The University of the State of New York

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

No. 24-042

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Liz Vladeck, General Counsel, attorneys for petitioner, by Frank J. Lamonica, 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 district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondent's (the parent's) son and ordered it to fund four hours per week of special education teacher support services (SETSS) to be provided to the student for the 2023-24 school year. The appeal must be sustained in part.

II. Overview—Administrative Procedures

When a student who resides in New York is eligible for special education services and attends a nonpublic school, Article 73 of the New York State Education Law allows for the creation of an individualized education services program (IESP) under the State's so-called "dual enrollment" statute (see Educ. Law § 3602-c). The task of creating an IESP is assigned to the same committee that designs educational 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, 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 in detail. The student attended a parentally selected nonpublic school during the 2020-21 school year (Parent Ex. D at p. 1).[1] The

[1] Parent exhibit D and District exhibit 2 are duplicate copies of the student's December 23, 2020 IESP. This decision will cite to Parent exhibit D when referencing the December 2020 IESP.

CSE convened on December 23, 2020, determined the student was eligible for special education as a student with a learning disability, and developed the student's individualized education services program (IESP) to be implemented beginning January 4, 2021 (see generally Parent Ex. D).[2] On or about September 8, 2022, the parent initiated a separate proceeding alleging that the district denied the student a FAPE for the 2022-23 school year by failing to convene the CSE for the 2022-23 school year and implement the services contained in the December 2020 IESP (Parent Ex. B at p. 3). In a decision dated February 17, 2023, the IHO in that matter held that the district denied the student a FAPE for the 2022-23 school year and directed the district to directly fund/reimburse the parent for the cost of four sessions per week of SETSS in Yiddish for the 2022-23 school year (id. at pp. 16-17).

On or about May 30, 2023, the parent's attorney emailed a notice to the district that the student would be parentally placed at a parochial nonpublic school for the 2023-24 school year (Parent Ex. E). The parent also provided the CSE with notice of "residence and school enrollment so that the CSE c[ould] provide [the student] with all special education and related services that they require for the 2023-24 school year" (id. at p. 2). The hearing record did not include a district response to the parent's May 2023 email (see Parent Exs. A-J; Dist. Exs. 1-4). On September 7, 2023, the parent signed a contract with Mount Resources to provide the student with four hours per week "SETSS at a rate of $205 per hour" for the 2023-24 school year (Parent Ex. F). In an email to the district dated September 12, 2023, the parent provided 10-day notice of parental placement explaining that she would implement the December 2020 IESP on her own and would seek reimbursement or direct funding from the district (Parent Ex. C). In a due process complaint notice dated September 12, 2023, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2023-24 school year (see Parent Ex. A).[3]

A prehearing conference was held on October 18, 2023 (Tr. pp. 1-11). An impartial hearing convened on December 7, 2023 and concluded on December 19, 2023 after two days of proceedings (Tr. pp. 12-75). During the impartial hearing, the district argued that the parent had parentally placed the student in a nonpublic school and had not requested dual enrollment services under Education Law § 3602-c prior to June 1 of the preceding school year (see, e.g., Tr. p 5). The parent produced evidence that she contracted with Mount Resources to provide services to the student, a progress report, and testimony from two witnesses (see Parent Exs. F; H-J). The district also argued that the rates charged by Mount Resources as excessive with respect to providing educational services to the student (see, e.g., Tr. p.63). The IHO admitted two district exhibits into evidence over the parent's attorney's objections: a related services independent provider rate schedule dated August 2, 2019 (rate schedule) and a report from the American Institutes for Research (AIR) dated October 2023 titled Hourly Rates for Independently Contracted Special Education Teachers and Related Service Providers (AIR report) (Tr. pp. 36-43; Dist. Exs. 3, 4). AIR was tasked by the district to calculate hourly rates for independently contracted service providers by using data from the district's geographic region obtained from the United States

[2] The student's eligibility for special education as a student with a learning disability is not in dispute (see 34 CFR 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

[3] Parent exhibit A and District exhibit 1 are duplicate copies of the parent's September 12, 2023 request for a due process hearing. This decision will cite to Parent exhibit A when referencing the September 2023 due process complaint notice.

Bureau of Labor Statistics (BLS) and by using "the current salary schedule used for New York City public school teachers, with respect to pay differentials associated with teachers' educational attainment and experience" (Dist. Ex. 4 at p. 4).[4] The AIR report reflected that inflation-adjusted hourly compensation rates for the New York-New Jersey-Pennsylvania Metro Area for special education teachers ranged from $72.62 to $159.42 per hour (id. at p. 18).

In a decision dated December 26, 2023, the IHO determined that the district failed to offer the student a FAPE for the 2023-24 school year, that the district failed to establish that the June 1 notice defense under Education Law 3602-c applied to the facts of this case, and that Mount Resource's hourly rate was appropriate (IHO Decision at pp. 6-7). The IHO noted that she reviewed the rate schedule and the AIR report but did not find it persuasive (id. at p. 7). As relief, the IHO ordered the district to pay Mount Resources the amount of $205 per hour for the student's four hours per week of SETSS in Yiddish for the 2023-24 school year (id. at p. 8).

IV. Appeal for State-Level Review

The district appeals.[5] The parent did not file an answer to the district's request for review, and is not represented by the attorney retained by her during the impartial hearing phase of the administrative process.[6] Notwithstanding the parent's failure to answer, I have examined the entire hearing record and make an independent decision based on the entire hearing record (Arlington Cent. Sch. Dist. v. State Review Officer, 293 A.D.2d 671 [2d Dep't 2002]; see 20 U.S.C. § 1415[g]; 34 C.F.R. § 300.514[b][2][i]).

The following issues presented on appeal must be resolved on appeal in order to render a decision in this case:

1. Whether the IHO erred by determining that a May 2023 notice sent via email to the district constituted an adequate written request for services before the June 1st deadline under Educ. Law 3602-c[2];

2. Whether the IHO erred in finding that the parent met her burden of proving that Mount Resources was an appropriate SETSS provider for the student, and

[4] Dist. Ex. 4 contains hyperlinks to the reports, schedules, agreements, forms and documentation cited as its data sources (Dist. Ex. 4 at pp. 4-6).

[5] After approximately six attempts at personal service of appeal related papers upon the parent at different times of the day and evening the district was authorized by the undersigned to effectuate alternate service upon the parent (SRO Exs. 1-4). The district affirmed that the attorney who represented the parent during the impartial hearing notified the district that his office had not been retained by the parent for purposes of the appeal (SRO Exs. 1; 3). I note that the district further submitted an affidavit dated February 6, 2024 erroneously captioned "declaration of email service" but the document clarifies that on February 5, 2024 alternative service was effectuated in part by certified mail, return receipt requested in accordance with the undersigned's alternate service directives (Req. for Rev. at p. 17).

[6] It should be noted that the parent was late to appear at the impartial hearing to present her testimony (Tr. pp. 55-58). Following the parent's testimony, the IHO invited the parent stay for the remainder of the hearing but the parent replied "I think my lawyer will take care of that," said goodbye and signed out of the hearing (Tr. p. 60).

3. Whether the IHO erred in finding that the Mount Resources hourly rate was appropriate.

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]). "Boards of education of all school districts of the state shall furnish services to students who are residents of this state and who attend nonpublic schools located in such school districts, upon the written request of the parent" (Educ. Law § 3602-c[2][a]). In such circumstances, the district of location's CSE must review the request for services and "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an [IEP]" (Educ. Law § 3602-c[2][b][1]). The CSE must "assure that special education programs and services are made available to students with disabilities attending nonpublic schools located within the school district on an equitable basis, as compared to special education programs and services provided to other students with disabilities attending public or nonpublic schools located within the school district" (id.).[7]

VI. Discussion

A. Education Law § 3602-c and June 1 Defense

Turning to the district's appeal and the claim the parent is not entitled to any relief because the IHO erred in her determination that the district did not sufficiently set forth its affirmative

[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 https://www.nysed.gov/sites/default/files/special-education/memo/chapter-378-laws-2007-guidance-on-nonpublic-placements-memo-september-2007.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.).

Education Law § 3602-c June 1 deadline defense, the State's dual enrollment statute requires parents of a New York State resident student with a disability who is parentally placed in a nonpublic school and for whom the parents seek to obtain educational services to file a request for such services in the district 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]).

The issue of the June 1 deadline is similar to other affirmative defenses, such as the defense of the statute of limitations, which are required to be raised at the initial hearing (see M.G. v. New York City Dep't of Educ., 15 F. Supp. 3d 296, 304, 306 [S.D.N.Y. 2014] [holding that the limitations defense is "subject to the doctrine of waiver if not raised at the initial administrative hearing" and that where a district does "not raise the statute of limitations at the initial due process hearing, the argument has been waived"]; see also R.B. v. Dep't of Educ. of the City of New York, 2011 WL 4375694, at *4-*6 [S.D.N.Y. Sept. 16, 2011] [noting that the IDEA "requir[es] parties to raise all issues at the lowest administrative level" and holding that a district had not waived the limitations defense by failing to raise it in a response to the due process complaint notice where the district articulated its position prior to the impartial hearing]; Vultaggio v. Bd. of Educ., Smithtown Cent. Sch. Dist., 216 F. Supp. 2d 96, 103 [E.D.N.Y. 2002] [noting that "any argument that could be raised in an administrative setting, should be raised in that setting"]). "By requiring parties to raise all issues at the lowest administrative level, IDEA 'affords full exploration of technical educational issues, furthers development of a complete factual record and promotes judicial efficiency by giving these agencies the first opportunity to correct shortcomings in their educational programs for disabled children.'" (R.B. v. Dep't of Educ. of the City of New York, 2011 WL 4375694, at *6 [S.D.N.Y. Sept. 16, 2011], quoting Hope v. Cortines, 872 F. Supp. 14, 19 [E.D.N.Y. 1995] and Hoeft v. Tucson Unified Sch. Dist., 967 F.2d 1298, 1303 [9th Cir. 1992]; see C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at *12 [S.D.N.Y. Sept. 22, 2011]).

Moreover, unless specifically prohibited by regulation, IHOs are provided with broad discretion, subject to administrative and judicial review procedures, in how they conduct an impartial hearing, so long as they "accord each party a meaningful opportunity" to exercise their rights during the impartial hearing (Letter to Anonymous, 23 IDELR 1073 [OSEP 1995]; see Impartial Due Process Hearing, 71 Fed. Reg. 46,704 [Aug. 14, 2006] [indicating that IHOs should be granted discretion to conduct hearings in accordance with standard legal practice, so long as they do not interfere with a party's right to a timely due process hearing]). An IHO must provide all parties with an opportunity to present evidence and testimony, including the opportunity to confront and cross-examine witnesses (34 CFR 300.512[a][2]; 8 NYCRR 200.5[j][3][xii]).

In this instance, the hearing record includes evidence of an email with a letter attachment, both dated May 30, 2023, from the parent's then-attorney to the district titled "Notice of Residence to School District of Location" (see Parent Ex. E). It was emailed to the district by the parent's attorney "on behalf of Parent" and requested that the student "receive all services that they require via the [district]" and stated that the parent "consent[ed] to the [district] providing [her] child with all necessary special education and related services" (id. at p. 2). In the May 2023 email and attachment the parent notified the district of the student's current placement at the nonpublic school of the parent's choice (id.). The IHO held that this "letter sent by [p]arent's counsel, clearly indicat[ed] it [wa]s submitted on behalf of [the p]arent, to be sufficient notice that [the p]arent sought the [d]istrict to provide all services recommended in the IESP" (IHO Decision at p. 6). In her decision, the IHO acknowledged the district's argument that the May 2023 letter did not

constitute a valid June 1 notice because it was electronically signed by the parent's counsel instead of the parent, but the IHO held that the district presented no legal authority to support its argument that the letter failed to put the district on notice of the parent's request for special education services for the privately placed student (id. at pp. 6-7).

In its appeal, the district repeats the argument in made during the impartial hearing that the May 2023 letter fails to comply with the service requirements for June 1 deadline letters because it was not signed by the parent, but rather the parent's attorney. Having read the email and letter, the IHO reasonably concluded that the documents provided to the district constituted sufficient notice of the parent's intent to enroll the student in a private school and that these documents reflect that the parent was requesting special education services be provided by the district to the student. The district's contention is essentially that an attorney representing a parent is precluded from assisting or communicating with a school district on behalf of a client with regard to the June 1 notice requirement in § 3602-c, but the district provides no authority interpreting § 3602-c in such a manner and I have found none. Absent circumstances not present here, such as evidence that the attorney provided the June 1 notice without the knowledge or authorization of the client, I decline to construct such an interpretation in this case. Accordingly, I decline to reverse the IHO's determination that the parent adequately complied with the Education Law § 3602-c June 1 notification requirements.

The district further argues on appeal that it "did not owe the [s]tudent a FAPE" because the student was parentally enrolled in a private school (Req. for Rev. ¶ 8). The district's position displays a remarkable misrepresentation of the federal requirements, because the district is essentially arguing that students with disabilities are, as a practical matter, effectively declassified whenever a parent decides to place a student with a disability in a nonpublic school. Contrary to the district's assertion, the obligation of the district of residence to provide a FAPE does not terminate because a student has been privately educated elsewhere – rather, the IDEA's obligations may be shared with the district of location, and Education Law § 3602-c "does not imply that parents may not also seek a FAPE for a privately placed child from the district of the parents' residence" (J.S. v. Scarsdale Union Free Sch. Dist., 2011 WL 5925309, at *27-*29 [S.D.N.Y.Nov. 18, 2011] [emphasis in original]; see Dist. Ex. G at p.12).

The following question and answer in the Office of Special Education guidance memorandum is relevant to the issue on appeal:

> 12. Must the district of residence develop an IEP for a student who is parentally placed and conduct annual reviews of this IEP? U[nited] S[tates] E[ducation] D[epartment] has provided guidance that states: "If a determination is made through the child find process by the LEA (local educational agency) where the private school is located that a child needs special education and related services and a parent makes clear his or her intent to keep the child enrolled in the private . . . school located in another LEA, the LEA where the child resides need not make FAPE available to the child." Therefore, if the parents make clear their intention to keep their child enrolled in the nonpublic . . . school, the district of residence need not develop or annually review an IEP for the student.

("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. 12, VESID Mem. [Sept. 2007], available at https://www.nysed.gov/sites/default/files/special-education/memo/chapter-378-laws-2007-guidance-on-nonpublic-placements-memo-september-2007.pdf). Even assuming for the sake of argument that the parent had failed to submit any notices requesting equitable services under § 3602-c at all, that does not explain why the district failed to convene the CSE. There is no evidence all that the parent made clear that she was keeping the student enrolled in a private school in another LEA and did not wish to receive any special education services from the district. More to the point, the parent argued in her due process complaint notice that the district had failed to convene to create either IESP or an IEP for the student (Parent Ex. A).

Furthermore, because the district was placed on notice by the parent prior to June 1 that the parent was seeking dual enrollment services, the district offers no explanation how its "FAPE" vs "equitable services" argument would affect the outcome of this dispute. The district's FAPE argument does not square with the evidence it presented in this case and is rejected as meritless.[8]

B. Unilaterally Obtained Services

The district appeals from the IHO's failure to review the appropriateness of the SETSS provided to the student by Mount Resources using the Burlington-Carter analysis. The district asserts that the privately obtained SETSS were not appropriate for the student because the services were delivered individually to the student rather than in a group, the SETSS provider was not certified to provide special education instruction at the student's grade level, and there was little evidence of progress in the hearing record (Req. for Rev. ¶¶ 11-12). For the reasons discussed below I find that some aspects of the district's specific arguments are not entirely persuasive; however, review of the evidence in the hearing record demonstrates that the parent failed to meet her burden to show that the unilaterally obtained SETSS provided the student with specially designed instruction to meet his special education needs during the 2023-24 school year.

The district is correct that although the parties presented arguments on the issue (Tr. p. 72-73) the IHO erred, first because the IHO did not assess the services from Mount Resources or how they related to the student special education needs under any standard at all and instead bypassed that portion of the case and proceeded to the parties' dispute over the costs of the private services.

Although this is a dual enrollment case, there is no question that the parent contracted with Mount Resources as a remedy for the violations of the district. As a practical matter, this kind of dispute can really only be effectively examined using a Burlington/Carter unilateral placement framework because the attempts to resolve such cases that do not use a Burlington/Carter style of

[8] As the district remains responsible for providing this student with appropriate special education programs and related services, I note that even more troubling is that the unappealed February 17, 2023 IHO decision in the prior due process proceeding ordered the CSE to convene within 30 days of the date of the order to "consider [s]tudent's eligibility for special education and/or related services, and if eligible, to develop and IESP or IEP in accordance with the IDEA and State law" (Parent Ex. B at p. 17). In the event that the CSE has not already convened pursuant to the February 2023 order, the district should ensure that this occurs immediately.

analysis have tended to lead to chaos. When deciding cases in which a parent requests a school district to directly fund or reimburse costs incurred by the parent on behalf of a student when obtaining private services without the consent of public school officials. 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]).

"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"]).

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 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).

Turning to the facts of this case, at the outset a discussion of the evidence of the student's needs is necessary as background. According to the student's December 2020 IESP, his overall cognitive skills, including verbal comprehension and working memory, were in the very low range (Parent Ex. D at p. 1). A progress report from the school year preceding the one in question in this case was placed in evidence (Parent Ex. H). At the time the December 2022 SETSS progress report was prepared, the student was in fifth grade at the nonpublic school and received four hours of SETSS per week in a "pull-out setting" (id. at p. 1). According to the progress report, the SETSS was "geared towards building skills in the reading, writing, math and language domains," as those delays "must be addressed in order for [the student] to function appropriately in the classroom setting" (id.).

In the area of reading, the December 2022 progress report indicated that the student read up to four-letter words and recognized a number of sight words, but had difficulty decoding multi-

syllabic words and struggled to read sentences independently (Parent Ex. H at p. 2). The student grasped material read to him and understood the sequence of the story and the author's main ideas; however, when reading on his own the student "display[ed] significant lack of comprehension and [wa]s unable to answer basic questions" (id.). Goals for the student included applying grade-level phonics and word analysis skills to decode words, improving decoding skills for different types of words, asking and answering questions to demonstrate understanding of texts, and reading with sufficient accuracy and fluency to support comprehension (id. at pp. 2-3). The progress report indicated that the student was "significantly delayed" with respect to writing skills, which were at a first grade level (id. at p. 3). The student wrote "a small number of basic words," struggled to "write words and complete sentences," lacked knowledge of spelling and grammar rules, and his handwriting was unclear (id.). Goals for the student included demonstrating "command" of "standard English grammar," capitalization, punctuation, and spelling when writing and speaking, writing informative texts, and using various types of nouns, verbs, adjectives, conjunctions, prepositions, and sentence types in response to prompts (id.). Informal assessment results indicated that the student's math skills were at a third grade level, which the SETSS provider described as "significantly delayed" (id. at pp. 1-2). The student struggled to complete double-digit subtraction problems, lacked fluency with multiplication, and struggled with division concepts and using the correct operation for word problems (id. at p. 2). Goals for the student included solving various types of addition, subtraction, multiplication, and division problems using specific methods (id.).

According to the December 2022 SETSS progress report, English was the student's second language and he understood "quite well when spoken to," followed multi-step directions, and participated in class (Parent Ex. H at pp. 3-4). However, the SETSS provider also described the student's receptive and expressive language skills as "deficient" and indicated that he displayed weak comprehension skills during independent work, did not independently follow directions, and required 1:1 instruction (id.). The progress report also indicated that the student's "expressive speech [wa]s significantly below grade level, characterized by the use of primarily one- or two-word sentences," and he demonstrated limited vocabulary and lack of grammar knowledge (id. at p. 4). The SETSS provider reported that the student's social/emotional skills were "delayed," he had "low self-confidence" related to his below grade level skills, and he exhibited difficulty expressing his frustration, which he at times took "out on his peers" (id.).

Turning to the 2023-24 school year in question, in direct testimony by affidavit the supervisor of special education services at Mount Resources (supervisor) stated that the agency provided four hours per week of SETSS delivered individually to the student at his "mainstream" nonpublic school (Parent Ex. J ¶¶ 4, 9, 12, 15). According to the supervisor, the provider of the student's SETSS was a State certified special education teacher and "a bilingual Yiddish provider" (id. ¶ 10). The supervisor testified that the student's SETSS was "typically provided outside of the classroom," and consisted of "individualized sessions that include[d] a great deal of specialized instruction" (id. ¶ 18). The December 2020 IESP in evidence called for the student's SETSS to be provided in Yiddish, the December 2022 progress report indicated that English was considered to be the student's second language, and some of the student's goals involved improving English grammar, etc., and usage when writing or speaking (Parent Exs. D at p. 4; H at p. 3). The SETSS provider for the 2023-24 school year was described as "bilingual Yiddish," (Parent Ex. J ¶ 10), However, evidence in this case does not indicate what language the student required instruction in or what language the SETSS services were provided in in during the 2023-24 school year.

One of the district's assertions on appeal is that the unilaterally obtained SETSS were not provided in a group setting, purportedly pursuant to the student's December 2020 IESP (Req. for Rev. ¶ 12; see Parent Ex. D at p. 4). The supervisor acknowledged that the student was "mandated for group services"; however, the agency was "not able to locate a similarly situated group of students" and therefore provided the SETSS to the student in a 1:1 setting (Parent Ex. J ¶ 12). In situations where as here, the district failed to show that it offered appropriate programming to the student for the 2023-24 school year or attempted to implement even an outdated IESP, the fact that the parent's self-help remedy may not have comported to the letter with an IESP from the 2020-21 school year is not dispositive in determining whether the unilaterally obtained SETSS were appropriate. Rather, the supervisor's testimony as to the appropriateness of the decision to deliver the student's SETSS individually was not questioned by the district during the impartial hearing despite the opportunity to do so (see Tr. pp. 45-46, 49-55), and the hearing record lacks evidence that SETSS delivered to the student individually rather than in a group setting was not appropriate (see Tr. pp. 1-75; Parent Exs. A-J; Dist. Exs. 1-4). Similarly, the district's argument on appeal that the SETSS provider was not certified to provide special education services to a student at the student's grade level is not dispositive as the nonpublic school need not employ certified special education teachers when addressing the student's special education needs (compare Parent Ex. G, with Parent Ex. H at p. 1; Carter, 510 U.S. at 13-14).

Further, although the district's allegation on appeal that the hearing record offered little evidence of the student's actual progress is not ultimately dispositive, it highlights the deficiencies in the evidentiary record with respect to the parent's burden to show that the SETSS provided by Mount Resources constituted specially designed instruction that addressed the student's unique needs during the 2023-24 school year.[9] During the first day of the impartial hearing, December 7, 2023, counsel for the parent requested an adjournment to obtain the student's progress reports that had been completed "towards the end of November" 2023 so they could be disclosed consistent with the "five-day disclosure rule" (Tr. pp. 13-14). Counsel for the parent sought to present the progress reports "to show that the services that the [p]arent found [we]re appropriate," while acknowledging that there had been "a slight delay . . . in disclosure of the progress reports" (Tr. p. 15). The parent's attorney indicated that the extension of time was also needed to incorporate information about the progress the student had made as reflected in the reports into the affidavits of the parent and the "provider" (Tr. p. 16). The IHO adjourned the hearing until a later date with the assurance that the documents the parent's attorney discussed would be available (Tr. pp. 19, 21).

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

Despite the discussion held on December 7, 2023, the hearing record does not contain student progress reports dated November 2023 or from any other timeframe during the 2023-24 school year, nor did the student's SETSS provider provide testimonial evidence in the alternative (see Tr. pp. 1-75; Parent Exs. A-J; Dist. Exs. 1-4). In written testimony, the supervisor made one general statement that the progress report entered into evidence—the December 2022 progress report—was "an accurate representation of what [the SETSS provider] ha[d] been working on with [the student], including goals, over the course of the 2022-23 and 2023-24 school years" (Parent Ex. J ¶ 17). However, in contrast to this statement, is inconsistent testimony from the supervisor indicating that "[g]oals were created for [the student] to work on during the 2023-24 school year and [we]re reviewed quarterly" (id. ¶ 16). Further, the supervisor testified that the student's progress was measured through quarterly assessments, observations of the student in the classroom, and daily session notes, none of which were in evidence pertaining to the 2023-24 school year (see Parent Exs. A-J; Dist. Exs. 1-4).

Furthermore, even if the student was still working on the goals from the December 2022 progress report during the 2023-24 school year, that report does not adequately describe how any specially designed instruction was carried out with the student, and the hearing record does not otherwise include information about how the SETSS privately obtained by the parent was specially designed to meet the student's needs during the 2023-24 school year in dispute (see Tr. pp. 45-46, 49-55; Parent Ex. H). At the time the December 2022 progress report was prepared, the SETSS provider reported only that he used "the phonics method," "explicit instruction and encouraging reciprocal teaching" to build the student's reading skills; "much review and handwriting practice" and "teaching spelling and basic grammar rules" to address the student's writing skill needs; and that he had been "practicing math concepts" with the student "though the use of visual aids and repetition" to improve math skills (Parent Ex. H at p. 4). To address the student's social/emotional needs, the SETSS provider indicated that he taught the student "to express his feelings verbally and encourage[ed] the hands-free method" (id.). However, there is no indication in the hearing record that these methods would sufficiently address the student's needs or continued to be appropriate for the student during the 2023-24 school year. As such, the parent has failed to meet her burden to show that the unilaterally obtained SETSS provided specially designed instruction to meet the student's needs for the 2023-24 school year.

VII. Conclusion

Although the evidence in the hearing record supports the IHO's determination that the parent complied with the notice requirements of Education Law § 3602-c, contrary to the IHO's decision, the parent failed to meet her burden to prove that the unilaterally obtained SETSS provided by Mount Resources were appropriate to meet the student's special education needs during the 2023-24 school year. Accordingly, the necessary inquiry is at an end.

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

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision, dated December 26, 2023, is modified by reversing the determination that the district shall pay Mount Resources the amount of $205 per hour for the student's four hours per week of SETSS in Yiddish for the 2023-24 school year.

Dated: **Albany, New York**
March 7, 2024

JUSTYN P. BATES
STATE REVIEW OFFICER