The University of the State of New York

The State Education Department
State Review Officer
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No. 24-025

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:
Gulkowitz Berger, LLP, attorneys for petitioner, by Shaya M. Berger, 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, in part, her request that respondent (the district) fund the costs of services delivered to her son by Kids Domain Childcare Center (Kids Domain) at a specified rate for the 2023-24 school year. The district cross-appeals from the IHO's determination that that parent is entitled to an award of compensatory education. 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 IDEA (20 U.S.C. §§ 1400-1482), namely a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, State law provides that

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

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

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

III. Facts and Procedural History

The parties' familiarity with this matter is presumed and, therefore, the facts and procedural history of the case and the IHO's decision will not be recited here in detail.

Briefly, the CSE convened on February 6, 2020, to formulate the student's IESP (see generally Parent Ex. G). The February 2020 CSE recommended five periods of direct group special education teacher support services (SETSS) in Yiddish per week, two 30-minute sessions of individual speech-language therapy in Yiddish per week, two 30-minute sessions of individual occupational therapy (OT) per week, and two 30-minute sessions of individual physical therapy (PT) per week (id. at pp. 9-10).

According to the parent, the CSE did not reconvene thereafter (see Parent Ex. A). In a letter signed on May 8, 2023, the parent indicated that she had placed the student at a nonpublic school at her own expense and would like special education services (Parent Ex. D).

An agreement between the parent and Kids Domain indicated that Kids Domain would provide the student with SETSS and speech-language therapy for the 2023-24 school year (Parent Ex. E). The agreement indicated that the student would receive five periods of SETSS per week during an undisclosed number of months at a rate of $200 per hour and two 30-minute sessions of speech-language therapy at a rate of $200 per "sessions" (id.).[1] The agreement stated that it was "effective as of September 1, 2023" and the document was "DocuSigned"; however, there was no indication of the date of the electronic signature (id.).

In a due process complaint notice, dated August 31, 2023, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) and/or equitable services for the 2023-24 school year (see Parent Ex. A). The parent asserted that the last IESP was dated February 2020 and that for the full 2023-24 school year, the student required "the same special education services and all related services each week" as recommended by the February 2020 IESP (id. at p. 1). The parent indicated that she was able to find a service provider at rates higher than the standard district rate (id.). For relief, the parent requested:

> 1. Scheduling a pendency hearing and issue an order requiring the DOE to continue the student's special education and related services under the student's automatic pendency entitlement.
>
> 2. Scheduling an impartial hearing and issue an order for the student awarding 7 sessions per week of special education teacher services at an enhanced rate for the entire 2023-2024 school year.
>
> 3. Allowance of funding for payment to the student's special education teacher provider/agency for the provision of 5 sessions per week of special education teacher at an enhanced rate for the entire 2023-2024 school year.
>
> 4. Awarding all related services and aides on the IESP for the entire 2023-2024 school year and (a) related services authorizations for such services if accepted by the parent's chosen providers; or (b) direct funding to each of the parent's chosen providers at the rate each charges, even if higher than the standard DOE rate for such service.

[1] The agreement stated "2x30" for the frequency and length of speech-language therapy, but it did not state the periodic occurrence (i.e., weekly).

5. Such other and further relief as is appropriate.

(id. at p. 2).

An impartial hearing convened before the Office of Administrative Trials and Hearings (OATH) on November 20, 2023 (Tr. pp. 1-23). During the impartial hearing the district agreed that the student's pendency placement consisted of 5 sessions per week of SETSS, two 30 minutes sessions of OT per week, two 30 minutes sessions of speech-language therapy per week, and two 30 minutes sessions of PT per week (September 6, 2023 Pendency Implementation Form).

In a decision dated December 13, 2023, the IHO determined that the district failed to offer the student a FAPE for the 2023-24 school by not convening a CSE to determine the student's needs and by failing to implement the 2020 IESP (IHO Decision at pp. 6, 11). Due to the district's failure to convene a CSE and a lack of evidence about the student's needs, the IHO ordered the district to reconvene the CSE within 30 days of the IHO's decision to conduct necessary evaluations and assessments to determine the student's needs and eligibility for special education services (id. at pp. 8, 11). In addition, the IHO held that the parent's unilaterally obtained services were not appropriate because there was insufficient evidence to support a finding that the SETSS provider had "identified [the student's] needs and then provided services specially designed to address the [s]tudent's unique needs" (id. at pp. 7-8). However, the IHO found that the student should be provided with compensatory education services for the district's failure to provide OT services and awarded 18 hours of OT compensatory education services at the rate of $150 per hour (id. at p. 9).[2]

IV. Appeal for State-Level Review

The parent appeals through her attorney and argues that the IHO erred by failing to find that she is entitled to funding for SETSS provided by Kids Domain. The parent contends that the IHO applied an incorrect legal standard and even if it were the correct standard to apply, she had met her burden under that standard and therefore was entitled to relief. More specifically, the parent asserts that the district failed to implement the February 2020 IESP and she is contractually obligated to pay for the SETSS services provided by Kids Domain; therefore, she has met her burden of proof. Lastly, the parent argues for the first time on appeal that the IHO should have found that she is entitled to compensatory education services for OT, PT, and speech-language therapy for the entire 2023-24 school year.[3]

In an answer and cross-appeal, the district asserts that the IHO erred in granting an award of compensatory education services. The district contends that the parent did not request compensatory relief in the due process complaint notice and the issue was outside of the scope of the hearing. Moreover, the district argues that the parent's request for additional compensatory relief is also outside the scope of review.

[2] The IHO determined that the student was not entitled to compensatory education services for SETSS because the student was receiving pendency services for SETSS (IHO Decision at p. 9).

[3] It appears the parent is seeking on appeal an award of additional hours to the bank of 18 hours of compensatory OT services that the IHO awarded to the parent as relief.

V. Applicable Standards

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

However, under State law, parents of a student with a disability who have privately enrolled their child in a nonpublic school may seek to obtain educational "services" for their child by filing a request for such services in the public school district of location where the nonpublic school is located on or before the first day of June preceding the school year for which the request for services is made (Educ. Law § 3602-c[2]).[4] "Boards of education of all school districts of the state shall furnish services to students who are residents of this state and who attend nonpublic schools located in such school districts, upon the written request of the parent" (Educ. Law § 3602-c[2][a]). In such circumstances, the district of location's CSE must review the request for services and "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an [IEP]" (Educ. Law § 3602-c[2][b][1]). The CSE must "assure that special education programs and services are made available to students with disabilities attending nonpublic schools located within the school district on an equitable basis, as compared to special education programs and services provided to other students with disabilities attending public or nonpublic schools located within the school district (id.).[5] Thus, under State law an eligible New York State resident student may be voluntarily enrolled by a parent in a nonpublic school, but at the same time the student is also enrolled in the public school district, that is dually enrolled, for the purpose of receiving special education programming under Education Law § 3602-c, dual

[4] 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]).

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

enrollment services for which a public school district may be held accountable through an impartial hearing.

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E. v. New York City Dep't of Educ., 694 F.3d 167, 184-85 [2d Cir. 2012]).

VI. Discussion

Initially, I note that neither party appeals the IHO's finding that the district failed to offer the student a FAPE for the 2023-24 school year or provide the student with equitable services for that school year, and there was no appeal of the IHO's order for the district to evaluate and reconvene the CSE to determine the student's needs and eligibility for special education services (IHO Decision at pp. 6, 8). As such, these findings have become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).[6]

A. Scope of Impartial Hearing

Turning first to the district's cross appeal, the district argues that the parent failed to request compensatory education in the due process complaint notice; therefore, the IHO exceeded her jurisdiction by awarding such relief.

Generally, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). Under the IDEA and its implementing regulations, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[i][7][i][a]; [j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]). Indeed, "[t]he parent

[6] The additional exhibits submitted with the request for review are duplicative and except for one proposed exhibit, already part of the hearing record. Generally, documentary evidence not presented at an impartial hearing may be 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]). The only exhibit submitted with the request for review that was not already in the hearing record was proposed Parent Exhibit H, which clarified that the February 2020 IESP submitted by the district into evidence at the impartial hearing was incomplete (see Dist. Ex. 4). However, Parent Ex. G, the complete copy February 2020 IESP, was entered into the hearing record by the parent at the impartial hearing and, therefore is unnecessary. Moreover, the transcript of the November 20, 2023 impartial hearing reflects that Parent Exhibits A through G were all admitted into the hearing record (Tr. p. 4), and they are all part of the hearing record that is before me on review. Based on this information, there is no need to admit Parent Exhibits A-H offered by the parent as additional evidence with her request for review as doing so would be duplicative and unnecessary.

must state all of the alleged deficiencies in the IEP in their initial due process complaint in order for the resolution period to function. To permit [the parents] to add a new claim after the resolution period has expired would allow them to sandbag the school district" (R.E., 694 F.3d 167 at 187-88 n.4; see also B.M. v. New York City Dep't of Educ., 569 Fed. App'x 57, 58-59 [2d Cir. June 18, 2014]).

When a matter arises that did not appear in a due process complaint notice, the next inquiry focuses on whether the district, through the questioning of its witnesses, "open[ed] the door" to the issue under the holding of M.H. v. New York City Department of Education (685 F.3d at 250-51; see also Bd. of Educ. of Mamaroneck Union Free Sch. Dist. v. A.D., 739 Fed. App'x 79, 80 [2d Cir. Oct. 12, 2018]; B.M., 569 Fed. App'x at 59; J.G. v. Brewster Cent. Sch. Dist., 2018 WL 749010, at *10 [S.D.N.Y. Feb. 7, 2018], appeal dismissed [2d Cir. Aug. 16, 2018]; C.M. v. New York City Dep't of Educ., 2017 WL 607579, at *14 [S.D.N.Y. Feb. 14, 2017]; D.B. v. New York City Dep't of Educ., 966 F. Supp. 2d 315, 327-28 [S.D.N.Y. 2013]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 584-86 [S.D.N.Y. 2013]; A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 282-84 [S.D.N.Y. 2013]; J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, *9 [S.D.N.Y. Aug. 5, 2013]).

Here, the district is correct that the parent did not request compensatory education services in her due process complaint notice as it is evident on review that the parent instead sought funding for her unilaterally-obtained services by her preferred private providers. Specifically, the parent requested relief of pendency, SETSS funding, and an award for "all related services and aides on the IESP for the entire 2023-2024 school year and (a) related services authorizations for such services if accepted by the parent's chosen providers; or (b) direct funding to each of the parent's chosen providers at the rate each charges, even if higher than the standard DOE rate for such service" (Parent Ex. A at p. 2).

Further, upon an independent review of the hearing record, there is insufficient evidence to support a finding that the scope of the impartial hearing was expanded to include a request for compensatory relief. In this case, there was only one impartial hearing date (see Tr. pp. 1-23). During the impartial hearing, there was a discussion regarding a settlement conference, but there was no indication that the parent asserted a claim for compensatory education services (Tr. p. 4). After the district cross examined the parent's witness, the parties made closing statements on the record. Notably, during the parent's closing statement, the parent's attorney specifically stated that there was "no specific request for funding" of any of the related services listed in the February 2020 IESP, but that they were asking that the district "remain obligated to provide the services" (Tr. p. 21).[7] The district's closing statement makes no mention of a request for compensatory education services (Tr. pp. 16-18).[8] Neither party submitted a written closing brief. While IHOs have some latitude in fashioning appropriate relief, to survive a challenge there should be some discernable evidence in the hearing record that supports the need, calculation and reasoning for a

[7] The parent's attorney noted that OT, PT, and speech-language therapy were listed related services on the IESP (Tr. p. 21; see also Parent Ex. G at pp. 9-10).

[8] The parent's request in her due process complaint notice for "such other and further relief" was too broad for the IHO to construe as a specific request for compensatory education and, as noted, the parent did not raise it during or even at the conclusion of the impartial hearing.

compensatory education award. Here, there is no evidence about the student's current OT needs. Moreover, as the issue of compensatory relief was not specifically raised during the impartial hearing or in the due process complaint notice, I find the IHO erred by granting OT compensatory education services and the parent's request on appeal for additional compensatory education services for OT, PT and speech-language therapy is denied on the additional ground that there is insufficient evidence in the hearing record to support the need and calculation of such an award.

B. Unilaterally-Obtained Services

Prior to reaching the substance of the parties' arguments regarding the parent's unilaterally-obtained SETSS services, 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. Rather, the parent seeks public funding of the costs of the private SETSS.[9] "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 Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 14 [1993] [finding that the "Parents' failure to select a program known to be approved by the State in favor of an unapproved option is not itself a bar to reimbursement"]).[10]

The parent's request for privately-obtained services must be assessed under this framework. That is, a board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Carter, 510 U.S. 7; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 252 [2d Cir. 2009]). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

Turning to a review of the appropriateness of the unilaterally obtained services, the federal standard is instructive. A private school placement must be "proper under the Act" (Carter, 510

[9] The parent contracted with Kids Domain to provide speech language therapy; however, the director of Kids Domain indicated that Kids Domain was not providing it (Parent Ex. E; Tr. p. 14).

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

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).

Here, the IHO correctly used the Burlington/Carter standard when determining whether the parent's unilaterally-obtained services of SETSS were appropriate. In this instance, the parent

objected to the district's failure to develop an educational program for the student for the 2023-24 school year, the parent then indicated that the February 2020 IESP, developed three years prior to the current school year, constituted an appropriate program for the student. However, there is no information in the hearing record as to the student's current educational needs and no information to determine if the educational program as recommended in the February 2020 IESP is still an appropriate program for the student. This lack of information is the fault of the district; however, in deciding to continue the student's services from the three-year old IESP, the parent attempted to remedy the district's failure by unilaterally obtaining services for the student and took on the burden of establishing that any private programming that she acquired without the consent of school district officials was appropriate. "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 IEP 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 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."]).[11] Accordingly, for the situation presented in this matter, the IHO correctly identified that the issue was whether the private special education programming unilaterally identified by the parent was an appropriate program for the student for the 2023-24 school year.[12]

It is noted that there is no indication in the hearing record where the student was receiving the SETSS services. Also, the due process complaint notice listed a nonpublic religious school for the student's placement, while the IHO decision had a different nonpublic religious school listed (compare Parent Ex. A at p. 1 with IHO Decision at p. 13; see also Parent Ex. D). Further, the term SETSS is not defined in the State continuum of special education services (see NYCRR 200.6), and it went largely undefined in the hearing record in this case. As has been laid out in prior administrative proceedings, the term is not used anywhere other than within this school

[11] Although the standard employed is commonly referred to as the Burlington/Carter test and is based on two Supreme Court decisions, and dual enrollment special education services under an IESP are provisions based on State law, the provisions permitting due process proceedings for dual enrollment cases specifically reference State law, which provides that "a parent or person in parental relation seeking tuition reimbursement for a unilateral parental placement shall have the burden of persuasion and burden of production on the appropriateness of such placement" (Educ. Law 4404[c]; see Educ. Law 3602-c[2][b][1]). Accordingly, although there could, at some point, be separate federal and State tests for the appropriateness of unilaterally obtained services, at this point in time, the federal standard is instructive in review of the appropriateness of unilaterally obtained services. Additionally, although the State statute references "reimbursement," (Educ. Law 4404[c]), the original Burlington/Carter framework also initially only addressed reimbursement for the cost of private school tuition but was expanded to include a direct payment remedy (Cohen v. New York City Dep't of Educ., 2023 WL 6258147, at *4 [S.D.N.Y. Sept. 26, 2023]).

[12] Regarding the parent's contention that the district did not raise the issue of appropriateness at the impartial hearing, this is without merit. The district did assert in its closing statement that the parent must "demonstrate that the services are tailored and serving the needs of" the student (Tr. p. 16). Moreover, even if the district did not specifically raise appropriateness, it does not relieve the parent of her burden to demonstrate that the unilaterally-obtained services of SETSS were appropriate for the student.

district and a static and reliable definition of "SETSS" does not exist within the district, and unless the parties and the hearing officer take the time to develop a record on the topic in each proceeding it becomes problematic (see Application of the Dep't of Educ., Appeal No. 20-125). In this case, there is no evidence regarding what services the parent unilaterally obtained for the student, beyond that they are called SETSS. Without more information, the IHO correctly determined that the parent failed to meet her burden of demonstrating that the unilaterally obtained program was appropriate for the student.

Lastly, the parties have agreed to pendency in this case (see Sept. 6, 2023 Pendency Implementation Form). Therefore, to the extent the district has not provided the student with pendency services, the district is required to effectuate pendency through the date of this decision using district employees, unless the parties agree otherwise.

VII. Conclusion

Having determined that the evidence in the hearing record supports the IHO's determination that the parent failed to demonstrate that the parent's unilaterally obtained services were appropriate, the parent's requested relief is denied. In addition, given that the parent did not request compensatory education services in the due process complaint notice and there is insufficient evidence in the hearing record to support such an award, the IHO's order that awarded 18 hours of OT compensatory services is annulled.

I have considered the parties' 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 December 13, 2023, is annulled to the extent that it directed the district to fund a bank of 18 hours of compensatory OT services; and

IT IS FURTHER ORDERED that to the extent the district has not provided the student with pendency services, the district is required to effectuate pendency through the date of this decision using district employees, unless the parties agree otherwise.

Dated: **Albany, New York**
February 20, 2024

JUSTYN P. BATES
STATE REVIEW OFFICER