



The University of the State of New York

The State Education Department

State Review Officer

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No. 24-567

Application of a STUDENT WITH A DISABILITY, by his parents, 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:

Liz Vladeck, General Counsel, attorneys for respondent, by Lindsay R. VanFleet, 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) fund the cost of her daughter's private services delivered by EDOpt LLC (EDOpt) for the 2023-24 school year. The district cross-appeals, arguing that the IHO correctly determined that the unilateral placement was not appropriate and that equitable considerations disfavor the parent. The appeal must be sustained in part. The cross-appeal must be dismissed. This matter must be remanded to the IHO for a ruling on the appropriateness of the speech-language therapy services that the agency provided to the student.

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 parties' familiarity with this matter is presumed, and, therefore, the student's educational history, the procedural history of this matter, and the IHO's decision will not be recited in detail. Briefly, a CSE convened on March 12, 2019 to develop an IESP for the student, with a projected implementation date of April 1, 2019 (see Parent Ex. B). The March 2019 CSE recommended that the student receive five periods per week of group special education teacher support services (SETSS) as well as two 30-minute sessions per week of individual speech-language therapy (SLT) (id. at p. 9).^{1, 2} The March 2019 IESP noted that the student was parentally placed in a nonpublic school (id. at p. 12).

The parent signed an enrollment agreement with EDOpt on June 21, 2023 for the agency to provide services to the student for the 2023-24 school year in accordance with the last agreed upon IESP (see Parent Ex. C).³

In a letter dated August 23, 2023, the parent notified the district that it failed to assign a provider for services mandated for the student for the 2023-24 school year and that if the district failed to assign a provider she would be compelled to obtain services unilaterally (Parent Ex. D).

A CSE convened again on December 19, 2023 to develop an IESP for the student with a projected implementation date of December 26, 2023 (see Dist. Ex. 3). The December 2023 CSE continued to recommend that the student receive five periods per week of group SETSS and two 30-minute sessions per week of individual speech-language therapy (compare Parent Ex. B at p. 9, with Dist. Ex. 3 at p. 7). The December 2023 IESP also noted that the student was parentally placed in a nonpublic school (Dist. Ex. 3 at p. 10).

A. Due Process Complaint Notice

In a due process complaint notice, dated July 15, 2024, the parent, through a lay advocate, alleged that the district denied the student a free and appropriate public education (FAPE) for the 2023-24 school year (Parent Ex. A). Initially, the parent asserted that the district denied the student a FAPE by failing to supply providers for the services as recommended in the student's March 2019 IESP (id.). The parent also alleged that the district failed to inform the parent about how the services would be implemented and "improperly and impermissibly shifted its responsibility to provide [] the services to the student" (id.). The parent claimed that she was unable to procure a provider for the 2023-24 school year at the district's rates and had no choice but to retain the services of a private provider at an enhanced rate (id.). Additionally, the parent alleged that the district failed to convene a CSE before the beginning of the 2024-25 extended school year,

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

² 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.

³ EDOpt is not approved by the Commissioner of Education as a school or agency with which school districts may contract to instruct students with disabilities (see NYCRR 200.1[d]; 200.7).

resulting in a denial of a FAPE for the student (id.). The parent requested an order awarding the student five periods per week of SETTS, two 30-minute sessions per week of speech-language therapy, specifically requesting district funding for those services to the privately obtained provider and a bank of compensatory services for any services not provided by the district, also through district funding at an enhanced rate set by the provider (id. at p. 3). In a due process response, the district alleged numerous defenses that it intended to pursue at hearing, including, among others, that the parent had not requested equitable services prior to the June 1 deadline as required under the dual enrollment statute (Due Proc. Resp. dated 8/2/2024).

B. Impartial Hearing Officer Decision

An impartial hearing convened before the Office of Administrative Trials and Hearings (OATH) on October 1, 2024 and concluded the same day (Tr. pp. 1-56). In a decision dated October 17, 2024, the IHO found that the district was required to implement the recommended services and the district's failure to assign the student a SETSS provider "constituted a denial of FAPE on an equitable basis" (IHO Decision at p. 6).⁴ The IHO then found that while the parent sent a June 1 request for dual enrollment services for the 2023-24 school year, the parent did not send one for the 2024-25 school year and denied relief for the 2024-25 school year on that ground (id. at pp. 9, 11).

With respect to the 2023-24 school year, the IHO went on to assess the appropriateness of the unilaterally obtained services and found that the parent failed to show that EDOpt provided appropriate services to the student (IHO Decision at pp. 6-7). The IHO found that the hearing record was devoid of any testimony from actual providers or supervisors (id. at p. 7). The IHO added that the witness from EDOpt lacked any personal knowledge of the student's needs, methodologies used, or how progress was assessed (id.). The IHO also found that there was an overall lack of detail in the records provided by EDOpt and that the evidence presented did not demonstrate how EDOpt's services were tailored to meet the student's unique special education needs (id.). The IHO held that the parent did not meet her burden in proving that EDOpt was an appropriate placement for the student (id.).

The IHO found that even if the parent met her burden to prove the appropriateness of the unilateral placement, equitable considerations did not favor the parent, warranting a complete denial of an award or a reduction of the requested fees to the lowest rate set by the district (IHO Decision at pp. 7-9). The IHO noted that EDOpt did not provide documentary evidence regarding the certifications of the various providers nor evidence regarding any providers' education, training, or experience; thus, the IHO found that the parent failed to show that the providers were sufficiently qualified to provide services or to justify the requested rates for services (id. at 8). Additionally, the IHO found that the parent failed to present evidence regarding what actions she took to locate a provider at the DOE-approved rates (id.). The IHO noted the contract with EDOpt was executed in June 2023, well before the start of the school year, and before the parent sent the district notice regarding the parent's inability to locate a provider (id.). Finally, the IHO found that the parent failed to demonstrate that the services provided an educational benefit to the student

⁴ The IHO denied the district's motion to dismiss this matter for both the 2023-24 and 2024-25 school years on jurisdictional grounds (IHO Decision at pp. 9-10).

because not enough evidence was provided regarding the student's level of abilities at the beginning of the year or how the student's abilities had changed (id.).

With respect to the 2024-25 school year, in addition to finding that the parent did not send the required June 1 notice, the IHO made alternative findings that the parent failed to meet her burden in proving the appropriateness of the private services for the 2024-25 school year and that equitable considerations warranted a complete denial of an award for reimbursement/direct funding for special education services unilaterally obtained by parent for the 2024-25 school year (IHO Decision at 12-13).

IV. Appeal for State-Level Review

The parent appeals, alleging that the IHO erred in finding that she failed to meet her burden in showing the appropriateness of the unilaterally obtained services.⁵ Specifically, the parent argues that the IHO held the parent to an unreasonable standard of appropriateness and incorrectly found that the record was insufficient to establish appropriateness under Burlington/Carter.

The district submits an answer, arguing that the IHO correctly found that, for the 2023-24 school year, the parent failed to prove that the unilaterally obtained services were appropriate for the student and that all relief requested by the parent should be denied and that, for the 2024-25 school year, the parent did not appeal from the IHO's finding that the parent failed to submit a June 1 notice.⁶ In addition, the district argues that even if it is found that the parent adequately demonstrated the appropriateness of the unilaterally obtained services, equitable considerations disfavor the parent such that a complete denial of relief is warranted.⁷

⁵ The parent's request for review does not conform with form requirements. All pleadings must be signed by an attorney, or by a party if not represented by an attorney (8 NYCRR 279.8[a][4]). Here, the parent's request for review is signed by the parent's lay advocate, who is not an attorney (Req. for Rev. at p. 10). In addition, the name of the parent, as it appears on the request for review, is different from the name of the parent on the verification. The lay advocate for the parent is cautioned that repeated failures to conform to the practice regulations with regard to the form requirements and the filing of pleadings can result in dismissal of an appeal by a State Review Officer. Similarly, as the parent acknowledges, through her lay advocate, the late service of the notice of intention to seek review, without asserting good cause, the parent is also reminded to comply with the timelines established by the relevant practice regulation, and a continued failure to do so may also result in a rejection of future pleadings (8 NYCRR 279.3).

⁶ Although the district served and filed a document labeled "Verified Answer and Cross-Appeal," review of the document as a whole shows that it does not contain a cross-appeal in that it does not identify any precise rulings, failures to rule, or refusals to rule of the IHO of which the district seeks review (see 8 NYCRR 279.8[c][2]), accordingly, for purposes of this decision, the pleading will be referenced as the district's answer.

⁷ On December 19, 2024, the parent's lay advocate requested an extension to serve and/or file the parent's answer to the cross appeal until January 13, 2025. The parent's lay advocate was granted the extension, in part, until January 6, 2025. After service was made on January 6, 2025, a copy of the served pleading was filed with the Office of State Review on January 9, 2025. State regulation requires that a copy of the served pleading must be filed with the Office of State Review within two days of service (8 NYCRR 279.3). Accordingly, the parent's answer to the cross appeal was not timely filed. In addition, the answer to the cross-appeal was not signed. Thus, the answer to the cross-appeal is not accepted and will not be considered as part of this 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]).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

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.

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

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

VI. Discussion

As an initial matter, the parties do not appeal the IHO's finding that the district failed to offer the student a FAPE for the 2023-24 school year, nor do they appeal the finding that the parent failed to make a written request for IESP services by June 1 preceding the 2024-25 school year (see IHO Decision at pp. 6, 11-12). These findings have, therefore, 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]). Accordingly, the issues presented as a part of this appeal are limited to the 2023-24 school year and whether the IHO erred in finding that the unilaterally obtained private services were not specially designed to address the student's special education needs and in finding that equitable considerations supported a denial of all relief.

A. Unilaterally Obtained Services

The parent appeals from the IHO's determination that she did not meet her burden to show the appropriateness of the unilaterally obtained services. Specifically, the parent asserts that the IHO incorrectly determined that the hearing record lacked sufficient evidence to demonstrate that EDOpt provided the student with instruction specially designed to meet the student's special education needs and to enable her to make progress.

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 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 EDOpt 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 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 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).

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; 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

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 EDopt (Educ. Law § 4404[1][c]).

specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

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

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

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

1. Student's Needs

Although the sufficiency of the student's present levels of performance and individual needs as described in the March 2019 IESP and later December 2023 IEP are not in dispute, a discussion thereof, as well as of the other evaluative information available in the hearing record, provides a framework by which to determine appropriateness of the services obtained by the parent.

The hearing record contains a March 2019 IESP, developed when the student was six years old; however, there is nothing in the hearing record to suggest whether the CSE met or developed an IESP during the interval of time between the March 2019 and the December 2023 CSE meetings. According to the March 2019 IESP, the student presented with average cognitive skills, and high average processing speed (Parent Ex. B at pp. 1-2). Additionally, the student's academic skills were assessed to be within the average range with the exception of reading comprehension, which was below average (*id.* at p. 2). The March 2019 IESP indicated that the student's estimated reading ability was below grade level and noted that "her low performance suggest[ed] that any activity that has written print will be a challenge because she ha[d] not mastered decoding skills vital for reading" (*id.* at p. 4). Additionally, the IESP reported that the student "demonstrated math abilities that [we]re []appropriate for her [then-]current grade level" (*id.*). According to the IESP, the student's classroom teacher, at the time, reported that the student had difficulty applying phonics rules and was "slow to blend isolated letters into words"; struggled with spelling and the ability to process and write four-to-five-word sentences when dictated; and had difficulty

comprehending math word problems resulting in difficulty determining which mathematical operation to perform (id.). Further, the IESP indicated that the student had been struggling since the prior school year with reading, processing information, and focusing her attention, specifically noting that she "th[ought] things through slowly, [and] ha[d] difficulty reading and following multi-step directions" (id.).

A November 2023 psychoeducational evaluation, conducted as part of the student's mandated three-year evaluation, reflected the results of an administration of the Wechsler Abbreviated Scale of Intelligence – Second Edition (WASI), which yielded a full-scale IQ of 100, which fell in average range (Dist. Ex. 5 at p. 4). The full-scale IQ included composite scores from verbal IQ measures (SS 91) and non-verbal (performance) IQ measures (SS 109) that also fell within the average range (id.). Additionally, an administration of the Wechsler Intelligence Scale for Children – Fifth Edition (WISC-V) processing subtest yielded a standard score of 119 that was within the high average range (id. at pp. 4-5). With regard to academics, the results of an administration of the Wechsler Individual Achievement Test – Fourth Edition (WIAT-IV) indicated that the student scored in the average range on the numerical operations subtest, in the low average range on the reading comprehension and math problem solving subtests, and in the very low range on the word reading subtest (id. at pp. 2-4).¹¹

A review of the evaluator's behavioral observations suggested that the student's functional skills in the classroom may have been lower than what would be expected based on the student's scores on the standardized assessments (see Dist. Ex. 5 at pp. 1-2). In terms of reading, the evaluator reported that the student did not read with fluency; demonstrated difficulty answering "questions within scope"; stuttered while reading; took a long time to read a passage; required time to generate responses; and provided short responses and needed a lot of prompting to expand on them (id. at p. 1). The evaluator also indicated that the student had a hard time breaking down multisyllabic words and had difficulty with multi-step instructions but noted she "was very motivated by challenging tasks" (id.). Further, the evaluator opined that the student's comprehension and "expressive skills" were below grade level (id. at p. 2).

With regard to math, the evaluator indicated that the student was functioning within the average range and presented with "grade appropriate basic mathematical concepts"; however, the evaluator reported that the student was unable to multiply and divide single digits, add and subtract two-digit numerals without regrouping, solve long division with one divisor, or add and subtract three-digit numerals using regrouping (Dist. Ex. 5 at p. 3). Additionally, the evaluator indicated that the student's math problem solving fell within the low average range and reported that she was

¹¹ The November 2023 psychoeducational evaluation report indicates testing was conducted on November 20, 2024; however, it was entered into evidence as a November 27, 2023, psychoeducational assessment and is listed as that date on both the district's exhibit list and the in the IHO's decision (Tr. p. 9; compare Dist. Ex. 5 at p. 1 with IHO Decision at p. 15). Additionally, the report indicates the student's age as of November 2023 (compare Dist. Ex. 5 at p. 1, with Parent Ex. A at p. 1). Moreover, the reading and math scores obtained during the evaluation were included in the December 2023 IESP (compare Dist. Ex. 5 at pp. 2-4, with Dist. Ex. 3 at pp. 1-2). However, a review of the psychoeducational evaluation report shows that it contains several errors including the use of incorrect pronouns as well as reporting different percentile scores for the same subtest (see Dist. Ex. 5 at pp. 2, 4-5). Finally, although the assessment results indicated that most of the student's academic skills fell within the low average to average ranges, the psychoeducational evaluation narrative described that the student struggled with many age-appropriate academic skills (see generally Dist. Ex. 5).

able to demonstrate skills in basic mathematical concepts, correctly identified place values, and solved single word problem operations involving money (id.).

The December 2023 IESP present levels of performance included the scores obtained from the November 2023 psychoeducational evaluation as well as input from the student's SETSS teacher (compare Dist. Ex. 3 at pp. 1-2 with Dist. Ex. 5). As reflected in the IESP, the student's SETSS teacher reported that the student was a slow reader, read with poor fluency, demonstrated weakness in reading comprehension when asking inferential questions, and "require[d] strategies and methodologies" (Dist. Ex. 3 at p. 2). With regard to social development the IESP described the student as timid and quiet as well as obedient and respectful (id.). The December 2023 IESP indicated that the student needed the following resources and strategies to address her management needs: a multi-sensory approach to learning; scaffolding; repetition and rephrasing of directions as needed; periodic checks for understanding; review of previously learned material; instruction broken down into small, manageable units; previewing and modeling of content; visual aids and cues (i.e., graphic organizers, checklists); refocusing prompts and redirection as needed; preferential seating near the teacher; positive reinforcements and praise; peer models; and testing accommodations consisting of extended time and testing in a separate room/location (id.). To address the student's identified needs, the December 2023 CSE recommended the student receive five periods of group special education teacher support services (SETSS) and two 30-minute sessions of speech-language therapy weekly (id. at p. 7).

Turning next to speech-language therapy, the hearing record shows that the student previously presented with significant delays in her articulation skills and had been recommended to receive speech-language therapy (see Parent Ex. B at p. 3). The hearing record contains scant information by which to understand the student's needs during the 2023-24 school year or any progress she might have made since the March 2019 CSE meeting. Specifically, the March 2019 IESP contained the results from an administration of the Goldman Fristoe Test of Articulation 3 (GFTA-3) which indicated that the student attained a standard score of 59 placing her in the very low range (id. at p. 3). Further, the IESP indicated that the student's speech intelligibility was mildly impaired (id.). The December 2023 IESP does not include any narrative description or evaluation results that provide information regarding the student's articulation skills or speech-language skills in general; however, the CSE recommended the student receive two 30-minute sessions of individual speech-language therapy per week (Dist. Ex. 3 at p. 7). Moreover, the December 2023 IESP contained one annual goal designed to improve the student's speech intelligibility by reducing her dentilized and lateral lisps (Dist. Ex. 2 at p. 4). Furthermore, the contract with EDopt was to provide services "as per the last agreed upon IEP/IESP/FOFD" and the 2023-24 progress report indicated that EDopt was providing two 30-minute sessions of individual speech services (Parent Exs. C at p. 3; H at pp. 1, 3). However, the hearing record is otherwise devoid of information regarding the provision of speech-language services to the student during the 2023-24 school year.

2. Unilaterally Obtained Services from EDopt

An undated 2023-24 EDopt progress report indicated that the student was receiving five periods of special education teacher support services (SETSS) and two 30-minute sessions of individual speech services per week (Parent Ex. H at p. 1). The progress report stated that the student's "deficits and delays [we]re evident in multiple areas of academic and cognitive

development and social-emotional development" (id.). Additionally, the progress report noted that the student was currently functioning at a fourth grade level in both reading and math, despite being in sixth grade, and noted that she struggled with higher-order thinking, language processing, and making inferences or predictions while learning, which created challenges in problem solving and comprehending complex ideas (id.). Further, with regard to reading, the progress report indicated that the student struggled with decoding, reading fluency, and comprehension, especially when answering inferential questions or analyzing complex story elements such as conflict and resolution (id. at pp. 1-2). The progress report further noted that the student demonstrated improved comprehension and responses to inferential questions when text was read aloud to her (id. at p. 2). To support the student's reading development, the student was learning to summarize what she read every two to three sentences using a chunking strategy, as well as utilizing visual aids and scaffolding during SETSS (id.).

Next, the progress report indicated that the student struggled with expressing her thoughts in writing and noted that while her sentences followed a logical sequence, her compositions often lacked proper punctuation, grammar, and completeness (Parent Ex. H). Additionally, the progress report indicated that during SETSS, interventions directed at writing such as "the hamburger bun" strategy and the COPS method had helped the student organize her thoughts and check over her work (id.). With regard to math, the 2023-24 progress report described that the student had difficulty with multi-step problems, mathematical concepts like multiplication, division,, and working with decimals and fractions, and often needed instructions broken down into smaller steps and required additional prompts to understand the required operation (id.). Additionally, the progress report indicated that during SETSS the student used manipulatives, visual aids, and step-by-step guidance and the report noted that the student's performance improved significantly with individualized support (id.).

With regard to the student's learning style, the progress report described the student as a visual learner who benefitted from using hands on approaches, visual aids and repetition to learn new information and stated that she responded well to segmenting lessons into smaller manageable parts to help her process information more effectively (Parent Ex. H). The report further noted that the student struggled to keep up in classroom settings, where the visual aids and repetition may not be as prominent (id.).

Turning to social development, the 2023-24 progress report indicated that, while the student had a large group of friends with whom she regularly interacted, she had difficulty maintaining eye contact with adults and could become unfocused during interactions (Parent Ex. H at p. 3). The report further noted that the student would be uncomfortable receiving remedial help in an obvious way and could become self-conscious about how her peers may perceive her (id.). Additionally, the student had difficulty accepting different viewpoints or criticism which could lead to frustration, therefore SETSS involved perspective taking activities and discussion aimed at helping her understand that "some challenging tasks are ultimately beneficial" (id.).

Based on the information discussed above, contrary to the IHO's determination, the hearing record contains sufficient evidence to show that the SETSS provided by EDopt constituted specially designed instruction that aimed to address the student's unique educational needs. However, the hearing record did not include evidence regarding whether the student was receiving speech-language therapy from EDopt or any other entity, nor was there an analysis by the IHO as

to whether such therapy was required, under the totality of the circumstances, in order for the student to receive an educational benefit.

In the contract between EDopt and the parent, EDopt agreed to provide services "as per the last agreed upon IEP/IESP/FOFD" (Parent Ex. C at p. 3). At the beginning of the 2023-24 school year, the most recent IESP for the student was the March 2019 IESP, thus, the March 2019 IESP was last agreed upon IESP at time of the contract signing (Parent Ex. C at p. 2).¹² In addition to five periods of SETSS per week, the student's March 2019 IESP also recommended that student receive two 30-minute sessions of speech-language therapy per week (Parent Ex. B at p. 9).¹³ The contract with EDopt lists speech as a type of service that EDopt provides (Parent Ex. C. at p. 3). Accordingly, it appears as though the parent entered into a contract for delivery of speech-language services to the student for the 2023-24 school year. Additionally, the EDopt progress report indicated that the student was receiving two 30-minute sessions of speech-language services, although it does not provide any further information about such services (Parent Ex. H at p. 1).

Additionally, the timesheets produced by EDopt indicate that the only service the student received from EDopt's providers were "[e]nhanced [r]ates S[ETSS]" (Parent Ex. F at pp. 1-19). Accordingly, the hearing record does not demonstrate that EDopt provided speech-language therapy to student, despite speech being listed as a service type in the contract between the parent and EDopt (see Parent Ex. C at p. 3; F at pp.1-19). The parent does not dispute the CSE's recommendation of speech-language therapy for the student in the March 2019 IESP nor does the parent dispute the recommendation of speech-language therapy in the December 2023 IESP.

Considering the above, the hearing record included sufficient information to show that the SETSS provided to the student included specially designed instruction targeting the student's needs; however, the hearing record also indicated that speech-language was an area of need for the student and it is not clear if SETSS without speech-language therapy would have accommodated the student's needs under the totality of the circumstances. Additionally, while there is some indication that the student received speech-language therapy services during the 2023-24 school year, the hearing record does not include any details regarding this service. Accordingly, this matter must be remanded to the IHO to determine the appropriateness the services provided to the student during the 2023-24 school year with attention to be paid to whether the student's educational program, as a whole, met her needs related to speech-language. Should the IHO find that more information is needed to adequately address these allegations, the parties and the IHO may further develop the hearing record.

B. Equitable Considerations

Although the matter is being remanded to the IHO, having determined that the IHO erred in his findings regarding the appropriateness of the services delivered to the student, it is worth also addressing the IHO's findings regarding equitable considerations as the IHO determined that they constituted an independent basis for denying relief. The parent appeals from the IHO's finding

¹² The contract was digitally signed by the parent on June 21, 2023 (Parent Ex. C at p. 2; 3).

¹³ The December 2023 IESP contained the same recommendations for five periods per week of SETSS and two 30-minute sessions per week of individual speech-language therapy (Dist. Ex. 3 at p. 7).

that equitable considerations do not favor awarding her requested relief. The parent asserts that the IHO erred in applying her analysis of the student's educational program, such as the lack of certifications, as an equitable consideration and also contends that the IHO erred in taking the timing of the parent's contract with EDOpt into account asserting that the parent acted reasonably in sending a June 1 letter and a 10-day notice.

The final criterion for a reimbursement award is that the parents' claim must be supported by 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. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014] [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"]).

The IHO's findings regarding the individual providers' qualifications and the parent's failure to show that the services provided an educational benefit to the student impermissibly conflated the standard for finding the services appropriate as discussed above with the standard for equitable considerations. The Second Circuit Court of Appeals has 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 hour 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]). The findings regarding the providers' qualifications and the parent's failure to show that the services provided an educational benefit to the student are both factors that go towards demonstrating that the "unilateral placement [was] reasonably calculated to enable the child to receive educational benefits"

(Gagliardo, 489 F.3d at 112, quoting Frank G., 459 F.3d at 364-65). Thus, the IHO erred by addressing these factors as equitable considerations.¹⁴

Regarding relevant factors for equitable consideration, the CSE failed to convene a CSE meeting for the student from March of 2019 until December of 2023, meaning that the student's IESP was over four years old at the start of the 2023-24 school year (compare Parent Ex. B, with Dist. Ex. 3). Additionally, the parent sent the district a written ten-day notice on August 23, 2023, which stated the parent's concerns, requested that the district remedy the issue, and stated that if the issue was not resolved the parent would seek to unilaterally obtain services for the student at an enhanced rate (Parent Ex. D).

Regarding the IHO's finding that the parent failed to present evidence regarding the actions she took to locate providers at a district approved rate, the IHO stated that since the contract between the parent and EDOpt was executed before the start of the 2023-24 school year, the parent did not act in good faith to locate a SETSS provider at a district approved rate (IHO Decision at p. 8). This finding is without merit as the argument is in direct contravention of the controlling law found in the holdings of the Second Circuit Court of Appeals, which explain that so long as the parents cooperate with the district, and do not impede the district's efforts to offer a FAPE, even if the parents had no intention of placing the student in the district's recommended program, it is well-settled that their plan to unilaterally place a student, by itself, is not a basis to deny their request for tuition reimbursement (see E.M. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014]; C.L., 744 F.3d at 840 [holding that the parents' "pursuit of a private placement was not a basis for denying their [request for] tuition reimbursement, even assuming . . . that the parents never intended to keep [the student] in public school"]).

Further, the contract between the parent and EDOpt states that "[i]f the [p]arents decided to accept the program/services offered by [the district], [p]arents may cancel this [a]greement in its entirety or cancel the provision of a particular service by providing a timely written notice of cancellation to EDOpt" (Parent Ex. C at p. 1). Accordingly, although the timing of entering into a contract prior to the district's failure to implement services could call into question the motivation of the parent, had the district found and provided appropriate services to the student, before or even during the school year, the parent was permitted to cancel their contract with EDOpt. Thus, the IHO's finding that the parent did not act in good faith based on her entering into a contract with EDOpt prior to sending her 10-day notice and prior to the start of the school year must be reversed.

Based on the foregoing, there is insufficient basis for reducing or denying the parent's request for direct funding, should the IHO find that EDOpt was an appropriate placement under the totality of the circumstances upon remand.

¹⁴ The IHO's approach would have been equally problematic if it had been conducted as part of his analysis of the unilateral placement because as the Supreme Court held long ago a lack of State certification by the private teachers is not a bar to reimbursement and "it hardly seems consistent with the Act's goals to forbid parents from educating their child at a school that provides an appropriate education simply because that school lacks the stamp of approval of the same public school system that failed to meet the child's needs in the first place" (Carter, 510 U.S. at 14).

VII. Conclusion

Having found the evidence in the hearing record supports that the SETSS provided by EDopt to the student during the 2023-24 school year were appropriate, the portion of the IHO's order that found those services to be inappropriate must be overturned. Additionally, the IHO erred in the alternative finding that equitable considerations did not favor the parent. An inquiry into whether the student received speech -language therapy from EDopt must be conducted to determine whether the services provided by EDopt to the student were appropriate under the totality of the circumstances or, conversely, whether the student was unlikely to make appropriate progress due to a lack of speech-language therapy. Thus, this matter must be remanded the IHO to allow the parties an opportunity to be heard and to make a determination as to the appropriateness of EDopt under the totality of the circumstances.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO decision, dated October 17, 2024, is modified by reversing the IHO's finding that the SETSS delivered to the student by EDopt were not appropriate for the student for the 2023-24 school year;

IT IS FURTHER ORDERED that the IHO decision, dated October 17, 2024, is modified by reversing the finding that equitable considerations did not favor the parent; and

IT IS FURTHER ORDERED that this matter is remanded to the IHO to determine the appropriateness of the services delivered by EDopt to the student for the 2023-24 school year under the totality of the circumstances in accordance with the body of this decision, with attention to whether the student required speech-language services in addition the SETSS services for an appropriate special education program.

Dated: **Albany, New York**
 April 11, 2025

JUSTYN P. BATES
STATE REVIEW OFFICER