



The University of the State of New York

The State Education Department

State Review Officer

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No. 24-137

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 a decision of an impartial hearing officer (IHO) which ordered it to fund the costs of respondent's (the parent's) son's private special education services delivered by Empowered Kids for Success (Empowered) for the 2023-24 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 programming 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 hearing record in this proceeding provides little information regarding the student's educational history. An IESP also noted that the student had previously received speech-language therapy and occupational therapy (OT) during sixth grade but did not receive services during seventh grade, but reason(s) were not developed in the hearing record (Parent Ex. B at pp. 2, 3).

The parent executed a service contract with Empowered, dated September 1, 2023, which provided that the company would deliver SETSS to the student "to whatever extent possible" at a specified rate for the 2023-24 school year (Parent Ex. C).¹

A CSE convened on September 22, 2023, found the student eligible for special education as a student with a speech or language impairment, and developed an IESP with a projected implementation date of September 29, 2023 (Parent Ex. B).² The IESP indicated that the student had undergone a psychoeducational evaluation in September 2023 and the document also included information from a June 2022 speech language therapy report (Parent Ex. B at pp. 1-3).. The IESP reflected that the student was 12 years old and attending the eighth grade in a class of 15 students at a nonpublic, religious school at the time of the CSE meeting (id. at pp. 1, 2). The CSE recommended that the student receive three periods per week of group special education teacher support services (SETSS) (id. at p. 6).

In a due process complaint notice dated October 30, 2023, the parent, through an attorney, alleged that the last CSE meeting was held on September 22, 2023 and that the district did not locate a provider, thereby denying the student a free appropriate public education (FAPE) and failing to provide appropriate equitable services to the student for the 2023-24 school year (Parent Ex. A). In particular, the parent contended that the district "failed to locate an adequate provider for [the student]'s SETSS" (id. at p. 2). The parent indicated she had found a provider to deliver the services but "at a rate higher than the going [district] rate" (id.). The parent requested a finding that the student's pendency consisted of three hours per week of group SETSS (id.). For relief, the parent requested "[a]llowance of prospective payment to the student's SETSS provider/agency for three (3) hours a week of one on one enhanced rate SETSS for the entirety of the 2023-2024 [School Year]" (id.). The parent also sought compensatory education for any services missed while without a provider (id.).

In an email dated November 13, 2023, with the subject line "omnibus scheduling First Step Advocacy," an IHO with the Office of Administrative Trials and Hearings (OATH) listed 42 case numbers and informed the parties that the matters were "slated for Omnibus settlement conferences and to have hearings scheduled" (IHO Ex. I at p. 1). The email further set forth the IHO's hearing procedure practices and expectations of the parties' conduct with regard to the impartial hearing (id. at pp. 1-7).

An eight-minute-long impartial hearing convened on February 2, 2024 (Tr. pp. 1-11).³ The IHO entered all of the exhibits offered by the parent, the parent's attorney confirmed that the parties had entered a pendency agreement, both parties confirmed that they would not be calling any

¹ Empowered has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

² 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]).

³ On January 16, 2024, the district executed a pendency agreement reflecting that the student's pendency placement consisted of the SETSS mandated in the September 2023 IESP (Pend. Implementation Form).

witnesses, and the parent's attorney and the district's representative presented closing arguments (Tr. pp. 4-10; Parent Exs. A-E).

In its closing argument, the district's representative requested that the parent's relief be denied as the parent did not present "sufficient documentation or evidence to support [her] request" for relief such as "proof that services [we]re actually taking place or that the hourly rate [wa]s reasonable" (Tr. p. 5). The parent's attorney argued that, when the district did not implement the student's IESP for the 2023-24 school year, the parent had no choice but "to contract with the agency to provide the SETSS services" (Tr. pp. 6-7). The parent's attorney also argued that the matter was "not a unilateral placement" and "not a Burlington/Carter" type of case and was, instead, "quite simply," a case where the parent agreed with the services recommended by the CSE but the district did not implement them so the parent's obtained "the exact same services" recommended and seeks only an order for district funding of the services at the contracted rate (Tr. pp. 7-8).

In a decision dated March 12, 2024, the IHO found that there was "no dispute that Student [wa]s entitled to services pursuant to the IESP," the district "had the obligation to provide services to Student in conformity with the IESP," and, "[i]n failing to do so, the [district] failed to provide Student with services on an equitable basis" (IHO Decision at pp. 6, 7). The IHO found that the Burlington/Carter analysis was not an appropriate standard to apply and that, instead of requiring the parent to prove that the unilaterally obtained services were appropriate, "the burden remain[ed] with the [district] to prove that the services provided were inappropriate" (id. at pp. 3-5). Applying this standard, the IHO found that the district failed to present evidence that the parent's selected provider or the requested rate was inappropriate, or that the services were unnecessary (id. at p. 7). Accordingly, the IHO ordered the district to, upon submission of an invoice with an affidavit "attesting to the provision of the services," "pay a licensed/certified provider of Parent's own choosing for the administration" of three one-hour periods per week of SETSS in a group at the rate set forth in the contract in evidence (id. at pp. 7-8).

IV. Appeal for State-Level Review

The district appeals, alleging that the IHO erred in declining to assess the appropriateness of the SETSS purportedly delivered to the student by Empower during the 2023-24 school year. The district argues that the parent presented no evidence regarding when, where, or how the unilaterally obtained services were delivered, how the services addressed the student's unique needs, or whether the student made progress.

The parent did not file an answer to respond to the district's appeal.

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 individualized education program" (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 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]).

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.

VI. Discussion

A. Legal Standard

In this matter, the student has been parentally placed in a nonpublic school and the parent does not seek tuition reimbursement from the district for the cost of the student's placement in the nonpublic school. Instead, the parent alleged that the district failed to implement the student's mandated public special education services under the State's dual enrollment statute for the 2023-24 school year and, as a self-help remedy, she unilaterally obtained private services from Empowered for the student without the consent of the school district officials, and then commenced due process to obtain remuneration for the costs thereof. Generally, districts who fail to comply with their statutory mandates to provide special education can be made to pay for special education services privately obtained for which a parent paid or became legally obligated to pay, a process that is essentially the same as the federal process under IDEA. Accordingly, the issue in this matter is whether the parent is entitled to public funding of the costs of the private services. "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 district funding of privately obtained services must be assessed under this framework. Thus, 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]).⁶ 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 IHO articulated the basis for her view that the Burlington/Carter analysis was not appropriate. I will address the IHO's points seriatim. First, while I acknowledge that the use of the Burlington/Carter framework is utilized here in matters that are related to an IESP arising under

⁶ 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 that the parent obtained from Empowered for the student (Educ. Law § 4404[1][c]).

Education Law § 3602-c rather than an IEP under IDEA, there is no caselaw from the courts as to what other, more analogous framework might be appropriate when a parent privately obtains special education services without consent that a school district failed to provide pursuant to an IESP and then retroactively seeks to recover the costs of such services from the school district. I also note that IHOs have not approached the question with consistency. While the IHO in this matter may disagree with the use of the Burlington/Carter standard, I find the alternative approaches adopted by some other IHOs insufficient to address the factual circumstances in these cases. I address some of the reasons for this below.

The IHO in this matter distinguished the Burlington/Carter scenario factually based on the type of violation by the district (i.e., a failure to implement an IESP that the parents agreed with versus failure to develop an appropriate IEP) and the type of privately obtained relief (i.e., services versus private school tuition) (IHO Decision at pp. 4-5).

As for the underlying violation, the fact that the Burlington and Carter cases were IEP disputes, that is, disputes over the adequacy of the programming design, is of little consequence. It just so happens that parties more often disagree about which type of programming is appropriate for a student with a disability, and the courts have explained that the sufficiency of the program offered by the district must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained that "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (R.E., 694 F.3d at 195; see E.H. v. New York City Dep't of Educ., 611 Fed. App'x 728, 731 [2d Cir. May 8, 2015]; R.B. v. New York City Dep't of Educ., 603 Fed. App'x 36, 40 [2d Cir. Mar. 19, 2015] ["declining to entertain the parents' speculation that the 'bricks-and-mortar' institution to which their son was assigned would have been unable to implement his IEP"], quoting T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 419 [2d Cir. 2009]; R.B. v. New York City Dep't of Educ., 589 Fed. App'x 572, 576 [2d Cir. Oct. 29, 2014]).

However, a district's delivery of a placement and/or services must be made in conformance with the CSE's educational placement recommendation, and the district is not permitted to deviate from the provisions set forth in the IEP (M.O. v. New York City Dep't of Educ., 793 F.3d 236, 244 [2d Cir. 2015]; R.E., 694 F.3d at 191-92; T.Y., 584 F.3d at 419-20; see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. 2014]). Thus, a deficient IEP is not the only mechanism for concluding that a school district has failed to provide appropriate programming to a student and thereby also failed to provide a FAPE. Such a finding may also be premised upon a standard described by the courts as a "material deviation" or a "material failure" to deliver the services called for by the public programming (see L.J.B. v. N. Rockland Cent. Sch. Dist., 660 F. Supp. 3d 235, 263 [S.D.N.Y. 2023]; Y.F. v. New York City Dep't of Educ., 2015 WL 4622500, at *6 [S.D.N.Y. July 31, 2015], aff'd, 659 Fed. App'x 3 [2d Cir. Aug. 24, 2016]; see A.P. v. Woodstock Bd. of Educ., 370 Fed. App'x 202, 205 [2d Cir. Mar. 23, 2010] [deviation from IEP was not material failure]; R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 2012]; A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 492, 503 [S.D.N.Y. 2011] ["[E]ven where a district fails to adhere strictly to an IEP, courts must consider whether the deviations constitute a material failure to implement the IEP and therefore deny the student a FAPE"]). The courts do not employ a different framework in reimbursement cases because the parents raise a "material failure" to implement argument rather than a program design argument, and instead they employ the Burlington/Carter approach (R.C., 906 F. Supp. 2d at 273; A.L., 812 F. Supp. 2d at 501; A.P. v.

Woodstock Bd. of Educ., 572 F. Supp. 2d 221, 232 [D. Conn. 2008], aff'd, 370 Fed. App'x 202; A.S. v. New York City Dep't of Educ., 2011 WL 12882793, at *17 [E.D.N.Y. May 26, 2011], aff'd, 573 F. App'x 63 [2d Cir. 2014] [minor possible discrepancy between the 6:1:1 staffing ratio called for in the student's IEP and the possible 12:1:2 staffing ratio during gym class three times per week is not material when the student would have been accompanied to gym by his own paraprofessional]).

The IHO quotes the Supreme Court's decision in Burlington that "[t]he Act was intended to give . . . children [with disabilities] both an appropriate education and a free one; it should not be interpreted to defeat one or the other of those objectives" (IHO Decision at p. 4, quoting Burlington, 471 U.S. at 372). However, the IHO takes the statement out of context because the Supreme Court made this statement when holding that a parent did not waive the right to tuition reimbursement by moving the student to unilateral placement during the pendency of the proceedings (Burlington, 471 U.S. at 372). The Court did not find that placing a burden on the parent to prove appropriateness of a unilateral placement was defeating the objectives of the statute; to the contrary, the Court determined that if it was determined "that a private placement desired by the parents was proper under the Act," that the IDEA authorizes relief in the form of tuition reimbursement (*id.* at 369). The Court went on to eventually hold in a later decision that "[a]bsent some reason to believe that Congress intended otherwise, . . . the burden of persuasion lies where it usually falls, upon the party seeking relief" (Schaffer v. Weast, 546 U.S. 49, 57–58 [2005]). Accordingly, a state law placing the burden of production and persuasion on parents who seeks reimbursement or public funding of private services that they acquired from private companies without the consent of school district officials does not offend the objectives in the IDEA.

The Burlington/Carter framework was adopted in these matters to provide context, standards, and reasonable oversight over the proposed remedies. For example, although the school district could not contract with a teacher who was qualified as a special education teacher but not certified in the State of New York, a parent could do so and seek reimbursement from the district (Application of a Student with a Disability, Appeal No. 20-087). Further, in the earlier incarnations of these cases, the parents had not taken any financial risk that is required in a Burlington/Carter framework. Without any requirement for parents to take the financial risk for such services, the financial risk was borne entirely by unregulated private schools and agencies that have indirectly entered the fray in a very palpable way in anticipation of obtaining direct funding from the district; this has practical effects because the private school and agencies are incentivized to inflate costs for services for which parents do not have any financial liability and parents begin seeking the best private placements possible with little consideration given to what the child needs for an appropriate placement (or services) as opposed to "everything that might be thought desirable by 'loving parents'" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 132 [2d Cir. 1998], quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]). Further, proof of an actual financial risk being taken by parents tends to support a view that the costs of the contracted for program are reasonable, at least absent contrary evidence in the hearing record.

The most defining factor that has arisen in these matters for determining the appropriate category of relief and the standards attendant thereto is whether the parent engaged in self-help and obtained relief contemporaneous with the violation (i.e., the Burlington/Carter scenario) or

whether the relief is prospective in nature with the purpose to remedy a past harm (i.e., compensatory education). In the former, the parent has already gone out and made decisions unilaterally without input from the district and, therefore, must bear the burden to prove the adequacy of the services that the parent privately obtained without the consent of school district officials. For prospective compensatory education ordered to remedy past harms, relief may be crafted to be delivered in the future with protections to avoid abuse and to ensure appropriate delivery of services to the student in question. While some courts have fashioned compensatory education to include reimbursement or direct payment for educational expenses incurred in the past, these cases are in jurisdictions that place the burden of proof on all issues at the hearing on the party seeking relief, namely the parent, making the distinction between the different types of relief perhaps less consequential (see Foster v. Bd. of Educ. of the City of Chicago, 611 Fed App'x 874, 878-79 [7th Cir. 2015]; Indep. Sch. Dist. No. 283 v. E.M.D.H., 2022 WL 1607292, at *3 [D. Minn. 2022]). In contrast, under State law in this jurisdiction, the burden of proof has been placed 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 Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.F. v. New York City Dep't of Educ., 746 F.3d at 76; R.E., 694 F.3d at 184-85). In a case such as this one, it is problematic to place the burden of production and persuasion on the district to establish appropriate relief when the parent has unilaterally selected the private company and purportedly obtained the services and is, therefore, the party in whose custody and control the evidence resides. Therefore, the parent has the burden to establish whether the private company, AIM, provided appropriate special education services to the student.

Based on the foregoing, I find that the IHO erred by applying the incorrect legal standard to assess whether the parent was entitled to the relief sought.

B. SETSS Delivered by Empowered

Turning to a review of the appropriateness of the unilaterally obtained services, the federal standard for adjudicating these types of disputes 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, 142 F.3d at 129). Citing the Rowley standard, the Supreme Court has explained that "when a public school system has defaulted on its obligations under the Act, a private school placement is 'proper under the Act' if the education provided by the private school is 'reasonably calculated to enable the child to receive educational benefits'" (Carter, 510 U.S. at 11; see Rowley, 458 U.S. at 203-04). 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 (Carter, 510 U.S. at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the

parents' placement" (Gagliardo, 489 F.3d at 112, quoting Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether a unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether the placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] ["evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

The Second Circuit has set forth the standard for determining whether parents have carried their burden of demonstrating the appropriateness of their unilateral placement.

No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

(Gagliardo, 489 F.3d at 112, quoting Frank G., 459 F.3d at 364-65).

Before discussing the appropriateness of SETSS delivered by Empowered, a review of the student's needs as described in the hearing record is in order. According to the September 2023 IESP, results from administration of the Wechsler Intelligence Scale for Children-Fifth Edition (WISC-V) indicated that the student had a full scale intelligence quotient (IQ) of 91 in the average range with verbal comprehension, fluid reasoning, and processing speed skills in the average range (Parent Ex. B at p. 1). On a September 2023 administration of the Wechsler Individual Achievement Test-Fourth Edition (WISC-IV), the student's basic reading and reading comprehension skills were in the low average range and his writing skills and math problem-solving and calculation skills were at the "low end" of the average range (id. at p. 2). The student's spelling skills were in the "[l]ow range" (id.). As reported by the student's teacher, the student needed encouragement and motivation to participate in class (id.). The teacher noted that the student "struggle[d] with multistep word problems and received small group assistance" and that he knew "computation and calculation but more complex math problems [we]re difficult for him"

(id.). The parent reported that the student struggled with math and "bec[a]me frustrated and fe[lt] overwhelmed when he had to do his homework or take a test" (id. at p. 3). As reported in the IESP, the student had difficulty understanding math concepts and applying operations to solve problems and did "better in a one-on-one setting when his teacher read the problem aloud" (id.). The May 2023 IESP indicated, that according to the parent, the student "kn[ew] multiplication tables" and "his computation skill [we]re ok," but it took him a long time to grasp mathematical concepts (id.).

The May 2023 IEP included five goals focused on the student's reading, writing, and math needs and identified support to address the management needs of the student that included scaffolding, reviewing previously taught information, visuals and manipulatives, repetition, simplified language, pre-teaching component skills of algorithms and strategies, use of real-life scenarios to make problems functional, and visual and auditory examples (Parent Ex. B at pp. 4-5).

The student's functioning during the 2023-24 school year is also described in the November 2023 teacher progress report (Parent Ex. E). According to the progress report, in reading the student functioned at middle eighth grade level, with comprehension at middle seventh grade level (Parent Ex. E at p. 1). The SETSS provider indicated that the student "did well" with comprehending stories which follow a "basic structure" and did well and enjoyed reading when the topic interested him (id. at p. 2). However, the provider reported that the student's reading skills were deficient "in the area of reading comprehension and literary analysis" and the student "require[d] additional concrete information . . . to visually process the paragraphs or chapters . . . he read[]" (id. at pp. 1, 2). In addition, the provider noted that the student had difficulty organizing written responses within a group, remembering facts and "associating connections to text," and responding to abstract questions (id. at p. 2).

With regard to writing, the progress report related that the student was at middle seventh grade level in written language and spelling/organization (Parent Ex. E at p. 1). According to the SETSS provider, the student could share ideas and respond orally and "ha[d] the ability to grasp the questions being asked," but would "feel stuck" when asked to complete writing assignments related to reading (id. at p. 2). He had difficulty with organizational skills, written structure, and expressive language (id. at p. 3). Specifically, the student had difficulty planning for written responses, and with "getting his thoughts down on paper" and needed scaffolding and modeling in a "step by step format" to prevent frustration, and further lacked a "basic understanding of writing structure for paragraph writing" (id.). In addition, the provider noted the student "often ma[d]e grammatical errors, resulting in incomplete sentences, run on sentences, and lack of written structure" (id. at p. 1). The student lacked consistency with spelling, "often depending on words he . . . [found] on the page or teacher feedback" (id.).

In math, the progress report indicated the student was functioning at the middle seventh grade level in calculations and the middle sixth grade level in problem solving (Parent Ex. E at p. 1). The SETSS provider noted that the student did well when solving basic calculations using the four operations, could complete basic arithmetic "when given supports such reminders for steps for carrying," and could "solve for x in a one step equation with some support" but had difficulty completing problems with more than one computation step (id. at pp. 1, 3). In math problem solving, the student had, difficulty with "basic and higher order thinking problems" involving

abstract concepts and more than one step and would give up because he did not know the steps needed (id. at pp. 1-2, 3).

Speaking to the student's receptive language skills, the progress report stated that the student understood "basic instructions with one and two step expectations," could "contribute to discussion[s] minimally, but struggle[d] greatly with recall or follow up after the instructions ha[d] been given" and would leave out steps needed and "only go back once reminded" (Parent Ex. E at p. 4). Expressively, the student articulated his thoughts clearly "unless he [was] being watched by others, when he tend[ed] to shut down" (id. at p. 5). He used age-appropriate vocabulary and could "express himself with age appropriate words," but "show[ed] delays" when responding to a question, taking time to process the question and formulate a response (id.).

In the social/emotional domain, the progress report indicated that the student interacted with people with whom he felt safe but "had a hard time with those who he th[ought] m[ight] embarrass him or call him out on something" (Parent Ex. E at p. 5). He was "appropriate" in social settings and understood social cues (id.). In terms of the student's physical development and fine and gross motor skills, the progress report noted that the student wrote with "many pauses as if not sure what to write" and had legible handwriting (id. at p. 6). He had "difficulty with the personal space of others" and often "accidentally push[ed] others and knock[ed] things over," and he "struggled somewhat" with balance and spatial awareness (id.). The September 2023 progress report further related that the student was organized but was "always . . . missing important supplies" and needed reminders of what to bring to class (id.). He required assistance with multi-step tasks and longer assignments and "tend[ed] to give up in the middle and ask for help" (id.).

The evidence in the hearing record regarding the SETSS delivered to the student during the 2023-24 school year includes the contract between the parent and Empowered, which indicated that Empower would "make every effort to implement" three periods of group SETSS per week "with suitable qualified providers for the 2023-24 school year," information in the November 2023 teacher progress report, and a printout reflecting that the SETSS provider held an initial certificate as a teacher of students with disabilities grades 1-6 (Parent Exs. C-E).

The November 2023 progress report reflected that the student received SETSS three times per week (Parent Ex. E at p. 7). In a section of the progress report entitled "Specially Designed Instruction," the SETSS provider reported that the student received "individual special education instruction" and that the student "receiv[ed] support in the way of redirections, coaching for self-esteem and grit, provi[sion of] easier examples to increase confidence, visual guides, [and] video tutorials," which were "different than the programs and materials being used in the classroom, as the[y] [we]re catered to his specific needs, based on informal assessment" (id.). According to the progress report, tools and strategies used to support the student's management needs included manipulatives, verbal prompts, leveled texts, flash cards, highlighters, differentiated classwork, re-teaching, and repeated directions (id.).

In arguing that the parent failed to establish that the SETSS obtained for the student for the 2023-24 school year were appropriate, the district argues that there is no evidence demonstrating how Empowered delivered SETSS, what deficits the services addressed, when and where they were provided, or how they were specially designed. Contrary to the district position, while the evidence is not robust, the November 2023 teacher progress report identified several areas of

academic need which SETSS were designed to address through identified strategies and accommodations (see Parent Ex. E).⁷ The district notes that the student's nonpublic school provided limited secular education (see Parent Ex. D at p. 2) but the hearing record is not developed on that question and does not, without more, impact a finding that the SETSS delivered were appropriate.

The district also argues that the hearing record does not demonstrate the student's progress as a result of the SETSS; however, it is well settled that, although a relevant factor (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]), 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).

Based on the foregoing, I find that there is sufficient evidence to show that the student received SETSS specially designed to meet his needs as identified in the September 2023 IESP and the November 2023 progress report during the 2023-24 school year. Thus, the evidence in the hearing record shows that the parent met her burden to prove that the SETSS delivered by Empowered during the 2023-24 school year were appropriate.

VII. Conclusion

In summary, an independent review of the hearing record demonstrates that the parent met her burden to demonstrate that the private SETSS obtained from Empowered were appropriate. The district has not raised any equitable considerations that would warrant a reduction or denial of the relief sought. Accordingly, there is no reason to disturb the IHO's order requiring the district to fund the privately obtained SETSS.

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
May 16, 2024**

**JUSTYN P. BATES
STATE REVIEW OFFICER**

⁷ Although, as the district argues, the first page of the progress report is not completed with certain information (such as the student's grade, district identification number, school, and parent contact information), the report is dated and signed by the SETSS provider (see Parent Ex. E at pp. 1, 7).