The University of the State of New York

The State Education Department
State Review Officer
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No. 24-619

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:
Law Office Of Philippe Gerschel, attorneys for petitioner, by Philippe Gerschel, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Nicole Daley, 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 costs of her daughter's private services delivered by Enhanced Support Services Inc. (Enhanced) for the 2023-24 school year. The district cross-appeals from that portion of the IHO's decision which found that the parent's unilaterally-obtained services from Enhanced were appropriate. The appeal must be sustained to the extent indicated. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

When a student who resides in New York is eligible for special education services and attends a nonpublic school, Article 73 of the New York State Education Law allows for the creation of an individualized education services program (IESP) under the State's so-called "dual enrollment" statute (see Educ. Law § 3602-c). The task of creating an IESP is assigned to the same committee that designs educational programing for students with disabilities under the IDEA (20 U.S.C. §§ 1400-1482), namely a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law

§ 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, State law provides that "[r]eview of the recommendation of the committee on special education may be obtained by the parent or person in parental relation of the pupil pursuant to the provisions of [Education Law § 4404]," which effectuates the due process provisions called for by the IDEA (Educ. Law § 3602-c[2][b][1]). Incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

III. Facts and Procedural History

A CSE convened on January 18, 2023, found the student eligible for special education as a student with a learning disability, and developed an IESP with a projected implementation date of February 01, 2023 (Parent Ex. B at pp. 1, 11-12).[1, 2] The January 2023 IESP indicated the student was parentally placed in a non-public school and the CSE recommended that the student receive eight periods per week of group special education teacher support services (SETSS) with instruction in Yiddish, one 30-minute session per week of individual counseling in Yiddish, and two 30 minutes sessions per week of individual occupational therapy (OT) in English (id. at pp. 11-12, 14).[3]

On May 15, 2023, the parent completed a district form on which she notified the district of her intent to place the student in a nonpublic school at her own expense for the 2023-24 school year and that she was requesting the district provide the student's special education services for that school year (Parent Ex. D at p. 1). On July 20, 2023, the parent executed a contract with Enhanced for the provision of the recommended SETSS mandated in the student's IESP at a rate of $195 per hour during the 2023-24 school year (Parent Ex. E).[4]

On August 21, 2023, the parent, through her attorney, stated her agreement with and consent to all services recommended on the January 2023 IESP being implemented by the district (Parent Ex. C). The letter indicated, however, that the parent had no way of implementing the recommendations and, despite her best efforts, she was unable to locate providers for SETSS and related services at the district's "standard rate" (id. at p. 1). The parent indicated she was writing to inform the district that she had no choice but to implement the January 2023 IESP on her own and seek reimbursement or direct payment from the district (id.). The letter identified the school

[1] The hearing record contains duplicate copies of the January 2023 IESP (see Parent Ex. B; Dist. Ex. 3). Although the layout of the copies of the IESP differ slightly, the content and page numbers of both are the same (compare Parent Ex. B; with Dist. Ex. 3). For purposes of this decision, the parent's exhibit is cited.

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

[3] The term SETSS is not defined in the State continuum of special education services (see NYCRR 200.6), and the manner in which those services are treated in a particular case is often in the eye of the beholder. 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, and unless the parties and the hearing officer take the time to develop a record on the topic in each proceeding it becomes problematic (see Application of the Dep't of Educ., Appeal No. 20-125). For example, SETSS has been described in a prior proceeding as "a flexible hybrid service combining Consultant Teacher and Resource Room Service" that was instituted under a temporary innovative program waiver to support a student "in the general education classroom" (Application of a Student with a Disability, Appeal No. 16-056), and in another proceeding it was suggested that SETSS was more of an a la carte service that is completely disconnected from supporting the student in a general education classroom setting (Application of a Student with a Disability, Appeal No. 19-047).

[4] Enhanced is a corporation and has not been approved by the Commissioner of Education as a school or company with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

the student would be attending for the 2023-24 school year and stated that "their special education program [would be] provided on school premises" (id.).

According to the parent, Enhanced began providing the student with eight hours per week of SETSS on September 7, 2023 (see Parent Ex. I at ¶ 8).

A. Due Process Complaint Notice

In a due process complaint notice dated April 12, 2024, the parent alleged that the district denied the student a free appropriate public education (FAPE) for the 2023-24 school year by failing to implement the January 2023 IESP (Parent Ex. A at p. 2). The parent alleged that "[w]ithout supports, the parental mainstream placement [wa]s untenable" and that the district's "failure to either implement the services or provide a placement" was a denial of FAPE (id.).

For relief, the parent requested a finding that the district's failure to implement its recommendations for the 2023-24 school year was a denial of a FAPE (Parent Ex. A at p. 3). The parent further requested that the "providers located by [the parent]" be funded at the "contracted rate" and that the district be ordered to fund compensatory education equivalent to any services missed (id.).

B. Impartial Hearing Officer Decision

An impartial hearing convened before the Office of Administrative Trials and Hearings (OATH) on June 17, 2024 and concluded the same day (Tr. pp. 1-67). In a decision dated November 7, 2024, the IHO held that the district failed to implement the student's January 2023 IESP on "an equitable basis" and, therefore, denied the student a FAPE for the 2023-24 school year and that the parent's unilaterally-obtained program was appropriate; however, the IHO denied the parent's requested relief on equitable grounds (IHO Decision at pp. 2, 7).[5]

On the issue of the unilaterally-obtained services, the IHO found that the parent presented credible witnesses and progress reports to establish the appropriateness of the services provided to the student (IHO Decision at p. 5). The IHO held that the documentation and testimony was sufficient to establish that the provider agency "employed a variety of research-based methodologies, and created an individualized program suited" to meet the student's needs (id.). Moreover, the IHO determined that the student received services from "experienced, licensed, and qualified providers" and that, "[t]hrough th[o]se targeted interventions," the student made progress (id.).

Next, the IHO held that equitable considerations did not favor the parent and made two distinct findings (IHO Decision pp. 5-7). First, the IHO reviewed the parent's request for funding at Enhanced's contracted rate (id. at pp. 6-7). The IHO noted that the district's evidence as to the established market rate was persuasive and, therefore, ruled that the parent's requested rate was excessive as a matter of law (id. at p. 6). The IHO calculated what she believed was a reasonable rate using a formula derived from the New York State Education Department's rate setting

[5] The IHO's decision is not paginated; for the purposes of this decision, the pages will be cited by reference to their consecutive pagination with the cover page as page one (see IHO Decision at pp. 1-12).

methodology, arriving at a figure of $138.46 (see id. at pp. 6-7 & n.6). Despite this finding, the IHO then determined that the parent was not entitled to relief on the basis that she did not have a financial obligation to pay for the services provided by Enhanced (id. at p. 7). The IHO found that the contract submitted by the parent was not persuasive because it was contradicted by testimony of the parent herself (id.). The IHO noted the parent's testimony that she was not invoiced for the services provided and that she did not have a financial responsibility to Enhanced (id.). The IHO held the parent did not have an obligation to pay Enhanced for services delivered to the student despite the contract and, therefore, denied her request for district funding of SETSS provided by Enhanced (id.).

Finally, the IHO reviewed the parent's request for compensatory education (IHO Decision at pp. 7-8). The IHO determined that the parent failed to demonstrate a "deficit was created by the [d]istrict" such that the requested compensatory education would address same and denied the request in its entirety (id. at p. 9).

IV. Appeal for State-Level Review

The parent appeals, alleging that the IHO erred in denying the parent's requested relief on the basis that the parent failed to establish she was financially obligated to pay for the services provided by Enhanced. The parent argues that the contract included in the hearing record and the accompanying testimony were sufficient to establish the parent's financial obligation. The parent also argues that the district did not present credible evidence of a reasonable market rate, and that the IHO improperly considered evidence that was not included in the hearing record to calculate a reasonable rate. Finally, the parent asserts that the IHO erred in addressing pendency in the final decision.

In an answer with cross-appeal, the district alleges that the IHO erred in finding that the parent's unilaterally-obtained services were appropriate and cites the lack of OT services as the basis for this error. The district argues that without OT the student's needs could not be met. With respect to the IHO's denial based on equitable considerations, the district seeks affirmance of the IHO's determination that the parent was not financially obligated to pay for the equitable services and also argues that the IHO was correct in her finding that the contracted rate was excessive. In addition, the district argues that the parent did not give the district the opportunity to cure the alleged defect in the IESP. With respect to pendency, the district argues that the student is not entitled to pendency given that the parent unilaterally obtained services from a private provider.

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

VI. Discussion

A. Pendency

Initially, during the pendency of any proceedings relating to the identification, evaluation or placement of the student, the IDEA and the New York State Education Law require that a

[6] 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]).

[7] State guidance explains that providing services on an "equitable basis" means that "special education services are provided to parentally placed nonpublic school students with disabilities in the same manner as compared to other students with disabilities attending public or nonpublic schools located within the school district" ("Chapter 378 of the Laws of 2007–Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the Individuals with Disabilities Education Act (IDEA) 2004 and New York State (NYS) Education Law Section 3602-c," Attachment 1 (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.

student remain in his or her then-current educational placement, unless the student's parents and the board of education otherwise agree (20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; see Ventura de Paulino, 959 F.3d at 531; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 170-71 [2d Cir. 2014]; Mackey v. Bd. of Educ. of the Arlington Cent. Sch. Dist., 386 F.3d 158, 163 [2d Cir. 2004], citing Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]; M.G. v. New York City Dep't of Educ., 982 F. Supp. 2d 240, 246-47 [S.D.N.Y. 2013]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *20 [E.D.N.Y. Oct. 30, 2008]; Bd. of Educ. of Poughkeepsie City Sch. Dist. v. O'Shea, 353 F. Supp. 2d 449, 455-56 [S.D.N.Y. 2005]).[8] Pendency has the effect of an automatic injunction, and the party requesting it need not meet the requirements for injunctive relief such as irreparable harm, likelihood of success on the merits, and a balancing of the hardships (Zvi D., 694 F.2d at 906; see Wagner v. Bd. of Educ. of Montgomery County, 335 F.3d 297, 301 [4th Cir. 2003]; Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 [3d Cir. 1996]). The purpose of the pendency provision is to provide stability and consistency in the education of a student with a disability and to "strip schools of the unilateral authority they had traditionally employed to exclude disabled students . . . from school" (Honig v. Doe, 484 U.S. 305, 323 [1987] [emphasis in original]; Evans v. Bd. of Educ. of Rhinebeck Cent. Sch. Dist., 921 F. Supp. 1184, 1187 [S.D.N.Y. 1996], citing Bd. of Educ. of City of New York v. Ambach, 612 F. Supp. 230, 233 [E.D.N.Y. 1985]). A student's placement pursuant to the pendency provision of the IDEA is evaluated independently from the appropriateness of the program offered the student by the CSE (Mackey, 386 F.3d at 160-61; Zvi D., 694 F.2d at 906; O'Shea, 353 F. Supp. 2d at 459 [noting that "pendency placement and appropriate placement are separate and distinct concepts"]). The pendency provision does not require that a student remain in a particular site or location (Ventura de Paulino, 959 F.3d at 532; T.M., 752 F.3d at 170-71; Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 753, 756 [2d Cir. 1980]; see Child's Status During Proceedings, 71 Fed. Reg. 46,709 [Aug. 14, 2006] [noting that the "current placement is generally not considered to be location-specific"]), or at a particular grade level (Application of a Child with a Disability, Appeal No. 03-032; Application of a Child with a Disability, Appeal No. 95-16).

Under the IDEA, the pendency inquiry focuses on identifying the student's then-current educational placement (Ventura de Paulino, 959 F.3d at 532; Mackey, 386 F.3d at 163, citing Zvi D., 694 F.2d at 906). Although not defined by statute, the phrase "then-current placement" has been found to mean either: (1) the placement described in the student's most recently implemented IEP; (2) the operative placement actually functioning at the time when the due process proceeding was commenced; or (3) the placement at the time of the previously implemented IEP (Dervishi v. Stamford Bd. of Educ., 653 Fed. App'x 55, 57-58 [2d Cir. June 27, 2016], quoting Mackey, 386 F.3d at 163; T.M., 752 F.3d at 170-71 [holding that the pendency provision "requires a school district to continue funding whatever educational placement was last agreed upon for the child"]; see Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 452 [2d Cir. 2015] [holding that a student's entitlement to stay-put arises when a due process complaint notice is filed]; Susquenita Sch. Dist. v. Raelee, 96 F.3d 78, 83 [3d Cir. 1996]; Letter to Baugh, 211 IDELR 481 [OSEP 1987]).

[8] In Ventura de Paulino v. New York City Department of Education, 959 F.3d 519 (2d Cir. 2020), the Court concluded that parents may not transfer a student from one nonpublic school to another nonpublic school and simultaneously transfer a district's obligation to fund that pendency placement based upon a substantial similarity analysis (see Ventura de Paulino, 959 F.3d at 532-36).

Furthermore, the Second Circuit has stated that educational placement means "the general type of educational program in which the child is placed" (Concerned Parents, 629 F.2d at 753, 756), and that "the pendency provision does not guarantee a disabled child the right to remain in the exact same school with the exact same service providers" (T.M., 752 F.3d at 171). However, if there is an agreement between the parties on the student's educational placement during the due process proceedings, it need not be reduced to a new IEP, and the agreement can supersede the prior unchallenged IEP as the student's then-current educational placement (see Bd. of Educ. of Pawling Cent. Sch. Dist. v. Schutz, 290 F.3d 476, 483-84 [2d Cir. 2002]; Evans, 921 F. Supp. at 1189 n.3; Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 86 F. Supp. 2d 354, 366 [S.D.N.Y. 2000], aff'd, 297 F.3d 195 [2d Cir. 2002]; see also Letter to Hampden, 49 IDELR 197 [OSEP 2007]). Moreover, a prior unappealed IHO decision may establish a student's current educational placement for purposes of pendency (Student X, 2008 WL 4890440, at *23; Letter to Hampden, 49 IDELR 197).

During the impartial hearing, the parties agreed that the student's pendency placement lay in the January 2023 IESP; however, the district noted that the parent "privately implement[ed]" services for the student (Tr. pp. 16-17). Thus, the dispute between the parties, as it arises in the pendency context, is whether the student was entitled to pendency after the parent unilaterally obtained services from a private company.

The substance of this inquiry was addressed by the Second Circuit: the Court found that the district had the authority "to determine how to provide the most-recently-agreed-upon educational program" (Ventura de Paulino, 959 F.3d at 534). More specifically, the Second Circuit held that if a parent disagrees with a district's decision on how to provide a student's educational program, the parent could either argue that the district's decision unilaterally modifies the student's pendency placement and invoke the stay-put provision, seek to persuade the district to agree to pay for the student's program in the parent's chosen school placement, or enroll the student in the new school and seek retroactive reimbursement from the district after the IEP dispute is resolved (id.). According to the Court, "what the parent cannot do is determine that the child's pendency placement would be better provided somewhere else, enroll the child in a new school, and then invoke the stay-put provision to force the school district to pay for the new school's services on a pendency basis" (id.).[9]

Here, the January 2023 IESP contemplated public delivery of the student's special education services. When the parent unilaterally obtained services from Enhanced for the student, a private corporation, she declined the provision of pendency services from the district. On appeal, the parent does not grapple with this distinction or point to any communication or agreement between the parties that the student would receive some services from the district under pendency but not others. Under the circumstances, I find no basis to find that the IHO erred in not reaching the question of pendency in the final decision.

B. 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.

[9] Whether the unilaterally-obtained services are from a school like the one discussed in Ventura de Paulino, or a private corporation, as in this case, makes little difference.

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 Enhanced 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 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

[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 Enhanced (Educ. Law § 4404[1][c]).

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).

1. Student's Needs

The student's needs are not in a dispute and a review thereof will provide the background necessary to evaluate the appropriateness of the services provided to the student by Enhanced during the 2023-24 school year.

The January 2023 IESP reflected the student struggled with on task focusing, which impeded her learning within the classroom, and she functioned at the bottom of her class (Parent

Ex. B at p. 2). The IESP stated that, according to a representative from the private school, the student was only capable of learning outside of the classroom (id. at p. 2). The January 2023 IESP noted that the parent reported the student was a very insecure student (id.). The student struggled with homework, which took her a considerable amount of time to complete (id.).

Review of the January 2023 IESP shows that the CSE considered a December 13, 2022 psychoeducational assessment, a January 2023 SETSS progress report, and information provided by the parent (Parent Ex. B at pp. 1-6). With respect to the student's cognitive skills, the IESP indicated that administration of the Wechsler Intelligence Scale for Children-Fifth Edition (WISC-V) on December 13, 2022, yielded a full scale IQ in the"[v]ery [l]ow range" (id. at pp. 1-2). Review of the student's index scores on the WISC-V revealed the student performed in the "[v]ery [l]ow range" on the verbal comprehension and fluid reasoning indices (id. at p. 1). In addition, the student performed in the"[l] ow [a]verage" range on the visual spatial and working memory indices (id.). Lastly, the student performed in the "[a]verage range" on the processing speed index, an area described as a relative strength for the student (id. at pp. 1-2).

The student's academic functioning was assessed via administration of the Wechsler Individual Achievement Test-Fourth Edition (WIAT-IV) and, as recorded in the IESP, the student obtained a WIAT-IV core reading composite score in the "[v]ery [l]ow range" (Parent Ex. B at pp. 1-2). Significant deficits were noted in the student's verbal and logical thinking skills (id. at p. 2). The January 2023 IESP described the student's academic skills as weak (id.). The IESP stated the student achieved a core mathematics composite score falling in the "[e]xtremely [l]ow range" (id. at pp. 1-2). The student's math computation skills were noted to be better developed than her math problem solving skills, which were severely delayed (id.). The IESP indicated that the student's reading skills were variable (id.). While the IESP described the student's phonemic awareness as adequate, it also indicated the student demonstrated low average decoding skills and poor reading comprehension skills, which fell in the "[v]ery [l]ow range" (id.). According to the IESP, deficits in reading comprehension were noted when the student was reading in Yiddish (id. at p. 2). The student's spelling skills were reported to be adequate (id. at pp. 1-2).

The January 2023 IESP included information from a January 2023 SETSS progress report that stated the student's cognitive skills fell below her age-appropriate benchmark (Parent Ex. B at pp. 2-3). The January 2023 IESP indicated that the student had poor sensory integration, making it exceedingly difficult for her to regulate herself, thus affecting her classroom activity (id. at p. 3). The January 2023 IESP further indicated that the student had great difficulty working with background noise, making it difficult for her to perform in a classroom setting, and was easily distracted and struggled staying focused on the lesson (id.). According to the SETSS provider's assessment of the student, she often got lost in the details "and derailed from there" (id.). The student's failure to focus and comprehend was noted to "intercede" with her ability to function as a student in the classroom and the student did not follow instructions given, nor did she "come through" with a command unless continuously redirected and guided (id.).

Nevertheless, based on the SETSS provider's report, the January 2023 IESP noted the student had progressed in her reading skills as she had mastered reading words containing vowel pairs and "ruling R," as well as 50 sight words fluently (Parent Ex. B at p. 3). In addition, the student's comprehension was slowly approaching text level, and she could answer very basic simplified questions regarding a text and could use context clues to figure out the storyline (id.).

The student's lack of vocabulary further contributed to her weak comprehension (id.). Furthermore, the IESP stated the student struggled understanding new concepts (id.). As recorded in the IESP, the student's SETSS provider indicated the student could attend to a task for at least ten minutes (id.).

In math, the January 2023 IESP cited information from the SETSS provider's progress report that indicated there seemed to be notable delays in the student's math skills (Parent Ex. B at p. 3). The student demonstrated weak computation skills and struggled greatly with word problems (id.).

In writing, the January 2023 IESP indicated the student could form/write all letters; however, she wrote some of her letters backwards making it hard to decipher her written work effortlessly (Parent Ex. B at p. 4). According to the IESP, the student's SETSS provider used stencils, worksheets, and hand over hand guidance to help her writing skills (id.). Based on the SETSS provider's progress report, the IESP indicated the student could encode CVC words with accuracy and was progressing with CVC digraphs (id.). The IESP also noted that during written assignments the student had a hard time writing proper sentences and struggled with transferring her ideas onto paper (id.). The provider used graphic organizers to help the student organize her thoughts before writing them down in sentence form (id.).

With regard to language, the January 2023 IESP cited the SETSS provider's description of the student, which indicated she had age appropriate expressive language skills and expressed herself appropriately when necessary (Parent Ex. B at p. 4). Receptively, the IESP described the student's language skills as "up to par" when focused (id.). However, when her attention was elsewhere the student struggled with following instructions and learning information due to her weak attention span and comprehension skills (id.). As memorialized in the IESP, the SETSS provider indicated the student needed lots of repetition and modeling and reported that her deficiency in receptive language greatly impeded her ability to function in the classroom and beyond (id.). According to the IESP, the student's lack of comprehension "disabled" her from following simple instructions and understanding the information being provided to her (id.).

The January 2023 IESP reflected that, in addition to the student's relative strength in processing speed, she displayed academic strength in her phonemic awareness and spelling skills (Parent Ex. B at p. 4). The IESP also noted the student's weakness in reading comprehension and mathematics and the parent's concern about the student's continued academic struggles (id.).

With respect to the student's social development, the January 2023 IESP indicated that during an unidentified testing session the student was quiet and focused (Parent Ex. B at p. 4). She maintained an engaged manner as she attempted to complete all that she was asked to do and also maintained adequate eye contact with the examiner (id.). The IESP stated that "[s]chool leadership" was concerned about the student's poor self-esteem (id.). However, according to the IESP, the private school representative at the CSE meeting indicated that the student was doing well socially and emotionally (id.). The student had friends, was well liked, and demonstrated good expression of her feelings (id.). The January 2023 IESP indicated the student's pleasant demeanor was a strength (id. at p. 5).

The physical development portion of the student's January 2023 IESP reflected that the parent reported the student was in good health (Parent Ex. B at p. 5). Her hearing was within normal limits, but she required glasses to correct her vision (id.). The IESP noted that, although the student was highly distractible, there was no formal attention deficit hyperactivity disorder (ADHD) diagnosis and the student was not taking any medication (id.). The IESP indicated that OT was mandated for the student to address delays in proprioception, self-regulation, and focus (id.). The IESP also stated that the parent was concerned about the student's significant distractibility and difficulties remaining on task in the classroom (id.).

The January 2023 IESP recommended strategies and resources to address the student's management needs including preferential seating, a multisensory learning environment, breaks as needed, frequent teacher check-ins, positive peer models, refocusing and redirection, praise and encouragement, scaffolding, graphic organizers, and visual aids (Parent Ex. B at p. 5).

2. Services from Enhanced

The parent executed a contract with Enhanced that indicated that the agency would "make every effort to implement the recommended services with suitably qualified providers for the 2023-24 school year" (Parent Ex. E at p. 1; see Tr. p. 61). The contract stated, in pertinent part, that Enhanced intended to provide SETSS at the rate of $195 per hour (Parent Ex. E at p. 1; see Parent Ex. H at ¶ 7). The Enhanced program coordinator and the parent testified that Enhanced provided the student with eight periods of individual SETSS sessions per week for the 2023-24 school year at the student's nonpublic school (Tr. p. 60; Parent Exs. H at ¶¶ 11, 12; I at ¶ 8). The sessions were provided outside of the classroom (Tr. p. 53).

The program coordinator identified by name the provider of the services and indicated that the individual held State certifications to teach students with disabilities, passed the test certifying her to be a bilingual Yiddish provider, and was trained and experienced in teaching literacy and comprehension to school-aged children and adolescents (Parent Ex. H at ¶ 13).[11] Consistent with this testimony, the hearing record includes a document indicating that the provider held active certificates to teach students with disabilities (Parent Ex. G at p. 2). According to the program coordinator, in addition to providing SETSS to the student, the provider prepared for sessions, created goals, wrote progress reports, and met with parents and teachers (Parent Ex. H at ¶ 14).

Review of a progress report dated April 18, 2024 reveals the Enhanced SETSS provider addressed the student's academic and social deficits (see generally Parent Ex. F). According to the progress note, the student received step-by-step instruction using Orton Gillingham and Wilson methodology and visual aids (id. at p. 1). At the time of the progress report, the student displayed an improved ability to decode multisyllabic words, read grade-appropriate irregularly spelled words, and read with more accuracy, appropriate rate, and expression (id.). Step-by-step instruction was provided using graphic organizers, highlighting techniques, and questioning techniques (id.). Despite improved decoding skills, the progress report indicated the student showed minimal improvement in demonstrating basic comprehension skills (id.). The student displayed an increased ability to answer 'wh' questions based on text, describe connections, and

[11] Although the parent testified regarding two providers, the program coordinator clarified that one of the individuals was the provider and the other was the clinical supervisor (see Tr. pp. 38-39, 44, 51-52).

compare and contrast, however, she struggled to identify the main purpose of a text, refer to information in a text, and determine the meaning of words and phrases in a text, and also had difficulty with retelling, sequencing, and forming predictions based on a story (id.).

The SETSS progress report indicated that, through the use of manipulatives and individualized instruction, the student showed moderate progress in math (Parent Ex. F at p. 1). The student demonstrated improved ability to use the four operations with whole numbers to solve problems and understand factors and multiples (e.g., she could solve word problems using the four operations since she knew what to look for, and she could find all factor pairs for a whole number in the range of 1-20) (id. at pp. 1-2). According to the progress report, the student struggled to determine the unknown number in a multiplication or division equation, multiply fluently, and add and subtract fractions (id. at p. 2). With regard to the student's social/emotional abilities, the progress report indicated she showed small advancement in this domain (id.). The student's ability to communicate with peers improved, although she continued to lack the proper skills to negotiate with peers, follow a lead during play, and maintain eye contact (id.).

The program coordinator testified the progress report entered into the hearing record was an accurate representation of what the SETSS provider had been working on with the student, including goals for the 2023-24 school year (Parent Ex. H at ¶ 17). In addition, the program coordinator testified that the student's progress with the SETSS provider was measured through quarterly assessments and consistent meetings with teachers and school staff (Parent Ex. H at ¶ 18).

Although the district argues that the progress report did not establish a baseline for evaluating the student's progress, as discussed above, the student's needs were stated in the January 2023 IESP and, in any event, any deficiency in the evidence regarding the student's needs would be attributable to the district as "it was the district's obligation to evaluate the student and present its view of [her] needs at the impartial hearing" (Application of a Student with a Disability, Appeal No. 18-049; see 34 CFR 300.303[b][1]-[2]; 8 NYCRR 200.4[b][4]; A.D. v. Bd. of Educ. of City Sch. Dist. of City of New York, 690 F. Supp. 2d 193, 208, 214 [S.D.N.Y. 2010] [finding that a unilateral placement was appropriate although the private school's assessments and reports were alleged to be incomplete or inaccurate, as the fault for such inaccuracy or incomplete assessment of the student's needs lay with the district]).

The district also contends that the progress report does not demonstrate "quantifiable progress"; however, as detailed above, the report does describe that the student made some progress during the 2023-24 school year (see Parent Ex. F). Moreover, it is well settled that, while a relevant factor (Gagliardo, 489 F.3d at 115, citing Berger, 348 F.3d at 522 and Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]), a finding of progress is not required for a determination that a student's unilateral placement is adequate (Scarsdale Union Free Sch. Dist. v. R.C., 2013 WL 563377, at *9-*10 [S.D.N.Y. Feb. 4, 2013] [noting that evidence of academic progress is not dispositive in determining whether a unilateral placement is appropriate]; see M.B. v. Minisink Valley Cent. Sch. Dist., 523 Fed. App'x 76, 78 [2d Cir. Mar. 29, 2013]; D.D-S. v. Southold Union Free Sch. Dist., 506 Fed. App'x 80, 81 [2d Cir. Dec. 26, 2012]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 486-87 [S.D.N.Y. 2013]; C.L. v. Scarsdale Union Free Sch. Dist., 913 F. Supp. 2d 26, 34, 39 [S.D.N.Y. 2012]; G.R. v. New York City Dep't of Educ., 2009 WL 2432369, at *3 [S.D.N.Y. Aug. 7, 2009]; Omidian v. Bd. of Educ. of New Hartford Cent. Sch.

Dist., 2009 WL 904077, at *22-*23 [N.D.N.Y. Mar. 31, 2009]; see also Frank G., 459 F.3d at 364).

The district argues that, without the provision of OT, counseling, and group SETSS (instead of individual), the parent did not demonstrate the appropriateness of the unilaterally-obtained services. Although the January 2023 IESP recommended OT, counseling, and group SETSS for the student (see Parent Ex. B at pp. 11-12), a unilateral placement is not mandated by the IDEA or State law to provide services in compliance with a plan such as an IEP or IESP. Rather, it is well settled that parents need not show that their unilateral placement provides every service necessary to maximize the student's potential, but rather, must demonstrate that the placement provides education instruction specially designed to meet the unique needs of the student (M.H. v. New York City Dep't of Educ., 685 F.3d 217, 252 [2d Cir. 2012]; Gagliardo, 489 F.3d at 112; Frank G., 459 F.3d at 365; Stevens v. New York City Dep't of Educ., 2010 WL 1005165, at *9 [S.D.N.Y. Mar. 18, 2010]). "The test for the private placement 'is that it is appropriate, and not that it is perfect'" (T.K. v. New York City Dep't of Educ., 810 F.3d 869, 877–78 [2d Cir. 2016] [citations omitted]).

Here, according to the program coordinator's affidavit testimony, the student received pull-out individual SETSS sessions as opposed to the mandated group sessions because Enhanced was unable to "locate a similarly situated group of students" (Tr. p. 53; Parent Ex. H at ¶ 12). Beyond stating that the IESP included a recommendation for group SETSS, the district does not articulate its position as to why the individual SETSS provided by Enhanced were not specially designed to meet the student's needs, and a review of the IESP does not reveal the CSE's rationale for recommending that the student receive the services in a group (see generally Parent Ex. B). Accordingly, the hearing record does not indicate that the unilaterally-obtained SETSS were inappropriate due to their delivery to the student on an individual basis.

With respect to counseling, although the January 2023 CSE recommended the service, the present levels of performance summarized above did not identify the student's social/emotional needs as an area of deficit other than the concern stated by the private school's "leadership" about the student's self-esteem, and the committee did not develop any annual goals targeting the student's social/emotional needs (see Parent Ex. B at pp. 4-5, 5-12). In contract, for OT, the IESP noted the student's need for OT to address delays in proprioception, self-regulation, and focus, developed annual goals targeting these areas of need, and recommended two 30-minute sessions per week of OT (id. at pp. 5-7, 12). Nevertheless, while the student may have benefited from OT, the hearing record indicates that Enhanced targeted the student's self-regulation and attention. For example, the SETSS progress report noted that the student's interests were incorporated into SETSS sessions to help the student stay focused on the lesson (Parent Ex. F at p. 1).

Based on all of the foregoing, I find that, while the parent did not obtain OT for the student, there is sufficient evidence to show that the student received SETSS from Enhanced, and it further shows that the provider identified the student's specific needs and delivered instruction specially designed to meet those needs during the 2023-24 school year. Therefore, there is no need to disturb the IHO's holding as the totality of the evidence demonstrates the parent met her burden to prove that the unilaterally-obtained special education programming, overall, was appropriate.

C. Financial Obligation

Next the parent appeals the IHO's denial of her request for funding for the costs of the privately-obtained services based on an insufficient showing of the parent's financial obligation to Enhanced.

In Burlington, the Court stated that "[p]arents who unilaterally withdraw their child from the public school and thereafter seek tuition reimbursement for the[ir] child's private placement do so at their own peril," because they bear the financial risk, both as to tuition and legal expense, and the burden of demonstrating the appropriateness of their relief (471 U.S. at 373-74). Congress thereafter took action to emphasize the need for parents to be invested in the process of developing a public school placement for eligible students with disabilities by placing limitations on private school reimbursements under the IDEA (20 U.S.C. § 1412[a][10][iii]). The statute "textually presupposes that the parents had incurred those costs" (Moonsammy v. Banks, 2024 WL 4277521, at *7 [S.D.N.Y. Sept. 23, 2024]). This statutory construct is a significant deterrent to false or speculative claims (see Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 543 [2007] [Scalia, J., dissenting] [noting that "actions seeking reimbursement are less likely to be frivolous, since not many parents will be willing to lay out the money for private education without some solid reason to believe the FAPE was inadequate"]).

When the element of financial risk is removed and the financial risk is borne entirely by unregulated private schools or agencies that have indirectly entered the fray in a very palpable way in anticipation of obtaining direct funding from the district, it has practical effects because parents begin seeking the best private placements possible with little consideration given to what the child needs for an appropriate placement as opposed to "everything that might be thought desirable by 'loving parents.'" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]). As the First Circuit Court of Appeals noted, "[t]his financial risk is a sufficient deterrent to a hasty or ill-considered transfer" to private schooling without the consent of the school district (Town of Burlington v. Dep't of Educ. for Com. of Mass., 736 F.2d 773, 798 [1st Cir. 1984], aff'd, Burlington, 471 U.S. 359, 374 [noting the parents' risk when seeking reimbursement]; see also Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 247[2009] [citing criteria for tuition reimbursement, as well as the requirement of parents' financial risk, as factors that keep "the incidence of private-school placement at public expense . . . quite small"]). Further, proof of an actual financial risk being taken by parents tends to support a view that the costs of the contracted for program are reasonable, at least absent contrary evidence in the hearing record.

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. v. New York City Dep't of Educ., 758 F.3d 442, 458 [2d Cir. 2014]).

Here, the contract between the parent and Enhanced indicated that Enhanced would provide SETSS to the student during the 2023-24 school year "to whatever extent possible" and included the language that "[the parent is] liable to pay Enhanced" for "all recommended services delivered

by Enhanced" (Parent Ex. E at p. 1). The agreement further stated that the services would be provided at a specified rate (id.). The agreement stated that the parent would obtain legal counsel and would file a due process complaint in an attempt to obtain funding; that responsibility to pay the full amount "w[ould] be triggered by the completion of the case pending"; and that, in the event the district start[ed] providing services "within 30-days of signature," then the parent would be relieved of financial liability (id.).

Despite the written contract, during the impartial hearing, the parent testified to her understanding that she did not have a financial obligation to Enhanced (Tr. p. 45). Even assuming that the parent's testimony was inconsistent with the agreement as the IHO found, the parent's misunderstanding could not alter the terms or relieve her from being held financially responsible for the costs of the services (see E.M., 758 F.3d at 456-57 [faulting the IHO and the SRO for going beyond the written contract and relying on extrinsic evidence to suggest that the parent was not obligated to pay the private school]).

Based on the foregoing, the evidence in the hearing record supports a finding that the parent was financially obligated to fund the costs of the SETSS delivered to the student by Enhanced during the 2023-24 school year and the IHO's finding to the contrary therefore must be reversed.

D. Equitable Considerations

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., 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"]).

1. 10-Day Notice

Initially, the district argues that the parent's notice to the district of her intent to unilaterally obtain private services was not timely because it was provided to the district after the parent entered a contract with Enhanced. 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, 348 F.3d at 523-24; Rafferty, 315 F.3d at 27); see Frank G., 459 F.3d at 376; Voluntown, 226 F.3d at 68).

As noted above, the parent notified the district of her intent to unilaterally obtain services by letter dated August 21, 2023 (Parent Ex. C). Although the parent entered a contract with Enhanced on July 20, 2023 that indicated the school year began on July 1, 2023 (Parent Ex. E), the hearing record shows that Enhanced did not begin delivering services to the student until September 7, 2023 (see Parent Ex. I at ¶ 8).

The parent's notice of intent to unilaterally obtain services was timely provided to the district more than 10 business days before the student began receiving services from Enhanced on September 7, 2023 (see Parent Exs. C; I at ¶ 8). To the extent the district relies on the date on which the parent entered an agreement with Enhanced to calculate whether the parent's notice was timely provided, there is authority that the date of the student's removal from the district program is controlling (see Reg'l Sch. Unit 51 v. Doe, 920 F. Supp. 2d 168, 210-12 [D. Me. 2013]; Sarah M. v. Weast, 111 F. Supp. 2d 695, 701–02 [D. Md. 2000]; see also Landsman v. Banks, 2024 WL 3605970, at *3 [S.D.N.Y. July 31, 2024] [in discussing timing of a 10 day notice, referring to the date of enrollment as the date the student began attending the unilateral placement separate from the date the contract was signed]; A.D. v. Creative Minds Int'l Pub. Charter Sch., 2020 WL 6373329, at *6-*7 [D.D.C. Sept. 28, 2020]). The derivative in this case would be the date the student began receiving private services to the exclusion of public services. Therefore, the evidence in the hearing record does not support the district's argument that the timing of the 10-day notice warrants a denial or reduction of an award of funding for the services provided to the student by Enhanced.

2. Excessive Cost

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 [noting that whether the amount of the private school tuition was reasonable is one factor relevant to equitable considerations]). 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. v. New York City Dep't of Educ., 2016 WL 899321, at *7 [S.D.N.Y. Mar. 1, 2016], aff'd in part, 674 Fed. App'x 100).

Generally, an excessive cost argument focuses on whether the rate charged for the service was reasonable and requires, at a minimum, evidence of not only the rate charged by the unilateral placement, but evidence of reasonable market rates for the same or similar services.

In the instant case, the program coordinator testified that the rate charged by Enhanced was $195 per hour, $90 of which was paid to the individual service provider (Tr. p. 53). The program coordinator testified further that 40 percent of the rate covered administrative costs and that the remaining amount was used to finance interest payments on loans (Tr. pp. 54-55).

The district submitted evidence in an attempt to establish a reasonable market rate (see Dist. Exs. 1-2). However, in considering the reasonableness of the rate charged by Enhanced, the IHO declined to rely on the October 2023 final report from a study conducted by the American Institutes for Research (AIR report), which the district offered into evidence, but noted that the district's evidence was submitted "in an attempt to establish [a] market rate" which she found "persuasive" (IHO Decision at p. 6; see Dist. Ex. 1). Instead, the IHO cited reimbursement rates set by the State Education Department (SED) for providers operating school-age State-approved nonpublic schools, special act schools, or Board of Cooperative Educational Services (BOCES) programs to be funded by public tuition funding sources, which limit reimbursable nondirect costs to 35 percent of the reimbursable direct costs after adjustments (IHO Decision at p. 6). Based on this source, the IHO awarded SETSS at an hourly rate of $138.46 (id.).

Under the circumstances, it is not clear that the SED memorandum relied upon by the IHO was relevant or comparable to the question of how much a parent could reasonably bargain in a private arrangement with special education teachers in the New York City metropolitan area.[12] However, there is another basis for upholding the reduction applied by the IHO.

The IHO did not articulate the basis for not relying on the AIR report in evidence (see Dist. Ex. 1). With respect to fashioning appropriate equitable relief and its relevancy, I find that the AIR report and the district's arguments offer some basis to conclude that the SETSS rates charged by Enhanced are excessive, but not all of the AIR report and its methodologies are strictly applicable to a parent's decision to unilaterally obtain private special education services from a private company like Enhanced. First, the AIR report draws data published by the United States Bureau of Labor Statistics (USBLS), a U.S. government agency, and it is well settled that judicial notice may be taken of such tabulations of data published by government agencies (Canadian St. Regis Band of Mohawk Indians v. New York, 2013 WL 3992830 (N.D.N.Y. Jul. 23, 2013]; Mathews v. ADM Milling Co., 2019 WL 2428732, at *4 [W.D.N.Y. June 11, 2019]; Christa McAuliffe Intermediate School PTO, Inc. v. de Blasio, 364 F.Supp.3d 253 [2019]). I find that the wage information contained in the AIR Report from the USBLS is relevant to the question of how much special education teachers are paid in the New York City metropolitan region in a given year

[12] In terms of process, the IHO's approach of taking notice of the SED memorandum might have worked better had she discussed it with the parties and allowed them an opportunity to be heard. In her decision, the IHO provided a link to the website to access the memorandum (see IHO Decision at p. 6, n.6; "Tuition Setting Methodology for 2023-24 Rates for School-Age Providers Serving Students with Disabilities," Rate Setting Unit Mem. [June 2023], available at https://www.oms.nysed.gov/rsu/Rates_Methodology/MethodLetters/documents/2023-24%20School-Age%20Methodology%20MemoFINAL.pdf).

in which the data is published.[13] It was not inappropriate for the AIR to use such government-published data in its report. The data set in the New York, New Jersey and Pennsylvania region can be further limited and refined to the New York City, Newark, and Jersey City metropolitan region. It is reasonable to find that most teachers (public and private) working with special education students in New York City fall within this subset of data that is the greater metropolitan region specified in USBLS data ("May 2023 Metropolitan and Nonmetropolitan Area Occupational Employment and Wage Estimates New York-Newark-Jersey City, NY-NJ-PA," available at https://www.bls.gov/oes/current/oes_35620.htm).[14] Furthermore, the geographic data in this metropolitan subset does not have to be perfect in order to be sufficiently reliable for use when weighing equitable considerations.

The AIR report appears to address a question of what kind of approach "NYC DOE can use to determine a fair market rate for its Special Education Teacher Support Services (SETSS)" (Dist. Ex. 1 at p. 4). If the district were to offer hourly rates that were formulated on a negotiated basis (i.e. to employees paid on an hourly basis), it would understandably try to do so in a similar manner to the way it used its bargaining power in negotiations with both the United Federation of Teachers and other entities for fringe benefits and incidental costs that result in the pay scales for public school employees.

However, a parent facing the failure of the district to deliver his or her child's IESP services and who is left searching for a unilaterally selected self-help remedy would be unable to hire teachers already employed by the district (unless a teacher is "moonlighting" and thus dually employed), and the parent facing that situation would therefore not be able to negotiate for private teaching services with the same bargaining power that the district holds. Thus, while the AIR report's reliance on the salary schedules negotiated with the United Federation of Teachers that include provisions for steps, longevity, and criteria for additional experience and education, these provisions serve a different purpose—they are designed to ensure fair treatment among union members who are operating in public employment. But the fair treatment among district employees is of little or no interest to a parent who is trying to contract for services with private schools or companies after the district has failed in its obligations to deliver the services using its employees, and thus the district negotiated provisions are not particularly relevant to equitable considerations in a due process proceeding involving the funding of unilaterally-obtained services.

Fortunately, the USBLS data does not indicate that it is limited to district-employed teachers. It covers wages in the entire metropolitan region, which would include teachers from

[13] The Occupational Employment and Wage Statistics data is published by the USBLS starting in May of each calendar year, and the AIR report in evidence used May 2022 data, which preceded the 2023-24 school year at issue in this proceeding and would be relevant thereto (see https://www.bls.gov/oes/tables.htm); however, I note that May 2023 data is the most recent annual data published by the USBLS as of the date of this decision. While the AIR report presented a snapshot in time, I do not share any concern that the data itself is "fixed in perpetuity" because it is updated annually, which is particularly relevant when considering due process claims under IDEA and Article 89 are almost always related to a specific annual time period.

[14] The New York wage excerpt shows a mean wage of $117,120 from the USBLS' May 2022 data for the same occupation in the same New York metropolitan region, but because this case relates to the 2023-24 school year, the undersigned has taken judicial notice of the USBLS' data from May 2023, which is closer in time to the events of this case (Dist. Ex. 2 at p. 2).

across the spectrum including private schools, charter schools, and district special teachers. The USBLS indicated that in May 2023 data annual salaries for "Special Education Teachers, All Other" ranged from $49,000 in the 10th percentile, $63,740 in the 25th percentile, $97,910 in the median, $146,200 in the 75th percentile, to $163,670 in the 90th percentile.[15]

In my view this is consistent with the fact that some local and private employers within the metropolitan region pay less than those in the district, and it leaves room for the fact that a few employers may have paid more. As for fringe benefits and incidental costs, private employers who offer benefits and have overhead costs are not necessarily the same as those costs cited in the AIR report, which is premised upon the district's costs, not the parent's costs. Reliance on such costs may be permissible when the district is managing its own operations and negotiating with a labor organization, but it is not relevant to the private situation in a Burlington/Carter unilateral private placement. Again, the USBLS provides data for indirect and fringe benefit costs for civilian, government employees and private industry expressed as a percentage of salary, and for private industry such educational services costs were 27.7 percent, which tends to show that government benefits are often slightly better (and more expensive) than those offered in private industry (see Employer Costs For Employee Compensation (ECEC) – June 2023, available at https://www.bls.gov/news.release/archives/ecec_09122023.pdf).[16]

The undersigned had little difficulty with the explanation in the AIR report that children must be educated for 180 days per year in this state and that school days are typically between six and seven hours long.[17] I will take this into account when ordering equitable relief.

As noted above, the program coordinator testified that Enhanced was paying the student's provider $90 per hour (Tr. p. 53). A rate of $90 per hour annualized is $105,300, and that figure is only slightly above the 50th percentile, thus the $90 per hour portion of the rate is not excessive. However, the amount of indirect costs above the teacher's hourly wage is $105 per hour or approximately 54 percent of the $195.00 hourly rate charged by Enhanced. This falls far above the 27.7 percent in the USBLS data.

When considering the testimony described above, in which Enhanced's program coordinator identified only general categories of indirect costs that factored into the hourly rate charged and did not did not present evidence of the actual costs or why such expenses would justify

[15] The 2023 data for the metropolitan area is available in a downloadable Excel format, or the most recent statics offered can be searched using the USBLS Query System for "Multiple occupations for one geographical area" (see https://data.bls.gov/oes/#/home). A larger file with all regions for May 2023, including the New York-Newark-Jersey City metropolitan region is also available (https://www.bls.gov/oes/special-requests/oesm23ma.zip).

[16] The ECEC covers the civilian economy, which includes data from both private industry and state and local government. One could make an argument that a company like Enhanced should fall in one of the different rows of private employers, but it would result in only nominal differences in calculation, and the parent did not avail herself of the opportunity to develop the record in any detail regarding the indirect costs beyond that of the teacher's hourly wage.

[17] Using 6.5 hours results in approximately 1170 hours of instruction time for students during a school day, and similar to teachers, related services are typically provided to students on a similar schedule during the school day.

the amount of indirect costs included in the hourly rate charged, the evidence leads me to the conclusion that the parents arranged for services from Enhanced at excessive costs as the IHO found and that it is more than what the district should be required to pay. On the other hand, some indirect or overhead cost is reasonable. Using 27.7 percent for overhead costs, when added to the salary results in a rate of $114.93 per hour for SETSS. As the district did not cross-appeal the IHO's finding that a reasonable rate would be $138.46 per hour, I will not disturb the IHO's finding in this regard, and I will order the district to fund the costs of SETSS at the rate of $138.46 per hour as an equitable remedy.

VII. Conclusion

Based on the foregoing, the parent sustained her burden to demonstrate the appropriateness of the unilateral services she obtained for the student and that she had a financial obligation to pay for those services; however, for the reasons set forth above, I will not disturb the IHO's determination that the costs of the services were excessive. Accordingly, the district shall be required to fund the services delivered by Enhanced during the 2023-24 school year at the reduced rate.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO decision, dated November 7, 2024, is modified by reversing that portion which found that the parent did not have a financial obligation to pay for the services delivered to the student by Enhanced during the 2023-24 school year and, therefore, denied the parent's requested relief; and

IT IS FURTHER ORDERED that, upon receipt of proof of delivery, the district shall directly fund up to eight hours per week of SETSS provided to the student by Enhanced during the 2023-24 school year at an hourly rate not to exceed $138.46.

Dated: **Albany, New York**
May 8, 2025

CAROL H. HAUGE
STATE REVIEW OFFICER