The University of the State of New York

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

No. 24-402

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

Appearances:
Shehebar Law PC, attorneys for petitioner, by Ariel A. Bivas, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Cynthia Sheps, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from a decision of an impartial hearing officer (IHO) which denied her request that respondent (the district) fully fund the costs of her daughter's private special education services delivered by McDonald Enhanced Learning (McDonald Learning) for the 2023-24 school year. The district cross-appeals from those portions of the IHO's decision which found equitable considerations weighed in favor of the parent's requested relief and which directed the district to convene a Committee on Special Education (CSE) to develop an individualized education program (IEP) or an individualized education services program (IESP) for the student for the 2024-25 school year. The appeal must be sustained in part. The cross-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 IESP under the State's so-called "dual enrollment" statute (see Educ. Law § 3602-c). The task of creating an IESP is assigned to the same committee that designs educational programing for students with disabilities under the IDEA (20 U.S.C. §§ 1400-1482), namely a local 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

A Committee on Preschool Special Education (CPSE) convened on June 22, 2022 to develop an IEP for the student for the 2022-23 school year (Parent Ex. B at p. 1).[1] The June 2022 CPSE found the student eligible for special education as a preschool student with a disability and recommended one 60-minute session per month of parent counseling and training, and that the student receive 10 hours per week of special education itinerant teacher (SEIT) services in a group of three, one 30-minute session per week of individual speech-language therapy, one 30-minute session per week of speech-language therapy in a group of two, two 30-minute sessions per week of individual occupational therapy (OT), two 30-minute sessions per week of individual PT, and 12-month services (id. at pp. 1, 18, 19).[2]

A CSE convened on April 28, 2023 and, noting that the parent stated the student would be attending a religious nonpublic school for kindergarten in September 2023, developed an IESP for the student with an implementation date of September 5, 2023 (Parent Ex. C at pp. 1, 10). The April 2023 CSE found the student eligible for special education and related services as a student with autism and recommended one 60-minute session every five weeks of parent counseling and training, and that the student receive five periods per week of direct, group special education teacher support services (SETSS) in a separate location, one 30-minute session per week of individual speech-language therapy, one 30-minute session per week of speech-language therapy in a group, two 30-minute sessions per week of individual OT, two 30-minute sessions per week of individual PT, one 30-minute session of counseling services in a group, and 12-month services (id. at pp. 1, 10).[3, 4]

On January 31, 2024, the parent electronically signed a document on the letterhead of McDonald Learning, which stated that she was "liable to the pay . . . the full amount for all services delivered" in the event she was unable to secure funding from the district (Parent Ex. D at pp. 1-2). The document further stated that the service type was "SETSS, SPEECH" for the school year

[1] The summary page of the CPSE IEP indicated that the June 22, 2022 CSE meeting was a reconvene of the student's annual review for the purpose of adding physical therapy (PT) (Parent Ex. B at p. 1).

[2] State law defines SEIT services (or, as referenced in State regulation, "Special Education Itinerant Services" [SEIS]) as "an approved program provided by a certified special education teacher . . . , at a site . . . , including but not limited to an approved or licensed prekindergarten or head start program; the child's home; . . . or a child care location" (Educ. Law § 4410[1][k]; 8 NYCRR 200.16[i][3][ii]; see "[SEIS] for Preschool Children with Disabilities," Office of Special Educ. Field Advisory [Oct. 2015], available at https://www.nysed.gov/special-education/special-education-itinerant-services-preschool-children-disabilities). A list of New York State approved special education programs, including SEIS programs, can be accessed at https://www.nysed.gov/special-education/approved-preschool-special-education-programs. SEIT services are "for the purpose of providing specialized individual or group instruction and/or indirect services to preschool students with disabilities" (8 NYCRR 200.16[i][3][ii]; see Educ. Law § 4410[1][k]).

[3] SETSS is not defined in the State continuum of special education services (see 8 NYCRR 200.6). As has been laid out in prior administrative proceedings, the term is not used anywhere other than within this school district and a static and reliable definition of "SETSS" does not exist within the district.

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

"09-01-2023 - 06-30-2024" and the parent further agreed to rates of $195 per hour for "SETSS/SEIT" and $225 per hour for speech-language therapy (id. at p. 1).

A 2023-24 school year progress report reflects that the student received services consisting of SETSS, paraprofessional, counseling, speech-language therapy, and OT (Parent Ex. I at pp. 1-2).

A. Due Process Complaint Notice

In a due process complaint notice dated February 2, 2024, the parent alleged that the district denied the student a free appropriate public education (FAPE) for the 2023-24 school year (Parent Ex. A at p. 1). The parent disagreed with the April 2023 CSE's recommendation of five periods per week of SETSS and asserted that the district failed to consider sufficient, current, and appropriate evaluative information, and failed to provide the parent with a meaningful opportunity to participate in the decision-making process and failed to fully explain all the options to her (id. at p. 2). In addition, the parent argued that the April 2023 IESP was inappropriate and not reasonably calculated to enable the student to receive an educational benefit (id.). The parent also alleged that the district failed to implement the April 2023 IESP and that she was unable to identify any providers available and willing to provide the recommended services at the district's rates (id.). As a result, the parent contended that she unilaterally secured a provider to work with the student at an enhanced rate (id.). The parent invoked pendency and asserted that the June 2022 CPSE IEP was the last agreed upon IEP for the student (id. at pp. 1, 2). The parent reserved the right to seek compensatory education for unimplemented services and requested as further relief reimbursement for 10 hours per week of "SEIT" at the enhanced rate and reimbursement for one 30-minute session per week of individual speech-language therapy and one 30-minute session per week of speech-language therapy in a group at the enhanced rate (id. at pp. 3-4).

B. Impartial Hearing Officer Decision

An impartial hearing convened before the Office of Administrative Trials and Hearings (OATH) on June 3, 2024 and concluded on July 8, 2024 after two days of proceedings (Tr. pp. 1-64).[5] In a decision dated August 15, 2024, the IHO found that "[t]he district failed to present evidence to counter [the parent's] allegations and thus, failed to meet its burden of production and persuasion" and further that "the [district] conceded that it was not putting on a Prong I case" (IHO Decision at p. 7). The IHO initially set forth the legal standard for compensatory education, then reviewed the recommendations of the April 2023 IESP and found that they were appropriate (id. at pp. 7-8). The IHO then determined that the district failed to implement the April 2023 IESP and "[t]herefore the [district] failed to meet its burden on Prong I" (id. at p. 8). The IHO stated that the parent unilaterally sought services because the district failed to provide the student with "SEIT/SETSS or speech-language therapy" (id.). The IHO reviewed that the parent's evidence which included "the State license information of the direct service providers administering the SETSS and speech-language therapy to establish the appropriateness of that provider" and further noted that the student received individual, rather than group instruction (id.). The IHO stated that the April 2023 IESP noted the student's progress, which was confirmed by parent's witness (id.).

[5] The district did not appear on June 3, 2024 (Tr. p. 1).

The IHO then determined that the parent's unilaterally obtained "program, services, and direct service provider [were] appropriate for the [s]tudent, in part" (id.).

Notwithstanding an initial "Prong I" finding, the IHO then set forth the three-prong Burlington/Carter legal standard as "an alternative analysis" (IHO Decision at p. 8). The IHO reiterated that the district "conceded it was not putting on a Prong I case" and noted that the district "only contested the appropriateness of the services provided to [the s]tudent by [McDonald Learning] and questioned the rates charged by [McDonald Learning], without presenting any testimonial or documentary evidence to support their claims" (id. at pp. 8-9). The IHO found that the district's "inability to provide the enumerated services detailed in the [April] 2023 IESP was improper and unlawful, as it has been held that the [district] may not effectively compel a parent to resort to self-help in obtaining a provider" (id. at p. 9). The IHO then determined that "as implementation of the 4/28/2023 IESP was necessary . . . the [district]'s failure to implement the related services constitute[d] a denial of FAPE on an equitable basis" (id.).

Turning to the appropriateness of the parent's unilaterally obtained services, the IHO found that the district "did not offer any evidence in opposition with respect to the suitability of the program," that the district "failed to present any evidence or testimony to demonstrate the inappropriateness of the [McDonald Learning]'s services" and that the parent had "successfully demonstrated that [McDonald Learning] provide[d] 'services . . . specially designed to meet the student's [unique] needs' and that the instruction offered was 'reasonably calculated to enable the child to receive educational benefits' according to Prong II of the Burlington/Carter standard" (IHO Decision at pp. 9-10).

With regard to the equitable considerations, the IHO found that "[t]here [wa]s no evidence or claim made by the [district] asserting or suggesting that the [p]arent failed to cooperate with the [district] or interfered in any manner with the [district]'s obligation to provide the [s]tudent with a FAPE on an equitable basis for the 2023-2024 school year" (IHO Decision at p. 11). The IHO noted that the district had offered a "document named the AIR report" into evidence but did not provide testimony to support the evidence (id.). In addition, the IHO stated that the parent's requested rate for SEIT/SETSS was within the range of rates for SETSS listed in the report (id.). The IHO further noted that the report did not include rates for speech-language therapy (id.). The IHO then determined that the district "must either reimburse the [p]arent or fund the properly licensed provider of their choosing at their customary rate for [five] hours of SETSS weekly, not to exceed $195 per hour, and for 2x30 [speech-language therapy], not to exceed $225 per hour" (id.).[6] The IHO also found that the district "must fund a bank of compensatory hours of [PT] and counseling at a rate to be determined by the [district]'s Implementation Unit" (id.). The IHO further directed the district to evaluate the student "in all areas of her suspected disability, including speech and occupational therapy" (id.).

In conclusion, the IHO reiterated her findings that the April 2023 IESP was appropriate but that the district failed to implement the April 2023 IESP, which resulted in a denial of "a FAPE on an equitable basis" to the student for the 2023-24 school year (IHO Decision at p. 11). The IHO

[6] The IHO indicated in a footnote that the parent "did not provide a persuasive reason as to why 10 hours of SETSS were appropriate for [the s]tudent" (IHO Decision at p. 10 n.65).

then ordered the district to fund services for the entire 10-month 2023-24 school year consisting of five periods of individual SETSS per week at a rate of $195 per hour and two 30-minute sessions per week of speech-language therapy at a rate of $225 per hour (id. at pp. 11-12). The IHO further ordered the district to "provide [the s]tudent with an hour-by-hour compensatory education bank consisting of the weekly" PT and group counseling services for the number of weeks the district failed to implement the services during the 10-month, 2023-24 school year, to be delivered by providers of the parent's choosing at a rate to be determined by the district implementation unit (id. at p. 12). The IHO also ordered the district to convene a CSE meeting to consider the results of the evaluations and develop an "updated IEP/IESP" (id.).

IV. Appeal for State-Level Review

The parent appeals, alleging that the IHO erred in finding that the April 2023 IESP was appropriate given that the district failed to submit substantive evidence and stated that it would not put on a Prong I case. The parent further argues that the IHO incorrectly found that her unilaterally obtained services were appropriate in part. The parent contends that the hearing record demonstrates the student required 10 hours of SETSS and that the IHO erred in reducing the award to five hours per week. As relief, the parent requests direct funding of 10 hours per week of SETSS at the rate of $195 per hour.

In an answer with cross-appeal, the district argues that the IHO correctly determined that the parent did not sustain her burden of demonstrating the appropriateness of her unilaterally obtained 10 hours per week of SEIT services. The district cross-appeals the IHO's findings related to equitable considerations asserting that the parent failed to incur a financial obligation to McDonald Learning, that the parent did not have a written contract for SETSS services and speech-language therapy, and that the parent failed to provide 10-day written notice of her intention to unilaterally obtain services and seek public funding. The district further cross-appeals the IHO's order for the district to develop an IEP or an IESP for the student for the 2024-25 school year.

In a reply and answer to the cross-appeal, the parent argues that 10 hours of SETSS was appropriate and that the contract in evidence was sufficient to establish a financial obligation of the parent to McDonald Learning.[7]

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

[7] On October 2, 2024, the parent filed a reply with the Office of State Review that was not signed by the parent's attorney along with an affirmation of service that was also unsigned. On October 8, 2024, the parent filed an "Answer to Cross-Appeal" with the Office of State Review, which included an affidavit of verification and an affirmation of service. Both purported pleadings set forth the same arguments and allegations responding to the district's answer with cross-appeal. Based on the foregoing, the reply has not been considered.

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]).[8] "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.).[9] 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]).

---

[8] 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]).

[9] 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

The district has not cross-appealed from the IHO's findings that it failed to offer the student a FAPE for the 2023-24 school year, and that five hours per week of SETSS and two 30-minute sessions per week of speech-language therapy were appropriate unilateral services for the student. The district also has not cross-appealed from the IHO's award of compensatory education for unimplemented PT and group counseling services. Accordingly, these findings have become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]). Thus, the issues to be reviewed on appeal are whether the April 2023 IESP was appropriate, whether the parent demonstrated the appropriateness of the totality of the unilaterally obtained services including 10 hours per week of SETSS and 60-minutes per week of speech-language therapy, whether equitable considerations weigh in favor of an award of full funding of the unilaterally obtained services, and whether the IHO erred in ordering the district to convene a CSE to develop an IEP or IESP for the 2024-25 school year.

Before turning to the issues presented, I will briefly address the appropriate legal standard to apply given the IHO's consideration of the parent's requested relief both as a request for compensatory education and, alternatively, as a request for district funding of unilaterally obtained services. 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 parental placement. Instead, the parent alleged that the district developed an inappropriate IESP and 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 McDonald Learning 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 that fail to comply with their statutory mandates to offer and provide appropriate 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 they obtained for a student 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]).[10] 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).

A. April 2023 IESP

Turning to the parent's allegation that the IHO erred in finding the April 2023 IESP to be appropriate, I note that the question is academic given that the IHO's determination that the district denied the student a FAPE for failing to implement the IESP is final and binding. However, since the IHO relied on the determination that the IESP was appropriate to deny the parent's requested relief, in part, I will discuss the issue briefly.

As relevant herein, the April 2023 IESP recommended five periods per week of group SETSS (Parent Ex. C at p. 10). During the impartial hearing, the district explicitly stated that it was not going to present evidence to defend the recommendations in the April 2023 IESP (see Tr. pp. 23, 51). The parent had alleged that the district did not adequately evaluate the student (see Parent Ex. A at p. 2), yet the district offered little evidence of what evaluations were before the April 2023 CSE. A May 2023 prior written notice indicates that April 2023 CSE relied on classroom observations and the IESP refers to information from the student's teacher including from a "Teacher's Preschool Interview conducted on 3/21/2023" and a PT evaluation (see Parent Ex. C at pp. 1-3; Dist. Ex. 3 at p. 1). These references alone do not demonstrate that the CSE had sufficient information available to it. In addition, in response to the parent's claim that five periods per week of SETSS were insufficient (Parent Ex. A at p. 2), the district did not offer a cogent explanation for the CSE's recommendation. The IESP states that SETSS were recommended to support the student's acquisition of pre-academic skills and indicates that the CSE anticipated she would make progress with the recommended services but does not state the CSE's rationale for the frequency of the services (see Parent Ex. C at p. 1). While the IESP was entered into evidence, given the parent's claims and the district's explicit statement that it did not intend to defend its offer of equitable services to the student, the IHO erred in finding that the April 2023 IESP was appropriate.

It appears that the IHO found that the student did not require more than five periods of SETSS per week in order to find that the 10 hours per week of SETSS unilaterally obtained by the parent were excessive (see IHO Decision at p. 8). A determination that the frequency of unilaterally-obtained services was excessive may warrant a reduction in an award of funding for the services under equitable considerations is (see E.M. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014] [noting that whether the amount of the private school tuition was reasonable is one factor relevant to equitable considerations]; see L.K. v. New York City Dep't of

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

Educ., 2016 WL 899321, at *7 [S.D.N.Y. Mar. 1, 2016] [finding a reduction in funding could be warranted if there is evidence regarding segregable costs charged by the private school that exceed the level that the student required to receive a FAPE], aff'd in part, 674 Fed. App'x 100 [2d Cir. Jan. 19, 2017]). However, upon finding a denial of a FAPE and before reaching equitable considerations, the IHO was required to consider the appropriateness of the unilaterally-obtained services under the totality of the circumstances standard forth below without carving out a portion of the services upfront. As the Second Circuit Court of Appeals has recently held, it is error for an IHO to apply the Burlington/Carter test by conducting reimbursement calculations that are based on the IHO's analysis of the appropriateness of the unilateral placement (A.P. v. New York City Dep't of Educ., 2024 WL 763386 at *2 [2d Cir. Feb. 26, 2024] [holding that the IHO should have determined only whether the unilateral placement was appropriate or not rather than holding that the parent was entitled to recover 3/8ths of the tuition costs because three hours of instruction were provided in an eight hours day]). The Court further reasoned that "once parents pass the first two prongs of the Burlington-Carter test, the Supreme Court's language in Forest Grove, stating that the court retains discretion to 'reduce the amount of a reimbursement award if the equities so warrant,' suggests a presumption of a full reimbursement award" (A.P., 2024 WL 763386 at *2 quoting Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 246-47 [2009]).

Similarly, here, the IHO erred in finding that the April 2023 IESP was appropriate after the district declined to defend its recommendations (Tr. pp. 23, 51) and in relying on that finding to assess the appropriateness of only a portion of the services making up the unilateral placement rather than considering the totality of the circumstances. With this in mind, I now turn to a review of the services unilaterally obtained from McDonald Learning.

B. Unilaterally Obtained SETSS

As to 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 v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998]). 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; Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see also 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 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., 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). 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).

Review of the hearing record indicates that the parent unilaterally obtained SETSS for 10 hours per week and speech-language therapy for 60 minutes per week from McDonald Learning beginning in September 2023 (Tr. pp. 34-36; Parent Exs. D; E ¶ 8).[11] According to a 2023-24 teacher's report, the student was a "positive, friendly, and happy member" of the class and a hard worker who took "great pride in her work" and showed enthusiasm when completing tasks (Parent Ex. I at p. 2). Additionally, the progress report indicated that the student had been establishing meaningful friendships with the support of her team; however, she continued to require prompting and intervention (id.). The report further indicated how proud the providers were with "how well [the student] was tapping out and blending her words" and noted that they continued to work on her executive functioning and identification and recognition of the Alef Bet (id.).

In her written testimony, the coordinator of services for students between McDonald Learning and the private school (coordinator) indicated that the SETSS provider was working on

[11] The January 2024 parent service contract and the coordinator's written testimony both indicated that the service the parent obtained was SETSS; however, the coordinator testified that what was provided was SEIT and opined that SETSS was only for academic instruction and would not address the student's social/emotional and behavioral deficits (Parent Ex. D at p. 1; E ¶ 8; Tr. p. 44). For the purpose of this decision, the service will be referred to as SETSS.

reading fluency, using leveled books with repetition, establishing independence, practicing letters and simple equations, as well as using social stories to help her during center and play time (Parent Ex. E ¶¶ 1, 14). She further explained that the student "had already shown signs of progress through the services being provided" (id. ¶ 16). The coordinator further testified that instruction focused on improving the student's play skills, ability to follow directions, gross motor skills, social/emotional skills, conversational skills, and reading fluency and comprehension, and decreasing behaviors due to frustration (Tr. pp. 45-48). She opined that five hours of SETSS would not be adequate to meet the student's needs (Tr. pp. 49-50; see Tr. pp. 35-36, 38-41).

As set forth above, the IHO erred—based on her unsupported finding regarding the April 2023 IESP—in carving out five hours of SETSS rather than assessing the appropriateness of all of the services unilaterally obtained. Ultimately, however, the IHO found that the program, services, and direct service provider were appropriate for the student and that the parent had successfully demonstrated that the service provider delivered "services specially designed to meet the [S]udent's [unique] needs" and that the instruction was "reasonably calculated to enable the child to receive educational benefits" (IHO Decision at pp. 8, 10). The district does not challenge this finding. Taking into account the totality of the circumstances, the IHO's determination is applicable to the entirety of the unilaterally obtained services including the 10 hours per week of SETSS and the two 30-minute sessions per week of speech-language therapy and there is no basis for a finding that the services were not specially designed to address the student's unique needs.

C. Equitable Considerations:

Having found that the services that the parent unilaterally obtained from McDonald Learning were appropriate, I will now address equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]; L.K. v. New York City Dep't of Educ., 674 Fed. App'x 100, 101 [2d Cir. Jan. 19, 2017]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; E.M., 758 F.3d at 461 [identifying factors relevant to equitable considerations, including whether the withdrawal of the student from public school was justified, whether the parent provided adequate notice, whether the amount of the private school tuition was reasonable, possible scholarships or other financial aid from the private school, and any fraud or collusion on the part of the parent or private school]; C.L., 744 F.3d at 840 [noting that "[i]mportant to the equitable consideration is whether the parents obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA"]).

As noted above, the IHO's determination regarding the April 2023 IESP appears to have been made in order to address whether the 10 hours per week of SETSS obtained by the parent were excessive. The IHO treated this issue as a threshold determination rather than assessing the question as part of equitable considerations. As noted, among the factors that may warrant a

reduction in tuition under equitable considerations is whether the frequency of the services or the rate for the services were excessive (see E.M., 758 F.3d at 461). An IHO may consider evidence regarding whether the rate charged by the private agency was unreasonable or regarding any segregable costs charged by the private agency that exceed the level that the student required to receive a FAPE (see L.K., 2016 WL 899321, at *7). More specifically, while parents are entitled to reimbursement for the cost of an appropriate private placement when a district has failed to offer their child a FAPE, it does not follow that they may take advantage of deficiencies in the district's offered placement to obtain all those services they might wish to provide for their child at the expense of the public fisc, as such results do not achieve the purpose of the IDEA. To the contrary, "[r]eimbursement 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 [emphasis added]; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148). Accordingly, while a parent should not be denied reimbursement for an appropriate program due to the fact that the program provides benefits in addition to those required for the student to receive educational benefits, a reduction from full reimbursement may be considered where a unilateral placement provides services beyond those required to address a student's educational needs (L.K., 674 Fed. App'x at 101; see C.B. v. Garden Grove Unified Sch. Dist., 635 F. 3d 1155, 1160 [9th Cir. 2011] [indicating that "[e]quity surely would permit a reduction from full reimbursement if [a unilateral private placement] provides too much (services beyond required educational needs), or if it provides some things that do not meet educational needs at all (such as purely recreational options), or if it is overpriced"]; Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ., 790 F.2d 1153, 1161 [5th Cir. 1986] ["The Burlington rule is not so narrow as to permit reimbursement only when the [unilateral] placement chosen by the parent is found to be the exact proper placement required under the Act. Conversely, when [the student] was at the [unilateral placement], he may have received more 'benefit' than the EAHCA [the predecessor statute to the IDEA] requires"]).

As noted above, the district failed to meet its burden to prove that the CSE's recommendation for five periods per week of SETSS was reasonably calculated to enable the student to receive educational benefit and, accordingly, it would not be equitable under these circumstances to find that the frequency of services obtained by the parent was excessive for having exceeded the level of services in the IESP.

As to other equitable considerations, in its cross-appeal, the district alleges that the parent failed to establish a financial obligation through a valid contract with McDonald Learning and failed to provide the district with 10-day notice.

Regarding proof of financial risk, the Second Circuit has held that some blanks that the parties did not fill in in a written agreement would not render an entire contract void and indicated that in the case before it that "the contract's essential terms—namely, the educational services to be provided and the amount of tuition—were plainly set out in the written agreement, and we cannot agree that the contract, read as a whole, is so vague or indefinite as to make it unenforceable as a matter of law" (E.M., 758 F.3d at 458). In New York, a party may agree to be bound to a contract even where a material term is left open but "there must be sufficient evidence that both parties intended that arrangement" and an objective means for supplying the missing terms (Express Indus. & Terminal Corp. v. N.Y. State Dep't of Transp., 93 N.Y.2d 584, 590 [1999]; 166 Mamaroneck Ave. Corp. v. 151 E. Post Rd. Corp., 78 N.Y.2d 88, 91 [1991]).

Here, the district is correct that the document stating the parent's financial obligation was not signed by the parent until January 31, 2024 but, by its terms, the letter stated the parent's intention to be bound to pay the costs of "SETSS, SPEECH" services delivered by McDonald Learning for the school year "09-01-2023 - 06-30-2024," and the parent further agreed to rates of $195 per hour for "SETSS/SEIT" (Parent Ex. D at pp. 1-2). The coordinator testified that the student began receiving services from McDonald Learning in September 2023 (Tr. p. 36). The district did not rebut the parent's evidence, which I find sufficient to establish the parent's financial obligation.

Turning to the parent's failure to provide 10-day written notice, reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to their removal of the student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger v. Medina City Sch. Dist., 348 F.3d 513, 523-24 [6th Cir. 2003]; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G., 459 F.3d at 376; Voluntown, 226 F.3d at 68).

The April 2023 CSE attendance page indicated that the student's then-current classroom teacher, SEIT provider, and parent participated in the meeting (Dist. Ex. 2). In the section of the April 2023 IESP for concerns of the parent, the IESP stated that the student had made gains in prekindergarten and that, with "SETSS supports and continued related services [to] be initiated with this IESP for [the student] for Kindergarten in September, 2023[,] . . . it [wa]s anticipated that she w[ould] make progress in Kindergarten and beyond" (Parent Ex. C at p. 2). The IESP further reflected that "[the student]'s mother stated that this should be a great program for her daughter" that that the "School Social Worker re-explained Parents' Rights at this IESP meeting [and the] Parent stated that she understood her rights" (id.). The district sent the parent prior written notice dated May 4, 2023, which summarized the recommendations of the April 2023 CSE (Dist. Ex. 3 at pp. 1-2). The McDonald Learning coordinator testified that the parent had found some providers through the district but "reached out [to McDonald Learning for SETSS and speech] because her child really needed . . . even more" (Tr. p. 43). Upon questioning from the IHO, the coordinator testified that, after the student turned five, the district no longer offered SEIT and offered SETSS, but the parent "really felt and was very strong that her daughter really need[ed] and continues to need that -- the ten hours [of] support because of her delays with social interaction, playing appropriately" (Tr. p. 44). The coordinator further testified that she believed "SETSS [wa]s strictly for academics. SEIT focuse[d] both on behavioral social-emotional support. And for [the student], she really has a lot of goals that we were working with her to make her feel successful . . . in the mainstream setting, and I think that's where the difference [wa]s" (id.).

The hearing record reflects that the parent did not express disagreement with the recommendations of the April 2023 CSE until she filed her due process complaint notice on February 2, 2024 (Parent Ex. A at p. 1). In this instance, by failing to provide 10-day written notice to the district, the parent did not advise the district that she was rejecting the IESP and thwarted the district's ability to address the parent's objections to the CSE's recommendations before the parent engaged in self-help. I find that the parent's actions were not reasonable and warrant a 20 percent reduction in direct funding (20 U.S.C. § 1412[a][10][C][iii]).

D. Relief

The district also cross-appeals the IHO's directive that the district convene a CSE to develop an IEP or an IESP for the 2024-25 school year. The district argues that there was no indication in the due process complaint notice that the parent intended to seek a public school placement pursuant to an IEP and further that there was no evidence that the parent had requested equitable services for the 2024-25 school year. The district asserts that the IHO exceeded her authority and ordered relief outside the scope of the due process complaint notice.

Here, there is no dispute that the student remains eligible for special education. In response to a request from the IHO, the district provided a May 31, 2024 psychoeducational evaluation report that stated the student had been "evaluated as part of the mandated 3-year review process" (IHO Ex. I at p. 1). The hearing record is not developed regarding whether or not a CSE has yet convened to consider the May 2024 psychoeducational evaluation and engage in educational planning for the student for the 2024-25 school year; however, there is no merit to the district's apparent position that the student would not be entitled to either an IEP or an IESP given the parent's allegations in the due process complaint notice or given the purported lack of a request for equitable services for the 2024-25 school year. Although this is a dual enrollment case for the 2023-24 school year and even if the parent did not request dual enrollment services from the district for the 2024-25 school year, this would not, by itself, eliminate the district's obligations to evaluate the student and develop appropriate public school programming. The district and the CSE may not simply treat the student as if she had been declassified. Mere inaction by the parent does not establish that the parent made clear her intention to keep the student enrolled in a nonpublic school clear and, therefore, the district would not be relieved of its obligation to make a FAPE available to the student in the public school ("Questions and Answers on Serving Children with Disabilities Placed by Their Parents in Private Schools" 80 IDELR 197 [OSERS 2022]; see also "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). Therefore, the district does not present a convincing basis to disturb the IHO's equitable relief in the form of requiring the CSE to develop a new educational program for the student, if it had not already done so.

VII. Conclusion

In summary, the district failed to meet its burden to prove that it offered or provided the student appropriate equitable services for the 2023-24 school year and the parent met her burden to prove that unilaterally obtained SETSS and speech-language therapy provided by McDonald

Learning were appropriate to address the student's unique needs. While the IHO erred in reducing the amount of the parent's requested award of 10 periods per week of SETSS to five periods per week, equitable considerations nevertheless warrant a reduction of the total request sought by 20 percent.

I have considered the parties' remaining contentions and find they are unnecessary to address in light of my determinations.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision dated August 15, 2024, is modified by reversing those portions which found the April 2023 IESP was appropriate and that the parent was entitled to funding for only five hours per week of unilaterally obtained SETSS.

IT IS FURTHER ORDERED that, upon proof of delivery, the district shall fund 80 percent of the costs of up to 10 hours per week of SETSS and 60-minutes per week of speech-language therapy delivered to the student by McDonald Learning during the 2023-24 school year.

Dated: **Albany, New York**
October 22, 2024

SARAH L. HARRINGTON
STATE REVIEW OFFICER