**FINDINGS OF FACT AND DECISION**

Case Number: «Case»

Student’s Name: «First\_Name» «Last\_Name»

School District: N.Y.C. Dept. of Ed.,

Rep. District «Representative\_District»

CSE «DOE\_CSE»

Impartial Hearing Officer: Oren Varnai

Date of Filing: «Request\_Date»

Hearing Requested by: «Requested\_By»

Date of Hearing: «Hearing\_Date»

Record Close Date: «Record\_Close\_Date»

Date of Decision: «FOFD\_Date»

Time Sensitive: Choose an item.

**NAMES AND TITLES OF PERSONS WHO APPEARED AT THE DUE PROCESS HEARING:**

For the Student:

1. «Parents\_Counsel» for the parent, (hereinafter referred to as “Parent’s attorney”)

For the Department of Education (“DOE”):

1. «DOE\_Attorney» appeared on behalf of the DOE, (hereinafter referred to as “District’s Representative”)

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| |  |  | | --- | --- | | **DOE Witness** | **Redacted Term Used in FOFD** | | «DOEWitness1» | «DOEWitness1Title» | | «DOEWitness2» | «DOEWitness2Title» | | «DOEWitness3» | «DOEWitness3Title» | |  |  | |  |  | | **Parent Witness** | **Redacted Term Used in FOFD** | | «ParentWitness1» | «ParentWitness1Title» | | «ParentWitness2» | «ParentWitness2Title» | | «ParentWitness3» | «ParentWitness3Title» | |  |
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**NEW YORK CITY OFFICE OF ADMINISTRATIVE**

**TRIALS AND HEARINGS (OATH)**

**SPECIAL EDUCATION HEARINGS DIVISION**

**-------------------------------------------------------------------**

**«FIRST\_NAME» «LAST\_NAME», a Minor,**

**by and through his/her Parent(s),**

**PETITIONER FINDINGS OF FACT AND DECISION**

**against Case # «Case»**

**THE NEW YORK CITY Oren Varnai**

**DEPARTMENT OF EDUCATION, Impartial Hearing Officer**

**RESPONDENT**

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**I. Jurisdiction**

This proceeding arises under the Individuals with Disabilities Education Act (“IDEA”), 20 U.S.C. §§ 1400-1482; the federal regulations implementing IDEA, 34 C.F.R. §§ 300.1, et seq.; Article 89 of the New York State Education Law; and the New York State regulations at 8 NYCRR § Part 200, et seq.

The undersigned Impartial Hearing Officer (“IHO”) is a certified New York State Special Education Hearing Officer, employed by the New York City Office of Administrative Trials and Hearings (“OATH”) as a Special Education Impartial Hearing Officer, and meets all of the qualifications and requirements outlined in both federal and state statute which grant the IHO the authority to adjudicate this hearing. Furthermore, the IHO is not currently, nor has ever been, an employee of the NYC Department of Education, and does not have any personal or professional interest or bias that conflicts with his objectivity to hear this matter.

**II. Background**

1. **Due Process Complaint Notice**

Petitioner (Parent) is the parent of Student (“Student” or “Child”). On «Request\_Date», Petitioner filed a Due Process Complaint (“Complaint” or “DPC”) against Respondent, the New York City Department of Education (“NYC DOE” or “DOE” or “District”). Parent alleges that the Department of Education (“DOE”) failed to implement an individualized education service plan (“IESP”) dated «IESP\_Date» for the 10-month[[1]](#footnote-2) «School\_Years» school year. The Parent specifically seeks a compensatory education award consisting of:

1. Choose an item., Choose an item., Choose an item., Choose an item., in English.
2. Choose an item., Choose an item., Choose an item., Choose an item., in English.
3. Choose an item., Choose an item., Choose an item., Choose an item., in English.
4. Choose an item., Choose an item., Choose an item., Choose an item., in English.
5. Choose an item., Choose an item., Choose an item., Choose an item., in English.
6. Choose an item., Choose an item., Choose an item., Choose an item., in English.
7. **Procedural History**

I was appointed on «Appointment\_Date». The Due Process Hearing (“DPH”) took place on «Hearing\_Date», whereby Parent presented documentary evidence, and the testimonial evidence of «ParentWitness1Title» and «ParentWitness2Title», , and «ParentWitness3Title» and DOE presented no evidence.

The Parties agreed that Pendency lied in the «IESP\_Date» IESP.

Pendency was not in contention and will not be addressed.

In light of the foregoing and as more fully discussed below, I find that the DOE failed to implement the «IESP\_Date» IESP, thereby denying the Student access to equitable services for the «School\_Years» school year, and that the relief Parent seeks, funding for the provision of services directly to the Student consistent with the IESP, is appropriate compensatory relief.[[2]](#footnote-3)

**III. Findings of Facts and Decision**

After a full review of the record generated at hearing, I make the following findings of fact and determinations.

It is uncontested that the Student and Parent reside in New York City and the Student attended the parental placement school during the «School\_Years» school year. Furthermore, it is uncontested that the parental placement school is located within the geographic boundaries of the DOE. The Parent did not challenge the content of the «IESP\_Date» IESP, merely the delivery of the recommended services. See «Hearing\_Date» Hearing Transcript.[[3]](#footnote-4) Moreover, the parties agree to the following operative facts:

1. The «IESP\_Date» IESP is the operative program for this student for the 10-month «School\_Years» school year.
2. Inasmuch as DOE did not provide evidence that it had implemented the IESP DOE did not implement its mandates.
3. DOE did not present sufficient evidence or argument as to what an appropriate rate should be, and I am constrained to find that any services provided to Student during the 10-month «School\_Years» school year pursuant to the recommendations of the IESP should be funded at a reasonable market rate (as more fully discussed below) the rate Parent contracted with the provider subject to the limitations outlined in the below order.
4. In considering the above representations, the parties agree on the essential nature of the parent’s dispute, to wit: Student is entitled to services as described in the IESP and that the DOE did not provide such services. Moreover, there is no dispute for me to resolve between the parties as to how any IESP services provided to Student should be funded, except for the rate.

Since DOE can mitigate its potential financial loss, if any, of the hourly rate charged by the private provider at any time by implementing Student’s program or identifying a provider to contract with Parent at a lower hourly rate, there is no prejudice to DOE. If a market rate exists that is lower than the contracted rate, DOE should have no issues in identifying a provider for Parent; if DOE cannot identify a provider at a lower rate than that charged by Parent’s unilaterally procured provider, an argument that the rate charged is excessive cannot stand. This is especially true when DOE abrogated its responsibility to deliver the services to Student, and improperly shifted that responsibility to Parent without further discussion or explanation.

1. **Burden**

Except for in circumstances not applicable here, the burden of proof is on the school district during an impartial hearing (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); *C.F. v. New York City Dep’t of Educ.*, 746 F.3d 68, 76 (2d Cir. 2014))

1. **FAPE**

The IDEA provides that children with disabilities are entitled to a FAPE (20 U.S.C. § 1400 (d)(1)(A). A FAPE consists of specialized education and related services designed to meet a student’s unique needs, provided in conformity with a comprehensive written Individualized Education Program (“IEP”) (20 U.S.C. § 1401(9)). A school district has offered a student a FAPE when (a) the board of education complies with the procedural requirements set forth in the IDEA; and (b) the IEP is developed through the IDEA's procedures and is reasonably calculated to enable the student to receive educational benefits *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 206-07 (1982). In order to meet its substantive FAPE obligations, a district must offer a student an IEP that is “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Endrew F. v. Douglas County Sch. Dist. RE-1*, 137 S.Ct. 988, 999 (2017).

As outlined below, FAPE is not implicated in dual enrollment cases such as this one where state law alone is at issue. However, equitable services under Educ. Law §3602-C follow the same due process requirements as IDEA FAPE cases.

1. **Dual enrollment**

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)(l)(A); Educ. Law §4402(2)(a), (b)(2)). 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)). Under State law, however, parents who have privately enrolled their child in a nonpublic school may seek educational "services" for their child with a disability by filing a request in the district where the nonpublic school is located on or before the first day of June preceding the school year for which the request for services is made (Educ. Law §3602-C(2)). Then, the district of location's CSE must review the request 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)(l)).

Here, there is no dispute that Student is entitled to services pursuant to the IESP dated «IESP\_Date» with the parties agreeing to the essential, operative facts (*see above*). Moreover, the implementation of services falls on the district of location insofar as "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)). 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” (Educ. Law § 3602-C(2)(b)(1)). Additionally, section 3602-C provides that a parent may seek review of the recommendation of the CSE pursuant to the impartial hearing and State-level review procedures pursuant to Education Law § 4404.

1. **Affirmative Defenses**

Education Law § 3602-C(2) states that a parent or person in parental relation shall file a written request for services “on or before the first of June preceding the school year for which the request is made.”[[4]](#footnote-5) The “June 1st” requirement first must be asserted by DOE. Only then is a Parent obligated to respond. Courts have interpreted bars to services as affirmative defenses in the IDEA context.[[5]](#footnote-6) June 1st is such a bar and has been treated as such by the Office of State Review.[[6]](#footnote-7) In this context, the DOE bears the burden of proof and persuasion.[[7]](#footnote-8) DOE is required to assert and prove its defense before Parent needs to act at all. Parent has an obligation to rebut this defense only if the DOE has offered sufficient proof.

**Parent has a June 1 Notice or June 1 testimony**

In opposition, parent has asserted by submission of a June 1 notice (or by testimony) that Parent complied with the June 1 requirement. For the following reasons, I find the Parent’s/District’s proof to be credible and sufficient to rebut the District’s assertions/prove the District’s assertions. State why either party is credible.

**If Parent not credible (above) but has current IESP, consider below.**

**Parent does not have June 1 notice but does have current IESP that runs partially into this current school year.**

In this case, Parent admits the failure to file a June 1 notice, but asserts that Student is entitled to services because the District waived this defense. A party waives a defense when the party, knowing their rights, makes a conscious choice to waive them by course of conduct. *N.L.R.B. v. New York Tel. Co.* 930 F.2d, 1009, 1011 (2nd Cir. 1991); *see also*, *Albert J. Schiff Associates, Inc. v. Flack*,51 N.Y.2d 692, 698 (1980) (“a voluntary and intentional relinquishment of a known right”).

Here, Student has a current IESP dated «IESP\_Date». The DOE prepared a written plan (the IESP) for the time period from \_\_\_\_\_ to \_\_\_\_\_\_. The DOE agreed that Student needed these services. The DOE provided these services for the period from \_\_\_\_\_ to \_\_\_\_\_ under this plan which, all parties agree was intended to continue until end date of IESP. The DOE’s actions, in funding this agreed upon plan is a waiver of the notice requirement because the DOE already committed itself to providing these services. Thus, Student is entitled to services pursuant to this plan, but not beyond it because Student did not notify the DOE of their intent to continue to seek services for the balance of the «School\_Years» school year.

**Parent does not have a June 1 notice or a current IESP that runs partially into this current school year.**

In this case, Parent failed to provide a June 1 notice and does not have a current IESP. Since there were no current services being offered, the DOE has not waived its affirmative defense that Parent failed to file a notice on or before June 1. The DOE has provided proof that Parent failed to provide a June 1 notice. The DOE submitted/employee testified that …… Since the DOE has met its burden and Parent failed to rebut, I find that the DOE has proven its affirmative defense that Parent failed to notify the DOE on or before June 1.

1. **Compensatory Relief**

As more thoroughly discussed below, there is no precedential authority for the proposition that *Burlington/Carter*, and its statutory analogue in Education Law § 4404(1)(c), represents the definitive standard to apply in such cases. The *Burlington/Carter* approach favored by the Office of State Review is too formulaic and does not take into consideration the multitude of statutory and nuanced issues extant in 3602-c cases. Nevertheless, Parent submitted sufficient information to satisfy the *Burlington/Carter* standard, which will be addressed below, but a discussion about my concerns with such standard are warranted and will follow.

* 1. **Burlington/Carter Prong I[[8]](#footnote-9)**

Parent did not present a Ten-Day Notice (“TDN”), but the absence of such is not a reason to reduce or deny reimbursement. A TDN is designed to articulate a disagreement with a program give DOE time to cure a deficient IEP. Here, Parent and DOE do not dispute the services that Student should have received, and the only area of ‘dissatisfaction’ with the IESP is the fact that it was not implemented. DOE could have cured this ‘dissatisfaction’ at any time, and the purported purpose of a TDN is to afford the district time to reconvene and address Parent’s concerns. No reconvening would be needed; only implementation of the services DOE was obligated to provide but did not.

Therefore, I find that DOE did not meet its burden at hearing and that it failed to provide Student with equitable services under Education Law 3602-c, to which Student is entitled in the same manner as a FAPE.

* 1. **Burlington/Carter Prong II**

Parents need not show that the placement provides every special service necessary to maximize the student's potential, and when determining whether a unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether the placement is "reasonably calculated to enable the child to receive educational benefits."[[9]](#footnote-10) A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student.

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.

It is well established that a parent’s subjective intent, or preference for a nonpublic educational setting, is not relevant to a determination of the equities, even if, in seeking tuition funding, the parent has, as “[p]resumably, nearly all parents who make unilateral placement . . . and then seek tuition reimbursement, act[ed] at least in part out of a hope, belief, or expectation that the school district [would] ultimately be forced to fund [the] placement.” [Parents]’ pursuit of a private placement was not a basis for denying their tuition reimbursement, even assuming…that the parents never intended to keep [the student] in public school.”

In reviewing the testimony and documents presented, the weight of the evidence establishes that Student’s individual special education needs were addressed by the unilaterally procured service providers and that the instruction offered was "reasonably calculated to enable the child to receive educational benefits." I would also note that Student’s unilateral procurement of services, absent evidence to the contrary, should be viewed under the paradigm that imperfect services are better than no services at all.

* 1. **Burlington/Carter Prong III**

Even if a parent establishes a right to reimbursement under the IDEA, "courts retain discretion to reduce the amount of a reimbursement award if the equities so warrant." In making that equitable determination, a hearing officer may consider many factors, including, inter alia, whether a parent’s unilateral withdrawal of her child from the public school was justified, whether the parent provided the Department with adequate notice of the withdrawal, whether the amount of private-school tuition was reasonable, whether the parent should have availed herself of need-based scholarships or other financial aid from the private school, and whether there was any fraud or collusion in generating (or inflating) the tuition to be charged to the Department, or whether the arrangement with the school was fraudulent or collusive in any other respect.

Relatedly, whether a contract is necessary to demonstrate Parent’s obligation to pay an hourly rate is questionable as it is fundamentally different from a tuition contract. A related service contract evinces an obligation to pay in the form of a fee for service. Once an hour, or portion thereof, is delivered, the right to collect that amount accrues.[[10]](#footnote-11) Although it is possible for a parent to contract with a particular provider for a certain number of hours for a certain period of time (e.g., the entirety of a school year), this does not appear to be practice. The absence of a putative contract would not be, in and of itself, a bar for Parent to recoup funds expended, or obligate DOE to prospectively pay for the stated hourly rate. The issue is, however, a question of evidence to support the requested relief and not burden as envisioned by *Burlington/Carter* and Education Law 4404.[[11]](#footnote-12) Once a claim has been found to be in a parent’s favor, the next focus is the appropriate relief. To award the relief sought, Parent must substantiate the request with sufficient evidence to allow an IHO to grant such relief. Upon a finding of a denial of FAPE, or other substantiated claim at hearing, if there is insufficient, or contradictory, evidence in the record to permit IHO to award the precise requested relief, IHO must craft an alternative award.

As to the reasonableness of the hourly rate, I do not find DOE-**1** as persuasive, or supported by testimonial evidence, which I find to be necessary. There are numerous open questions related to DOE-**1** that must be testified to by the prepares of the report. For example, although the study represents a median salary and associated hourly rate, with the implication that the median is more representative of actual salaries, that claim is true only when there is evidence regarding the shape of the distribution curve. Median values are supposed to incorporate statistical biases related to skews of the distribution curve. Without such evidence, a purported distribution curve with no analysis of skew, if any, creates a scenario where the median value *is* the mean value because a normal distribution would be assumed. In a normal distribution, or the so-called ‘bell curve,’ the mean and the median are the same value. There are multiple other questions in the report that must be explained by its prepares, or another expert witness, to include:

* How to extrapolate a full-time position with a similarly situated independent contractor/agency with attendant overhead,
* The effect, if any, of including non-New York City areas for calculation as it includes a May 2022 report from the US Bureau of Labor Statistics entitled “Metropolitan and Nonmetropolitan Area Occupational Employment and Wage Estimates New York-Newark-Jersey City, NY-NJ-PA,” (DOE **1-7**)
* The significance, if any, of reporting a nearly six-year-old NYC DOE School Based Expenditure Report for the school fiscal year of 2017-2018 (DOE **1-5**, FN 4),
* The importance, relevance, and effect, if any, of the New York State Education Department (NYSED) Annual Financial Report (Form ST-3), consisting of 8,946 pages, (DOE **1-5**, FN 5), which may be misleading as it is a compilation of all school districts within New York State by the NYSED, Further, once on the webpage, you must download a zip file containing the 8,946-page Excel spreadsheet; the first page has convoluted instructions attempting to explain how to read the data. It is also impossible to locate [within the 8,946 pages], extrapolate, and determine the NYC data relied upon by the authors for their findings and opinions. Aside from this apparently innocuous reference, there may be an implication that these external web pages can constitute research that IHO is in no position to conduct,
* The relevance and applicability of DOE’s salary table,
* Which hourly rate to apply to Student’s unique situation.

In sum, DOE-**1** is essentially a compilation, unverified analysis, and a report that takes no position on what a reasonable hourly rate should be in the circumstances extant here.

Finally, there is no evidence in the record that the related services agency provides legal fees on behalf of Parent to litigate the instant claim. It would be jurisdictionally improper for any awarded hourly rate to include attorney fees as those fees are not allowable under CFR 300.517. Although Education Law 3602-c is a state statute, and there may be contrary authority, the presumption is that the authority to award attorney fees must be specifically authorized. In addition, 300.517(b)(1) contains prohibitions in that “[f]unds under Part B of the Act may not be used to pay attorneys’ fees or costs of a party related to any action or proceeding under section 615 of the Act and subpart E of this part.” Whether equitable services under 3602-c include federal funds is another matter that was not addressed at hearing. Here, there is no evidence to indicate that any amount included in the hourly rate for the services were rendered includes any portion of attorney fees to represent Parent at hearing. This issue must be addressed in such cases as to avoid circumvention of such awards through DOE reimbursement of providers.

Therefore, since a 10-month school year consists of 36 weeks, and SETSS was mandated for XX times per week, the total number of SETSS hours Student was entitled to during the school year was XXX sessions. At the contracted rate of $XXX per hour, this amounts to $XXXX.00. Calculating now in reverse, we deduct the $3,600 in attorney fees, which yields a total of $XXXXX.00 for the year. Dividing that total amount by the XXX sessions due to Student yields an hourly SETSS rate of $XXXX per hour. Calculating in such a manner ensures that each hour delivered to Student includes no portion of hourly rate consisting of legal fees.

I find no issue with the reasonableness of the costs associated with the services. Moreover, I find that the weight of the evidence establishes that Parent cooperated with DOE for the 10-month «School\_Years» school year. Overall and after considering the record at hearing, I find that the equities support Parent’s claim and requested relief. Finally, DOE’s inaction cannot be overstated as weighing in favor of Parent.

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On the issue of the applicability of the 3-Prong *Burlington/Carter* analysis, some State Review Officers (“SRO”) in the Office of State Review have stated that Impartial Hearing Officers should apply this standard instead of a compensatory services approach when deciding cases in which the Parent alleges that the DOE failed to implement an IESP.[[12]](#footnote-13) I respectfully disagree for the reasons outlined below. I also note that even the Office of State Review has acknowledged that there is no Federal or State directive to apply in these cases and that the federal standard is “instructive.” See Application of the New York City Department of Education, Appeal No. 23-175, FN 10 (noting that “although there could, at some point, be separate federal and State tests for the appropriateness of unilaterally obtained services, at this point in time, the federal standard is instructive in review of the appropriateness of unilaterally obtained services.”). Whether federal law is instructive is not dispositive, and not precedential. Crafting a non-precedential standard that does not represent an established legal standard will have the effect of leaving litigants, and IHOs, in a state of uncertainty until such time as the legislature steps in or binding caselaw is developed.

Section 3602-C is entirely a creature of state law, and it does not have a corollary in the IDEA or other federal statutes. If federal law applied to such cases, the LEA is not in compliance with the provisions of 20 USC 1412(a)(10)(A)(vii), which limits the LEA as to funds and property used to provide special education and related services, or with 20 USC 1412(a)(10)(A)(vi), which limits provisions of services to employees of the LEA, or through a contract by the LEA with a provider. The clear implication is that an LEA *may not* directly pay a provider/placement for a parentally placed student seeking equitable services, and there is not expansion of this scenario under 3602-c. The fact is, CFR 300.137 specifically excludes individual due process rights for parentally placed children. Ostensibly, 3602-c merely bridges the gap between state and federal laws, but the Office of State Review’s view of the issue, as well as the entirety of the due process system in New York, subscribes to the notion that state law is far more expansive than what federal law permits or envisions. Finally, CFR 300.137 also never contemplated that a district would not implement the very services to which it agreed to deliver.

The *Burlington/Carter* cases involved Parents who (1) *rejected* the school district’s IEP as inappropriate and (2) unilaterally placed their children in other *schools*. To apply these cases to a NYS statute is illogical since the Supreme Court dealt *exclusively* with the IDEA. Relatedly, Parents wishing to challenge administrative decisions vis-à-vis the Education Law appear to require appeals to State Court as opposed to Federal Court, while purely IDEA issues that can be appealed to either venue. In the instance for which Parent seeks a different level of services from those outlined in the IESP, the disagreement is merely a matter of amount rather than of kind. Rather, Parent and the District of Location (“DOL”) both agree that the student is entitled to services, be it SETSS and/or related services, following the timely request for dual enrollment services for the school year at issue. DOL need merely defend its CSE’s recommendation and, should it fail to meet its burden, then the sought-for remedy remains the same – a search for a mechanism of payment for services to which DOL otherwise agrees that the student is entitled.

In *Burlington*, the Court references rejection of an IEP when it found that “[t]he first question on which we granted certiorari requires us to decide whether this grant of authority includes the power to order school authorities to reimburse Parents for their expenditures on private special education for a child if the court ultimately determines that such placement, *rather than a proposed IEP*, is proper under the Act.”[[13]](#footnote-14) Likewise, the Court limited the discussion to schools when it wrote, “it seems clear beyond cavil that ‘appropriate’ relief would include a prospective injunction directing the school officials to develop and implement at public expense an IEP placing the child *in a private school*.”[[14]](#footnote-15)

Unlike in *Burlington* and *Carter*, in this case, Parent and the DOE agree that the services in the Student’s IESP were appropriate. The dispute between the parties revolves around the DOE’s unwillingness and/or inability to provide to Student with services outlined in their own proposed plan. Also, unlike in *Burlington* and *Carter* where the parents placed the students in private schools, in this case, though Student may be in a private school, only the supportive services are requested, **not** tuition reimbursement. Relatedly, tuition reimbursement is invariably attached to a Parent’s obligation to pay. That obligation is typically for the duration of an entire school year. 3602-C cases are fundamentally different because, even if there were a contract, it is a fee-for-service arrangement whereby payment is due upon each session of special education related services provided to the student. Irrespectively, the below order explicitly provides DOE with a mechanism to extinguish any future payment to a related services or SETSS provider by simply implementing its own IESP. IHO’s order does not obligate DOE to make any payments so long as DOE implements the IESP. Alternatively, if implementation is not possible, DOE may locate and identify a properly qualified provider who is ready, willing, and able, to render services to Student, and who can contract with Parent to deliver those services at the same frequency, location(s) and time(s) that the privately procured provider delivers those services.

Applying a *Burlington/Carter* analysis to failure-to-implement cases forces Parent into a predicament that is contrary to the purposes of the IDEA and state law. If the district fails to implement the IESP, Parent must either pay for the services the student should have been receiving, in which case the services are no longer “free,” or Parent must forgo the services pending the outcome of the litigation, which is inappropriate as it forces Student to be without services. Ironically, *Burlington* addressed this exact situation when the Court found that “[t]he Act was intended to give [] children [with disabilities] both an appropriate education and a free one; it should not be interpreted to defeat one or the other of those objectives.”[[15]](#footnote-16) As such, applying *Burlington/Carter* creates unintended outcomes that defeat the purpose of the IDEA and Section 3602-c. Even more fundamentally, since FAPE is *not* implicated in 3602-C cases, the above discussion could be reasonably argued as inapplicable, because the caselaw on IDEA specifically deals with FAPE. Therefore, cases addressing FAPE head-on, such as *Burlington/Carter*, cannot be the legal framework applicable to non-FAPE cases such as 3602-c.

In a recent decision, the Office of State Review favored a *Burlington* analysis because the “administrative due process system was not designed to set rate-making policies for what has grown into a completely unregulated cottage industry.”[[16]](#footnote-17) However, *Burlington/Carter* requires IHOs to assess the appropriate cost of a private school’s tuition, thus setting a “rate.” IHOs regularly examine evidence of rates for Independent Educational Evaluations and compensatory services for students who attend public schools and have been denied a FAPE. The administrative due process system was specifically designed to address special education claims and set rates for tuition and services where necessary. The same recent SRO decision stated that the attempts to analyze Section 3602-c failure-to-implement cases “that do not use a *Burlington/Carter* analysis have tended to lead to chaos,”[[17]](#footnote-18) but I disagree. In my view, these types of cases (including this case) are simple: DOE recommended, agreed to, and was supposed to, provide a service which it failed to provide, so Student is entitled to compensatory services, albeit on a prospective basis due to the ongoing harm.

I also note that the Office of State Review—collectively—has been inconsistent as to whether to apply a *Burlington/Carter* analysis or compensatory analysis. For example,[[18]](#footnote-19) one SRO used a compensatory services analysis in a Section 3602-c case. Using a *Burlington/Carter* analysis improperly places a burden on the parent. In New York, school districts have the burden of proof –including the burden of production and burden of persuasion – except when a Parent is seeking tuition reimbursement for a unilateral placement.[[19]](#footnote-20) Even then, Parent must only show that the placement they selected is appropriate.[[20]](#footnote-21) The New York State Education Department (“NYSED”) itself recognizes that parents only have a burden related to the appropriateness of a private school.[[21]](#footnote-22) The plain meaning of the term tuition is the cost paid for enrollment in a school. Additionally, the term “placement” in IDEA cases has also meant a school, not services.[[22]](#footnote-23)

Finally, Educ. Law § 4404(5) defines tuition as “instructional services.”[[23]](#footnote-24) The definition of “instructional services, does not include the “related services” sought by parents in these actions. The Commissioner of Education defines related services as “developmental, corrective, and other supportive services as are required to assist a student with a disability.”[[24]](#footnote-25) The definition of SETSS places these services as “related” services not “instructional,” as they are designed to supplement rather than replace the education a student receives in school. The argument could be made that these services are instructional, but I find that they are not, and they should not be lumped with cases involving the *Burlington-Carter* analysis.

As to remedies, a hypothetical example is illustrative of the unique nature of a classical tuition reimbursement case from a SETSS case. Parent can only prevail at hearing if Parent identifies a unilateral placement after advising the district, via a Ten-Day Notice (“TDN”), of intent to unilaterally place a student in a private school. If a Parent fails to identify a private school in a DPC, and does not have a school in mind, there can be no relief granted as the *Burlington/Carter* framework falls apart. It could be said that Justice Rehnquist’s dicta that “it seems clear beyond cavil that ‘appropriate’ relief would include a prospective injunction directing the school officials to develop and implement at public expense an IEP placing the child in a private school”[[25]](#footnote-26) would be an appropriate basis for a ruling in favor of Parent, the requirements to show ‘appropriateness’ of the school are unachievable. At a minimum, the burden on proving this issue would shift from the parent to the district to show *in*appropriateness.

The same cannot be said in a SETSS case. If Parent fails to identify a provider when filing a DPC, it is difficult to imagine a scenario where DOE’s failure to implement does not result in a finding that Student is entitled to a bank of hours. More saliently, in a compensatory education case under the IDEA where the district failed to deliver education or services to a student there is never a discussion as to the appropriateness or qualifications of a provider. Under both a qualitative and quantitative analysis, a bank of hours is established, and there is no whisper on the yet to be identified provider’s qualifications. Simply put, a bank of hours is given as relief, and Parent submits invoices or receipts for the district to fund those services.

Clearly, the law regarding the burden in New York was meant to address cases in which a parent unilaterally places the student in a private special education school, not failure-to-implement IESP cases, and to require a *Burlington/Carter* analysis would shift the burden regarding “prong II” to Parent, which is clearly not what NY Educ. Law § 4404(1)(c) intended to accomplish. As such, when DOE fails to implement the services on a student’s IESP, as it has done here, a compensatory services analysis is the appropriate method of developing a remedy.

“"SETSS’ is not defined in ‘the State continuum of special education services (see 8 NYCRR 200.6), a problem within this district that has been discussed in numerous State level review decisions.”[[26]](#footnote-27) This educational creation seems to satisfy DOE’s mandate to provide equitable services, yet this ill-defined term continues to permeate through the due process landscape.

If, in this case, the provider is deemed to be inappropriate by the Office of State Review, consideration should be given to the potential for creating a scenario where Parent *must* arrive at a due process hearing with an identified provider. This ignores DOE’s responsibilities to implement its own mandates and would stand for the proposition that absent an identified provider, Parent cannot prevail at hearing. If compensatory education is available to a parent who has not identified a provider, then surely that is the standard that should be applied to *all* cases, including where a parent identified a provider, and seeks reimbursement. To find otherwise, places parents in a uniquely peculiar disadvantage of taking the necessary steps to provide the services for Student, only to have to defend it at hearing. This is so, because in cases where there is no provider identified, and compensatory education is awarded, the issue of ‘appropriateness’ can never be assessed at hearing because there is no provider to assess. Simply, DOE would be ordered to fund a bank of hours, and for Parent to find a provider of her choosing, and perhaps qualifying the order with words such as “properly qualified” provider. If the ordered relief is where Prong II is addressed in those situations, and not *at* hearing, then surely *Burlington/Carter* is not the appropriate standard in these cases.

As a final analogy, the same result would take place in cases where a parent asserts that the current school year’s IEP (not necessarily IESP) was deficient, and that certain services *should* have been included in Student’s program but were not (i.e., SETSS in this example). In such a case it is common to order IEEs, or for Parent to provide expert testimony as to the IEP’s deficiencies. If an IHO determines that DOE should have included SETSS, then an IHO can award compensatory education without ever assessing a potential provider’s qualifications or appropriateness. Similar to the above, the IHO would award a bank of hours of SETSS having never addressed Prong II. I simply cannot reconcile this blatant discrepancy in legal standards. This legal gap is further illustrative of the unique nature of tuition reimbursement as compared to any and all other types of recompense for lost education, whether in the form of non-implementation of an agreed upon program, or a substantive claim for a service or education that should have been in a student’s IEP all along but was not.

The unifying principle for the above is that it is illogical:

1. Parents whose sole request compensatory education (just like in IEE scenarios) merely need to claim that DOE did not implement the agreed upon program, and compensatory education is the appropriate relief without ever addressing appropriateness.
2. Parents who present evidence of a unilaterally obtained provider are taking the risk that the evidence they present may result in a finding that the chosen provider is inappropriate.

I take a more flexible approach that recognizes the available equitable remedy of compensatory education for an ongoing harm that requires redress, and places parents on a level playing field with the same legal standard. Certainly, a Parent cannot come to hearing in a tuition reimbursement case without identifying an alternative program; this would be illogical and inconsistent with *Burlington/Carter*. Yet this precise fact pattern yields different results when a parent comes to hearing without an identified *provider* under 3602-c, and compensatory education may be awarded. *Burlington/Carter* was never designed to allow a parent to seek tuition reimbursement in non-FAPE cases, or where there is no disagreement whatsoever about the program or the IESP/IEP.

* 1. **A Compensatory Relief Analysis is Appropriate**

The remedy for a school district’s failure to provide appropriate equitable services required under Education Law § 3602-c is similar to the remedy for a school district’s failure to provide appropriate services under the IDEA.[[27]](#footnote-28) Assuming that IHOs have equitable powers in 3602-c cases as extant under the IDEA, courts can “grant such relief as the court determines is appropriate”, limited only by the restriction that “the relief is to be appropriate in light of the purpose of the Act.”[[28]](#footnote-29) Equitable considerations are relevant in fashioning relief, and the court enjoys broad discretion in doing so.[[29]](#footnote-30) Although an award of damages is not available under the IDEA,[[30]](#footnote-31) “a court may award various forms of retroactive and prospective equitable relief, including reimbursement of tuition, compensatory education, and other declaratory and injunctive remedies.”[[31]](#footnote-32)

A hearing officer may award compensatory education relief in the form of supplemental special education or related services when there has been a denial of FAPE.[[32]](#footnote-33) An award of compensatory services may be appropriate if a student has been denied appropriate services for an extended period of time, and if such deprivation of instruction can be remedied through the provision of additional services before the student becomes ineligible for instruction by reason of age or graduation. An award of additional services should aim to place a student in the position he or she would have been in had the district complied with its obligations under the IDEA.[[33]](#footnote-34) Compensatory education can serve as a “replacement of educational services the child should have received in the first place", and any award "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA[.]"[[34]](#footnote-35)

Compensatory education awards may include payment for out-of-pocket educational expenses incurred by a parent for services not delivered to a student, provided the school district’s failure to provide those services constitutes a denial of FAPE and the services are an appropriate remedy.[[35]](#footnote-36) Furthermore, under the IDEA, compensatory education awards can provide for direct payment to private providers.[[36]](#footnote-37)

While it may very well be permissible for a district to include Parent in the identification of a particular provider, especially if Parent is willing and able to do so, it does not follow that the responsibility to redress Parent’s inability to locate a provider is shifted away from DOE. DOE does not explain why it did not simply schedule the special education services as mandated by the IESP and, in essence, inform Parent where and when the services would be available, and at which time Parent would have the responsibility to produce the student in order to receive the services.

Each case must be viewed separately to accomplish the purposes of the IDEA and 3602-c cases, but the key in fashioning relief is, again, that “a court may award various forms of retroactive and prospective equitable relief, including reimbursement of tuition, compensatory education, and other declaratory and injunctive remedies.”[[37]](#footnote-38)

There are potentially four periods of time that can exist:

1. Pre-pendency where unilateral services may or may not have been procured from the beginning of the school year until the filing of the DPC.
2. Pendency, where the services are paid for as of right.
3. Post-hearing, prospective period, encompassing the remainder of the school year.
4. An entire, and lapsed, school year in which implementation did not occur.

Here, Parent was seeking retroactive reimbursement and prospective and ongoing compensatory education until such time as DOE implements the IESP. Once DOE implements the provisions of the IESP, Parent will no longer be entitled to unilateral procurement of services. DOE’s non-implementation to date is a factor to allow prospective relief for Parent until the end of the school year. This is precisely the result that would take place in a tuition reimbursement case, and it makes little sense for Parent to wait for an additional period of ‘injury’ only to file another DPC if DOE is allowed yet another opportunity to implement the very services it has failed to deliver to date.

An order allowing Parent to procure services DOE should have been providing all along is not an enforcement of implementation; it is merely a mechanism that allows DOE to implement the services it had contracted to provide, or to allow Parent to be reimbursed for out-of-pocket expenses—this is a question of equity upon which IHOs can rule. I also have serious concerns with applying the *Burlington/Carter* analysis retrospectively. Cases in which Parent is seeking tuition reimbursement when FAPE has been denied is markedly different from Education Law 3602-C equitable services cases. Relatedly, it makes little sense for ‘harm to accrue,’ meaning that DOE’s inactions to date form a sufficient basis to award Parent the relief sought for the entirety of the school year in the same manner tuition reimbursement cases are handled.

There is no evidence or claim made by the DOE asserting or suggesting that the Parent failed to cooperate with the DOE or interfered in any manner with the DOE’s obligation to provide the Student with a FAPE on an equitable basis for the «School\_Years» school year. After considering the representations of the Parties, I find that Student is entitled to the services described in the «IESP\_Date» IESP and that it is the DOE’s responsibility, as the district of location, to provide same. Therefore, the DOE must reimburse and/or directly fund the recommended services outlined in this order and must fund the provision of such services at a reasonable market rate / the contracted rate.

1. **Pendency**

Under the IDEA and New York State Law, a student is to remain his or her then current educational placement, unless the student’s parents and the District agree otherwise, for the duration—or pendency—of any due process proceeding relating to the identification, evaluation, or placement of the student.[[38]](#footnote-39) Pendency serves as an automatic injunction, and there is no requirement that the moving party meet the requirements of injunctive relief of irreparable harm, likelihood of success on the merits, or a balancing of the equities or hardships.[[39]](#footnote-40) The stated purpose of pendency is to maintain the Student’s status quo as it existed on the date of the filing of the DPC, and to provide consistency and stability in the education of a student with a disability in order to "strip schools of the unilateral authority they had traditionally employed to exclude disabled students . . . from school."[[40]](#footnote-41) Pendency is also evaluated on its own, without considering the appropriateness of the program the CSE has offered the Student, in that “pendency placement and appropriate placement are separate and distinct concepts.”[[41]](#footnote-42)

Pendency under the IDEA does not necessitate a particular site or location[[42]](#footnote-43) as the “current placement is generally not considered to be location specific,”[[43]](#footnote-44) or at a particular grade level.[[44]](#footnote-45) The inquiry focuses on the student’s then current educational placement which 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.[[45]](#footnote-46) Pendency "requires a school district to continue funding whatever educational placement was last agreed upon for the child,[[46]](#footnote-47)” with entitlement to the stay-put arising when a due process notice is filed.[[47]](#footnote-48)

Educational placement is "the general type of educational program in which the child is placed,"[[48]](#footnote-49) and "the pendency provision does not guarantee a disabled child the right to remain in the exact same school with the exact same service providers."[[49]](#footnote-50) If there is an agreement between the parties with respect to placement during the due process proceedings, it would serve to supersede other agreements, and a new IEP need not be created.[[50]](#footnote-51) Finally, a prior un-appealed IHO decision establishes a student's pendency as his current educational placement.[[51]](#footnote-52)

Finally, “Section 3602-C provides for review of IESPs pursuant to § 4404, and Education Law §4404 provides that a student shall remain in his or her then-current educational placement "[d]uring the pendency of any proceedings conducted pursuant to" Education Law § 4404.[[52]](#footnote-53)

Here, DOE did not dispute that the IESP dated «IESP\_Date» constitutes Student’s pendency, and Parent is entitled to recoup all out-of-pocket expenses necessary to effectuate pendency services.

**IV. Orders**

NOW, THEREFORE, IN LIGHT OF THE ABOVE FINDINGS OF FACT, **IT IS HEREBY**:

1. **ORDERED** that, for purposes of Pendency, which lies in the «IESP\_Date» IESP, DOE shall reimburse and/or directly fund all out of pocket expenses for the services Parent procured, immediately upon submission of invoices and service provision dates from a properly licensed/certified (if applicable) provider of Parent’s choosing, from the date of the filing of the DPC until the date of this order, for the «School\_Years», 10-month, 36 week, school year, the following:
2. **ORDERED** that, to extent that any pendency services were not implemented from the filing of the DPC until the date of this Order, DOE shall establish a bank of hours of those same pendency services outlined in paragraph 1 of this Order, under the same rate, provider, and funding conditions. The bank of hours may be used for up to 1 year from the date of this Order.
3. **ORDERED** that DOE reimburse and/or directly fund, immediately upon submission of invoices and service provision dates, from the provider Parent chose at the contracted hourly rate outlined below, for the entirety of the «School\_Years», 10-month, 36-week, school year, to the extent not already provided by DOE, the following:
4. **ORDERED** that DOE reimburse and/or directly fund any unfulfilled unilaterally procured hours outlined in paragraph 1 of this order due to Student, and to the extent not delivered by DOE, and which shall be funded as a bank of hours under the same hourly rates and conditions as outlined in paragraph 1. This bank of hours shall expire 1 year as of the date of this order.
5. **ORDERED** that DOE shall continue to fund the above services at the above hourly rate until such time as DOE either (subparagraph (a) or (b)):
   1. Implements the services of the «IESP\_Date» IESP, for the remainder of the school year, **or**
   2. Locates, identifies, and refers to Parent a properly qualified provider who is ready, willing, and able, to deliver the service(s) outlined above to Student, and who can contract with Parent to deliver the service(s) at DOE expense and direct funding at a lower hourly rate at the same frequency, location(s), and time(s) that the privately procured provider(s) delivers those services to Student, for the remainder of the school year.
   3. If DOE complies with either of subparagraphs (a) or (b) of this section, or combination thereof, Parent must cooperate with DOE to effectuate the delivery of the service(s) to Student or continue using the service(s) Parent unilaterally contracted provider(s) to deliver but at Parent’s own expense. Student’s private school’s noncooperation is imputed to Parent.
   4. If at any time after DOE complies with either subparagraphs (a) or (b), or combination thereof, the service(s) provider(s) secured by DOE or referred to Parent can no longer provide the service(s) to Student, Parent shall be entitled to funding with the unilaterally contracted provider for the remainder of the school year.
   5. Subparagraphs (a) and (b) of this section permit DOE one instance to either implement and/or identify a provider(s) at a lower hourly rate, subject to the other provisions of this Order. In all other circumstances, Parent shall be entitled to continued funding of the unilaterally contracted provider for the remainder of the school year.
6. **ORDERED** that DOE initiate and conduct new evaluations in all areas of suspected disabilities for Student, and that the CSE reconvene to develop a new IEP or IESP for Student, consistent with 8 NYCRR § 200.4, with the date of this Order being the triggering event to commence the timelines for the evaluations. This Order shall constitute Parental consent to the evaluations unless Parent, in writing, objects.

**DATED: «FOFD\_Date» SO ORDERED**

**Oren Varnai, IHO**

**NOTICE OF RIGHT TO APPEAL**

**Within 40 days of the date of this decision, the parent and/or the Public School District has a right to appeal the decision to a State Review Officer (SRO) of the New York State Education Department under Section 4404 of the Education Law and the Individuals with Disabilities Education Act.**

**If either party plans to appeal the decision, a notice of intention to seek review shall be personally served upon the opposing party no later than 25 days after the date of the decision sought to be reviewed.**

**An appealing party’s request for review shall be personally served upon the opposing party within 40 days from the date of the decision sought to be reviewed. An appealing party shall file the notice of intention to seek review, notice of request for review, request for review, and proof of service with the Office of State Review of the State Education Department within two days after service of the request for review is complete. The rules of procedure for proceedings before an SRO are found in Part 279 of the Regulations of the Commissioner of Education. A copy of the rules in Part 279 and model forms are available at** [**http://www.sro.nysed.gov**](http://www.sro.nysed.gov)**.**

**IMPARTIAL HEARING OFFICER'S CERTIFICATION OF THE RECORD**

I, Oren Varnai, Impartial Hearing Officer in this matter, do hereby certify that the below Index of Exhibits included within this Findings of Fact and Decision itemizes the entire record before me used at the hearing, and includes all other documents distributed to the Parties and uploaded to DOE’s Impartial Hearing System by IHO or his OATH administrative staff designees. I further certify that the materials included in the record were represented to me to be either the original or a true copy of the original materials that were provided to me in this matter, other than potential minor corrections in pagination and number of pages submitted.

**DATED: «FOFD\_Date» CERTIFIED BY**



Oren Varnai, IHO

**EXHIBITS**

**PARENT EXHIBITS**

|  |  |  |  |
| --- | --- | --- | --- |
| **Exhibit** | **Document** | **Date** | **Pages** |
|  | None | None | None |

**DOE’S EXHIBITS**

|  |  |  |  |
| --- | --- | --- | --- |
| **Exhibit** | **Document** | **Date** | **Pages** |
|  | None | None | None |

**IHO’S EXHIBITS**

|  |  |  |  |
| --- | --- | --- | --- |
| **Exhibit** | **Document** | **Date** | **Pages** |
|  | None | None | None |

1. A 10-month school year consists of 36 weeks (180 school days divided by 5 days per week). If a student attended 12-month programming, then the school year would consist of 42 weeks (i.e., 36 weeks plus 6 weeks during summer) (see Educ. Law § 3604[7]; 8 NYCRR 175.5[a], [c]; 200.1[eee]). [↑](#footnote-ref-2)
2. There was no discussion of DOE’s failure to develop a more current IESP/IEP, and the Parties assumed that the outdated 12/13/2023 IESP represented Student’s current programming that required implementation. [↑](#footnote-ref-3)
3. In that the transcript from the hearing has not been finished, reference to the transcript as a whole is made herein. [↑](#footnote-ref-4)
4. Educ. Law §3602-C(2). [↑](#footnote-ref-5)
5. *Somoza v. NYC Dep’t of Educ*., 538 F.3d 106, 111 (2nd Cir. 2008); *M.G. v. NYC Dep’t. of Educ.*, 15 F. Supp. 3d 296, 304-6 (S.D.N.Y. 2014). [↑](#footnote-ref-6)
6. *Application of a Student with a Disability*, 23-140. [↑](#footnote-ref-7)
7. Educ. Law §4404(1). [↑](#footnote-ref-8)
8. *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, [1985] [↑](#footnote-ref-9)
9. *Frank G*., 459 F.3d at 364; *see Gagliardo*, 489 F.3d at 115. [↑](#footnote-ref-10)
10. A specific discussion of the statute of frauds is not necessary here but is illustrative of the potential parameters necessary to prove an obligation to pay. [↑](#footnote-ref-11)
11. An example relating to “burden” for a claim (as opposed to relief) is the requirement that there be evidence of a Ten-Day Notice under Prong of *Burlington/Carter*. It is certainly DOE’s burden of persuasion and production to prove that it had provided Student with a FAPE, yet it is Parent’s responsibility (as opposed to the strict definition of “burden”) to provide that TDN at hearing. The absence of a TDN may result in a reduction or denial of tuition reimbursement. In these cases, **evidence** must be distinguished from **burden**. It would be illogical for Parent to come to hearing with no evidence, *especially* evidence that Parent would be in the unique position to possess. [↑](#footnote-ref-12)
12. *Application of a Student with a Disability*, Appeal No. 23-071. [↑](#footnote-ref-13)
13. *Sch. Comm.* *of Burlington v. Dep’t of Educ.*, 471 U.S. 359, 369, (1985). [↑](#footnote-ref-14)
14. *Id,* at 369. [↑](#footnote-ref-15)
15. *Burlington*, 471 U.S. at 372. [↑](#footnote-ref-16)
16. *Application of the New York City Department* *of Education*, Appeal No. 23-071. [↑](#footnote-ref-17)
17. *Id.* [↑](#footnote-ref-18)
18. Application of a Student with a Disability, Appeal No. 23-065. [↑](#footnote-ref-19)
19. NY Educ. Law § 4404(1)(c). [↑](#footnote-ref-20)
20. *Id.* [↑](#footnote-ref-21)
21. *See* New York State Law, Regulations and Policy Not Required by Federal Law/Regulation/Policy March 2023, *available at* https://www.nysed.gov/sites/default/files/special-education/nys-608-analysis-updated-march-2023\_.pdf (stating “[t]he law creates an exception for impartial hearings in which the parent seeks tuition reimbursement for a unilateral placement *in a private school*” at p. 11.) (Emphasis added). [↑](#footnote-ref-22)
22. *See* 34 C.F.R. 300.130 where the definition of parentally placed private school children means placement in schools that meet the definition of elementary or secondary schools. [↑](#footnote-ref-23)
23. Education Law § 4401 [5] defines “tuition” as “the per pupil cost of all *instructional services*, supplies and equipment, the operation of instructional facilities and allocable debt service for the instructional facilities, as determined by the commissioner” [emphasis added]. [↑](#footnote-ref-24)
24. “Related services means developmental, corrective, and other supportive services as are required to assist a student with a disability and includes speech-language pathology, audiology services, interpreting services, psychological services, physical therapy, occupational therapy, counseling services, including rehabilitation counseling services, orientation and mobility services, medical services as defined in this section, parent counseling and training, school health services, school nurse services, school social work, assistive technology services, appropriate access to recreation, including therapeutic recreation, other appropriate developmental or corrective support services, and other appropriate support services and includes the early identification and assessment of disabling conditions in students.” NYCRR § 200.1(qq). [↑](#footnote-ref-25)
25. *Id,* at 369. [↑](#footnote-ref-26)
26. *See Application of a Student with a Disability 17-034, 16-056.*  [↑](#footnote-ref-27)
27. *See Application of a Student with a Disability,* Appeal No. 20-023, citing *Doe v. E. Lyme Bd. of Educ.,* 262 F. Supp. 3d 11, 27 (D.Conn. 2017). [↑](#footnote-ref-28)
28. *Doe v. East Lyme Bd. Of Educ.*, 790 F.3d 440, 454 (2d Cir. 2015) (citation omitted). [↑](#footnote-ref-29)
29. *Florence Cty. Sch. Dist. Four v. Carter,* 510 U.S. 7, 16 (1993). [↑](#footnote-ref-30)
30. *see Polera v. Bd. of Educ. of Newburgh Enlarged City Sch. Dist*., 288 F.3d 478, 486 (2d Cir. 2002). [↑](#footnote-ref-31)
31. *Doe v. East Lyme*, 790 F.3d at 454. [↑](#footnote-ref-32)
32. *See P. v. Newington Bd. of Educ.*, 546 F.3d 111, 123 (2d Cir. 2008). [↑](#footnote-ref-33)
33. *P. v. Newington*, 546 F.3d 111, 123 (2d Cir. 2008). [↑](#footnote-ref-34)
34. *Reid v. Dist. of Columbia*, 401 F.3d 516, 518 (D.C. Cir. 2005); see also *Draper v. Atlanta Indep. Sch. Sys.*, 518 F.3d 1275, 1289 (11th Cir. 2008) (holding that "[c]ompensatory awards should place children in the position they would have been in but for the violation of the Act"). [↑](#footnote-ref-35)
35. *Foster v. Bd. of Educ. of the City of Chicago*, 611 Fed App’x 874, 878-79 (7th Cir. 2015) (citing cases). [↑](#footnote-ref-36)
36. *Indep. Sch. Dist. No. 283 v. E.M.D.H.*, 2022 WL 1607292, at \*3 (D. Minn. 2022), citing I*ndep. Sch. Dist. No. 283 v. E.M.D.H.*, 960 F.3d 1073, 1084-85 (8th Cir. 2019). [↑](#footnote-ref-37)
37. *Doe v. East Lyme*, 790 F.3d at 454. [↑](#footnote-ref-38)
38. 20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; *see Ventura de Paulino v. New York City Dep't of Educ.*, 959 F.3d 519, 531 [2d Cir. 2020]; T.M., 752 F.3d at 170-71; *Mackey v. Bd. of Educ. for 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] [↑](#footnote-ref-39)
39. *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]. [↑](#footnote-ref-40)
40. *Honig v. Doe,* 484 U.S. 305, 323 [1987] *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]. [↑](#footnote-ref-41)
41. *Mackey*, 386 F.3d at 160-61; Zvi D., 694 F.2d at 906; O'Shea, 353 F. Supp. 2d at 459. [↑](#footnote-ref-42)
42. *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]. [↑](#footnote-ref-43)
43. Child's Status During Proceedings, 71 Fed. Reg. 46709 [Aug. 14, 2006]. [↑](#footnote-ref-44)
44. Application of a Child with a Disability, Appeal No. 03- 032; Application of a Child with a Disability, Appeal No. 95-16. [↑](#footnote-ref-45)
45. *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 [↑](#footnote-ref-46)
46. *Id.* [↑](#footnote-ref-47)
47. *Doe v. E. Lyme Bd. of Educ.*, 790 F.3d 440, 452 [2d Cir. 2015]. *See Susquenita Sch. Dist. v. Raelee*, 96 F.3d 78, 83 [3d Cir. 1996]; Letter to Baugh, 211 IDELR 481 [OSEP 1987]). [↑](#footnote-ref-48)
48. *Concerned Parents*, 629 F.2d at 753, 756. [↑](#footnote-ref-49)
49. *T.M*., 752 F.3d at 171. [↑](#footnote-ref-50)
50. *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, 86 F. Supp. 2d at 366; see also Letter to Hampden, 49 IDELR 197 [OSEP 2007]. [↑](#footnote-ref-51)
51. *Student X*, 2008 WL 4890440, at \*23; Letter to Hampden, 49 IDELR 197. [↑](#footnote-ref-52)
52. Application of a Student with a Disability, Appeal No. 17-034 & No. 23-068. *See* Educ. Law § 4404[4][a]. [↑](#footnote-ref-53)