services provider from the [district] or even independently, Parent reserves their right to ask for compensatory SETSS and related services for any periods not provided during the current 2022/23 school year" (Parent Ex. A at p. 3).

[3] The district did not appear at the first four impartial hearing dates (Tr. pp. 1-2, 11, 13-14, 20-22, 28-30). At the February 6, 2023 hearing date, the district declined to present any evidence and stated its intent to "make its case through cross-examination" (Tr. p. 53).

[4] The IHO referred to a September 11, 2017 IEP as the last-agreed upon IEP (see Interim IHO Decision at pp. 3-4); however, it appears that this was a typographical error as no IEP bearing that date was developed for the student. The IHO cited to this IEP as Parent Exhibit B, which is the student's IEP dated July 8, 2020 (see Interim IHO Decision at pp. 3-4; Parent Ex. B at p. 2).

resulted in progress were not examples of "useful evidentiary material" and did not show how the unilaterally-obtained services met the student's needs (id. at pp. 7 n.2, 12).

Although the IHO found that the parent did not prevail because she did not meet her burden to prove the appropriateness of the services provided by Enhanced, she also provided additional findings in the alternative regarding whether equitable considerations would have favored the parent and whether the parent would otherwise have been entitled to the relief requested (IHO Decision at pp. 12-13). Regarding the parent's obligation to pay Enhanced, the IHO found the agreement was "poorly worded (such as its reference to 'intensive special services') and [wa]s missing important terms (such as the cost of the services and the number of hours of services)" but noted that it did reflect that the parent was responsible to pay for the services if the district did not (id.). On the other hand, the IHO found the lack of evidence of the "actual provision of services" to the student and the parent's testimony that she was unsure of the services delivered "troubling" (id.). As to the parent's ability to pay, the IHO found the parent's testimony that she could not afford the costs of the services credible and indicated that it would have been sufficient to warrant direct payment notwithstanding that the statements were not supported by documentation or details (id.).

IV. Appeal for State-Level Review

The parent appeals, arguing that the IHO erred in finding that the parent did not meet her burden to prove that the unilaterally-obtained services were specially designed to meet the student's needs. Initially, the parent argues that, by not presenting any evidence, the district effectively conceded that the April 2022 CSE's "reduction" in the amount of recommended special education teacher services to three periods per week of SETSS, compared to the July 2020 CPSE's recommendation for five sessions of SEIT services, was inappropriate, which "relieve[d] Parent of any burden to defend the need for 5 periods of SETSS." The parent argues that the services sought by the parent were a continuation of the July 2020 IEP, "not a unilateral placement separate and distinct from the mandate that the [district] recommended." The parent asserts that "a parent's burden is diminished in instances where no unilateral placement is at issue."

The parent also argues that, even if the parent had a burden to prove the appropriateness of the services, the IHO erred in finding the evidence insufficient. The parent notes testimony about how Enhanced assigned providers to students. Regarding progress, the parent points to testimony that the special education teacher services benefited the student. In addition, on this point, the parent offers additional evidence in the form of the student's progress report and requests that it be considered.

The parent asserts that no equitable considerations exist that would warrant a reduction or denial of relief. Regarding the relief sought, the parent addresses the IHO's discussion of her obligation to pay Enhanced, arguing that no evidence of the parent's obligation was requested, "nor is it required as a matter of law." The parent also asserts that parents are not required to establish financial hardship.

In an answer, the district responds to the parent's allegations and argues that the IHO's decision should be affirmed in its entirety. In addition, the district argues that the additional evidence submitted by the parent should not be considered because it was available at the time of the impartial hearing and that its omission was "not merely a mistake" but, instead, was an

"affirmative decision" made during the impartial hearing. In the alternative, the district asserts that the additional evidence does not support the contention that the parent's unilaterally obtained services were appropriate since the progress report references the student's receipt of three sessions of SETSS per week and two 30-minute sessions per week of speech-language therapy, rather than the five hours of SETSS and three 30-minute sessions of speech language therapy per week that the parent sought.[5]

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

[5] The parent prepared, served, and filed a reply to the district's answer in this matter; however, the document was captioned as a "Request for Review." Further, although the parent's attorney stated his confirmation upon filing that the pleading was accompanied by a verification, no such verification was included with the pleading as required by State regulation and the pleading is defective (8 NYCRR 279.7[b]). Even if it had been procedurally compliant, State regulation limits the scope of a reply to "any claims raised for review by the answer . . . that were not addressed in the request for review, to any procedural defenses interposed in an answer . . . or to any additional documentary evidence served with the answer" (8 NYCRR 279.6[a]). In this instance, the district's answer does not include any of the necessary conditions precedent triggering the parent's right to file a reply. As such, the parent's reply fails to comply with the practice regulations and will not be considered.

[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]).

education programs and services provided to other students with disabilities attending public or nonpublic schools located within the school district (id.).[7]

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. of Mass., 471 U.S. 359, 369-70 [1985]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 184-85 [2d Cir. 2012]; T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 252 [2d. Cir. 2009]). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

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., 694 F.3d at 184-85).

VI. Discussion

A. Additional Evidence

Initially, the parent requests that the student's progress report, dated December 19, 2022, be considered as additional evidence on appeal. The parent argues that its omission during the impartial hearing was a mistake.

Generally, documentary evidence not presented at an impartial hearing is considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]).

[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.).

The affidavit of the educational director at Enhanced (Enhanced director), affirmed on December 30, 2022, stated that "[t]he progress report entered into evidence [wa]s an accurate representation of what [the providers] ha[d] been working on with [the student], including goals, over the course of the 2022-2023 school year." (Parent Ex. F ¶ 20). However, the parent did not offer such a progress report into evidence (see Tr. pp. 50-51). During the February 6, 2023 hearing date, the district's representative noted this discrepancy and the IHO inquired of the parent's attorney whether the progress reports would be offered (Tr. p. 50). The parent's attorney responded "No. It's more just a passing reference as far as their course of conduct" and also indicated that it "may have been clerical" but it is unclear if the attorney meant that the failure to offer the progress report into evidence or the inclusion of the reference to the progress reports in the director's affidavit was a clerical error (Tr. pp. 50-51). The IHO stated that "we don't know if it's clerical" and indicated that the affidavit "says one thing, but we don't have that one thing" and that this is "what the record" would show (Tr. p. 51). The IHO confirmed that "there isn't a progress report entered into evidence, so I make note of that for the record" (id.). There is no further indication in the hearing record that the parent thereafter attempted to offer the progress report into evidence.

The failure to offer this information during the impartial hearing cannot be considered an inadvertent mistake, especially when both the district's attorney and IHO pointed out the oversight to the parent's attorney.[8] Given the above exchange and the parent's attorney's affirmative statement that the parent was not offering the progress report, I decline to consider the document at this late juncture. The factor specific to whether the additional evidence was available or could have been offered at the time of the impartial hearing is of even greater weight in this instance. The factor serves to encourage full development of an adequate hearing record at the first tier to enable the IHO to make a correct and well supported determination and to prevent the party submitting the proposed additional evidence from withholding what the party either knew or should have known was relevant evidence during the impartial hearing and thereby shielding the additional evidence from cross-examination or later attempts to spring it on the opposing party, effectively distorting the State-level administrative review and transforming it into a trial de novo (see M.B. v. New York City Dep't of Educ., 2015 WL 6472824, at *2-*3 [S.D.N.Y. Oct. 27, 2015]; A.W. v. Bd. of Educ. of the Wallkill Cent. Sch. Dist., 2015 WL 1579186, at *2-*4 [N.D.N.Y. Apr. 9, 2015]).

This is also not an instance where the parent's attorney may not have known that the evidence would be central to an issue in dispute. To the contrary, the document was referenced in the affidavit testimony of the parent's own witness. While the parent may now regret that the document was not offered into evidence, this is not a basis for permitting the parent to take an end run around the impartial hearing process, which would be both unfair and unreasonable. Accordingly, I decline to consider the additional evidence offered by the parent as it was available at the time of the impartial hearing.

B. Unliterally-Obtained Services

Neither party appeals the IHO's determination that the district failed to meet its burden to prove the appropriateness of the services recommended in the April 2022 IESP (see IHO Decision

[8] Furthermore, this was not a case, for example, when the parties and IHO believed a document was in evidence, when in fact it had not been moved into evidence by the IHO.

at p. 11). Accordingly, this finding has become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]). The next issue to be considered is the appropriateness of the student's private services from Enhanced.

Prior to reaching the substance of the parties' arguments, some consideration must be given to the appropriate legal standard to be applied, particularly in light of the parent's argument on appeal that the unilaterally-obtained services were a continuation of the July 2020 CPSE IEP, "not a unilateral placement separate and distinct from the mandate that the [district] recommended" and that the parent's burden was "diminished."

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 appropriate IESP for the 2022-23 school year and as a self-help remedy she unilaterally obtained private services from Enhanced for the student without the consent of the school district officials, and then commenced due process to obtain remuneration for the costs thereof. Accordingly, the issue in this matter is whether the private 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 Enhanced 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]; see Carter, 510 U.S. at 14 [finding that the "Parents' failure to select a program known to be approved by the State in favor of an unapproved option is not itself a bar to reimbursement."]).

The parent's request for district funding of privately-obtained services must be assessed under this framework; namely, given the district's failure to meet its burden to prove that it offered the student appropriate equitable services for the 2022-23 school year under the State's dual enrollment statute, the issue is whether the private services obtained by the parent from Enhanced constituted appropriate unilaterally obtained services for the student such that the cost of the services is reimbursable to the parent or, alternatively, payable directly by the district to the provider. The parent's contention that there is a similarity in the type and amount of the unilaterally-obtained services for the 2022-23 school year to the recommendations of July 2020 CPSE somehow alters the parent's burden in this matter does not alter that framework. There is no dispute that the July 2020 CPSE recommended services to be delivered by the district in a preschool program; but since then the student transitioned to school-aged programs and the parent has obtained private services to be delivered in a parentally selected private school. While the parent may permissibly rely on the July 2020 preschool IEP in order to define the student's stay-put placement during the pendency, she may not rely on that document to avoid her burden to prove that the private services she obtained were appropriate for the student during the 2022-23 school year.

Turning to the standard to apply in assessing the appropriateness of the unilaterally-obtained services, the federal standard is instructive. A private school placement or, as in this case, private services must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school or services 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). 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] [finding that "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).

1. Student's Needs

Here, the only evidence of the student's needs is the description of the student in the April 2022 IESP and the student's needs as set forth in the IESP are not in dispute (Parent Ex. D).

According to the April 2022 IESP the student presented with a speech and language impairment with deficits in expressive language (Parent Ex. D at p. 5). The IESP reflected that the student struggled with word finding and vocabulary as well as phonological deficits that interfered with her academics in reading and math (id.).

Review of the April 2022 IESP shows that the CSE considered the information provided in a December 5, 2021 SEIT report and information provided by the parent (Parent Ex. D at p. 2).[9] With respect to her cognitive skills, the IESP identified that the student was able to sort objects by color and categories, rote count to 10, and count using 1:1 correspondence up to five, as well as follow two step directions, recognize the letters of her name, and listen to a story (id.). The IESP indicated that the student was unable to rote count up to 15, count with 1:1 correspondence up to 10, identify a problem and try to solve it independently, follow multi-step directions, match words that rhyme, or demonstrate awareness of the relationship between sounds and letters (id.). In regard to the student's play skills, the April 2022 IESP indicated that the student had strengths in dramatic play skills and was able to imitate adult behavior during play but lacked the ability to carry out a three-part sequence during play (id.). The IESP noted that the student was a visual learner and benefited from modeling and role play (id.).

Additionally, the April 2022 IESP reflected the parent's input that the student was not able to identify numbers but was able to count by rote to five, and knew Hebrew letters that had been taught thus far but not the English alphabet because it had not yet been taught (Parent Ex. D at p. 2). Further, according to the IESP, the parent indicated that the student knew shapes and colors, was able to identify her name in print, and was beginning to learn to write her first name (id.). The April 2022 IESP reported the parent's concern regarding the student's speech; particularly her slight stutter, hesitation when learning, and her struggle to get words out which impacted her socialization (id.). The IESP also noted that the student had articulation deficits as she omitted and substituted sounds, she presented with language and vocabulary deficits, and was known to need basic concepts broken down in order to understand and process information (id.). According to the April 2022 IESP, the parent reported that the student showed improvement in her word finding skills, no longer drooled, and did not have an open mouth posture or present with oral motor skill deficits (id.).

With respect to the student's social development, the April 2022 IESP indicated that the student responded to the initiation of peers, she initiated interactions with peers, chose a peer as a 'preferred friend,' played cooperatively with peers, followed and adhered to the daily routines in school, and participated through a good morning circle (Parent Ex. D at p. 3). The parent conveyed in the IESP that the student got along with peers and her siblings, listened, followed rules, and was respectful with the parent at home (id.). According to the IESP, the student did not wait her turn, focus on an activity of her choosing for 10 minutes, focus on a teacher chosen activity for 10 minutes, focus and attend to a difficult task not of her choosing until completion, or focus and

[9] The December 2021 SEIT report referenced in the April 2022 IESP was not included in the hearing record.

persevere on a task she perceived as difficult (id.). It was reported that the student's provider supported the development of the student's social skills through prompting and praise (id.). The April 2022 IESP indicated that the parent was concerned with the student's difficulty articulating what she wanted to say, noting that she was able to talk about her day but was unable to express herself well (id.).

The physical development portion of the April 2022 IESP included information regarding the student's motor skills as purportedly conveyed by the December 5, 2021 and March 2, 2022 SEIT reports (Parent Ex. D at p. 4). The IESP reported that with respect to gross motor skills the student was able to walk upstairs alternating feet and jump in place and, with respect to fine motor skills, that she could draw a horizontal line and a circle (id.). The IESP indicated that, according to the parent, the student was in good health with age-appropriate balance, endurance, stamina, and fine motor skills (id.). As per parent report the student was able to ambulate throughout a building without tripping, alternated feet when ascending and descending stairs, and was able to trace lines appropriately (id.). The parent also reported that the student was able to dress herself and manage her basic personal hygiene independently in an age-appropriate manner (id.). The parent indicated that the student used pencil, crayons, and markers appropriately when tracing and coloring and she was able to ride a scooter (id.). According to the April 2022 IESP the parent had no concerns regarding the student's motor development (id.).

The April 2022 IESP recommended management strategies and interventions to address the student's needs, including repetition and rephrasing, instructions broken down into discrete units of learning, use of multi-sensory materials, prompting and cluing when necessary, praise and encouragement, use of visual aids, repetition and review, and the use of manipulatives (Parent Ex. D at p. 4).

2. Services from Enhanced Support Services Inc.

As stated above, the April 2022 IESP identified several of the student's needs with respect to her academic abilities, language skills, and social development but there is sparse evidence in the hearing record that demonstrates what services the student received or how the contracted agency addressed the student's needs.

The contract with Enhanced indicated that the agency would provide the student with "intensive special services" during the 2022-23 school year in an amount to "be determined" (Parent Ex. G). The Enhanced director and the parent testified by way of affidavit that the agency provided the student with five hours per week of "Special Education Services," without describing what was meant by this phrase (Parent Exs. E ¶ 9; F ¶ 12).[10] The director identified, by name, the

[10] Initially, the generic reference to "Special Education services" is problematic. In New York, the Education Law describes special education as including "special services or programs," which, in turn, includes, among other things, "[s]pecial classes, transitional support services, resource rooms, direct and indirect consultant teacher services, transition services . . . , assistive technology devices . . . as defined under federal law, travel training, home instruction, and special [education] itinerant teachers [services] . . . ." (Educ. Law § 4401[2][a]). In New York the definition of "special services or programs" (and therefore special education) also encompasses related services, such as counseling services, OT, PT, and speech-language therapy (Educ. Law § 4401[2][k]). In the private context, the phrase could be even broader. Here, the reference to the student's services as "Special Education services" is too amorphous, omitting even the suggestion of a teacher as the provider in the name,

provider of these services and indicated that the individual held State certification to teach students with disabilities and was a bilingual Yiddish provider "trained and experienced to teach literacy and comprehension to school aged children and adolescents" (Parent Ex. F ¶ 13). For this provider, the hearing record includes a document indicating that the provider held an "Internship Certificate" in early childhood education and to teach students with disabilities (Parent Ex. H at p. 1). The director also indicated that the agency provided the student with three thirty-minute sessions of speech-language therapy services (Parent Ex. F ¶ 12). The director named the provider of the speech-language therapy and stated that the individual held State certification as a speech-language pathologist (id. ¶ 14; see Parent Ex. H at p. 2).

According to the director's testimony, his familiarity with the student was limited to reports and that his affidavit was based on reports provided to him by individuals who he supervised (Tr. pp. 87-89). Neither of the providers, which the director indicated delivered services to the student, testified at the impartial hearing. The director testified in his affidavit that the student "typically" received her services on a pull-out basis at the school and that sessions were "individualized" and "included a great deal of specialized instruction" (Parent Ex. F ¶¶ 18, 21). The director testified that goals were developed for the student that were reviewed quarterly (id. ¶ 19). Further, the director testified that the student's progress was measured through quarterly assessments, consistent meetings with the provider and support staff, and observation of the student in the classroom in addition to daily session notes (id. ¶ 22). Generally, the director stated, without elaboration, that the student showed "signs of progress with her Special Education service provider" and "some progress" in speech-language therapy but needed to continue services in both areas (id. ¶ 23). Similarly, the parent testified that the "SEIT" services were "keeping her on pace" (Tr. p. 67). As noted above, the director referenced a "progress report" in evidence, but the parent did not offer that document into evidence during the impartial hearing (Parent Ex. F ¶ 20; see Tr. pp. 50-51). Indeed, during the impartial hearing the parent did not provide evidence of any goals, quarterly assessment reports, or session notes as referenced by the director.

The evidence in the hearing record indicates that it is not clear that the student received the services at the frequencies identified by the director and the parent in their affidavits (Parent Exs. E ¶ 9; F ¶ 12). During the impartial hearing, the parent testified that she was unsure if the student was getting the full amount of the services stating that the student was receiving "between three and five for SEIT, and then between two and three for speech" (Tr. p. 72; Parent Ex. E ¶ 9).[11]

making them even less delineated than the also problematic reference to services as special education teacher support services or "SETSS" which also lack any definition in the State continuum of special education services, are used only within this school district, and lack a static and reliable definition (see 8 NYCRR 200.6; Application of a Student with a Disability, Appeal No. 16-056 [describing SETSS as "a flexible hybrid service combining Consultant Teacher and Resource Room Service" that was instituted under a temporary innovative program waiver to support a student "in the general education classroom"]; Application of a Student with a Disability, Appeal No. 19-047 [suggesting that SETSS was more of an a la carte service that is completely disconnected from supporting the student in a general education classroom setting]). The description in the hearing record of the services purportedly delivered to the student by Enhanced does not provide sufficient description such that the broad and generic phrasing used by Enhanced could be overlooked.

[11] The hearing record is devoid of evidence that documents dates of service.

Overall, there is some indication in the hearing record that the parent attempted to replicate a program for the student similar to that set forth in the July 2020 preschool IEP, and conversely that the district did not meaningfully dispute that the student required some level of services from a special education teacher, as well as speech-language therapy (Tr. pp. 102-103; Parent Ex. B); however, to the extent such factors might be relevant, the parent must still come forward with evidence that describes the services and the delivery thereof, particularly where, as here, the district has maintained its position that the parent did not meet her burden to prove that the unilaterally-obtained services were appropriate. However, the hearing record lacks consistent information about the level of services the student received and does not explain how the services from Enhanced addressed the student's needs (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]). As the IHO aptly described, the hearing record "does not explain what Enhanced's providers did to specifically address [the student's] unique needs and how the services provided by these educators and therapists specifically benefitted [the student]-other than the limited, generic statements that [special education services] and speech therapy [we]re provided outside of the classroom and [we]re somehow 'individualized,'" which "is not useful evidentiary material and does not explain how the Enhanced providers [we]re meeting [the student's] special education needs" (IHO Decision at p. 12).

Consequently, the IHO correctly found that the parent did not meet her burden to establish the appropriateness of the services provided to the student by Enhanced during the 2022-23 school year.

VII. Conclusion

Having found that the parent did not sustain her burden of demonstrating the appropriateness of her unilaterally-obtained services, the necessary inquiry is at an end and there is no need to reach the issue of whether equitable considerations support the parent's request for relief (see M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]).

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
June 9, 2023

JUSTYN P. BATES
STATE REVIEW OFFICER