



The University of the State of New York

The State Education Department

State Review Officer

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No. 23-085

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

Appearances:

Gulkowitz Berger LLP, attorneys for petitioners, by Shaya M. Berger, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Theresa Genthe, 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. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for their son's private special education teacher support services (SETSS) for the 2022-23 school year. The appeal must be dismissed.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to 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, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

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

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

III. Facts and Procedural History

The student has received a diagnosis of attention deficit hyperactivity disorder (ADHD) (Dist. Exs. 7 at p. 1; 9 at p. 1). He began receiving weekly individual counseling services in July 2021 at age four (Dist. Ex. 9 at p. 1). For the 2021-22 school year the student attended a parochial preschool (see Dist. Exs. 4 at p. 1; 9 at p. 2). The parents and the student's teacher expressed "concern[]" over the student's behavior because when upset the student would hit, kick, push or throw chairs at children and adults, he "instigated and provoked others," and the "other children [we]re afraid of him" (Dist. Ex. 4 at p. 2). In fall 2021 the student underwent a functional behavioral assessment (FBA) (Dist. Ex. 4). The social worker who conducted the FBA relied on a review of records, observation, parent and teacher interviews, results of the Motivation

Assessment Scale (MAS) completed by the student's teacher, and data collected about the student's behaviors taken by school staff (id. at p. 1).¹

On November 18, 2021, a behavioral intervention plan (BIP) was developed to address the student's behaviors, which the FBA indicated stemmed from the student's desire for attention, inability to interact appropriately with peers, and decreased attention span (Dist. Ex. 4 at p. 8; see generally Dist. Ex. 5). The BIP recommended a variety of strategies to address these behaviors and progress monitoring of the student's behaviors (Dist. Ex. 5 at pp. 1-3). In late November 2021 the student began receiving ten hours of special education itinerant teacher (SEIT) services per week (Parent Ex. K at p. 1; Dist. Ex. 9 at p. 3). The student also received two 30-minute sessions of counseling per week (Dist. Ex. 9 at p. 3).

The student's special education teacher completed a "turning five report" dated February 25, 2022 (Dist. Ex. 9 at pp. 3-5).² The report indicated that the student continued to experience significant social/emotional and behavioral delays in the classroom environment (id. at p. 5).

The district conducted an update of the student's social history on March 21, 2022 (see Dist. Ex. 7). The questionnaire, completed by the parents, that formed the basis of the update indicated that the parents thought the student would be ready for a mainstream kindergarten in September because his pre-kindergarten program had prepared him for it (id. at p. 7). The questionnaire also indicated that the parents thought the student would need a "1:1 para" and wanted to see if the student could get "speech"(id. at pp. 1, 7).

A district social worker conducted a classroom observation on March 23, 2022 as part of the student's turning five evaluation process (Dist. Ex. 6 at p. 1). The social worker indicated that the student was observed in a preschool classroom consisting of 18 students and two teachers (id. at pp. 1, 2). Based on her observation, the social worker reported that the student was "very observant of his surroundings and appeared to have a lot of knowledge" related to topics discussed in class but also noted that he struggled with self-management and "need[ed] consistent prompting, reminders, and redirection to stay on task" (id. at p. 2). According to the social worker, the student's teacher felt that the student would need the support of a behavior paraprofessional in kindergarten (id. at p. 2).

By letter dated April 7, 2022, the student's classroom preschool teacher indicated that "during periods when [the student] receive[d] consistent [SEIT] services, his episodes of aggressive behaviors ha[d] decreased" but that "after even a period of a few days without SEIT services" there was "extreme regression" in the student's behavior (Dist. Ex. 9 at p. 6). The teacher "strongly recommend[ed] that the student receive summer services to maintain his skills" (id.).

An April 24, 2022 counseling "progress report" indicated that the student was popular and some children enjoyed playing with him but also noted that at times the student could not control

¹ According to the FBA, a psychological evaluation, though not in evidence, was administered to the student on July 13, 2021 which yielded cognitive and communicative scores within average range and noted that neither the parents or his teacher reported concern over the student's communication or ability to learn (Dist. Ex. 4 at p. 2).

² Attached to the turning five report was an undated counseling report (see Dist. Ex. 9 at p. 1).

himself, used his hands rather than words to communicate with peers, preferred to set the rules when playing with peers and had difficulty following their directions, played rough with peers which caused them to fear for their safety, and bothered peers sitting near him during circle (Dist. Ex. 9 at p. 7). The social worker who provided the student counseling stated that the student needed continued supervision to effectively participate in classroom activities with his peers, in order to keep the student and his peers safe (id.).

In a "regression statement," dated May 3, 2022, the student's SEIT provider indicated that the student experienced regression after a 10-day break in services (Dist. Ex. 9 at p. 2; see Parent Ex. J at p. 2).³ The SEIT provider explained that "in the months since receiving SEIT services, [the student] ha[d] shown the ability to respond well to consistent positive reinforcement for appropriate behavior" but noted that following the break in services the student had not been responsive to prompts to comply with adult directives and became upset and aggressive when corrected (Dist. Ex. 9 at p. 2).

The CSE convened on May 10, 2022 to create a program for the student's kindergarten school year (2022-23) (Dist. Ex. 1 at p. 1). Finding the student eligible for special education services as a student with an other health impairment, the CSE recommended that the student receive integrated co-teaching (ICT) services in English-language arts (ELA), math, social studies, and science (id. at p. 12). The CSE also recommended two 30-minute sessions per week of group counseling services and a daily, full-time, individual paraprofessional for behavior support (id.).

By prior written notice to the parents dated June 5, 2022 the district summarized the recommendations of the May 2022 CSE (Dist. Ex. 2 at pp. 1-2). The prior written notice indicated that the CSE had considered general education with related services only but this option was rejected "because [the student's] difficulties regulating his emotions impact[ed] on his classroom functioning" (id. at p. 2). The CSE also considered but rejected SETSS for the student since the student "require[ed] a lot of prompting, redirection and individual assistance in his classroom throughout the school day in order to achieve his goals" (id.). The prior written notice also noted that the CSE had considered a 12:1+1 special class in a community school but rejected this program as it was too restrictive (id.).

In a prior written notice, dated June 17, 2022, the district notified the parents of the particular public school site to which it assigned the student to attend and receive the services recommended in the May 2022 IEP and provided the parents with contact information for assistance in arranging a visit to the school (Dist. Ex. 3 at pp. 1-2).

On June 23, 2022, a Committee on Preschool Special Education (CPSE) convened to recommend services for the extended school year of July and August 2022 (Dist. Ex. 8 at pp. 1, 4, 12-13). The CPSE recommended ten 60-minute sessions per week of SEIT services in a group of

³ A "preschool special education program regression tool" completed by the social worker who provided the student counseling for two 30-minute sessions per week indicated that the student missed four sessions of counseling due to a holiday break and when he returned he had difficulty sitting during circle time and was belligerent when corrected by the social worker (Dist. Ex. 9 at p. 8).

two and two 30-minute sessions per week of counseling services in a group of two (id. at pp. 1, 12).

The parent entered into a "parent agreement" on July 1, 2022 with Special Edge Support, LLC (Special Edge) for delivery of SETSS to the student (see Parent Ex. C). The agreement indicated that it was for the 2022-23 school year but did not provide for the cost or frequency of SETSS (see generally id.).

A January 18, 2023 progress report from the student's Special Edge SETSS provider indicated that the student was enrolled in an 18:1+1 preschool class at a parochial school where he received "10 hours of SEIT instruction per week" along with speech-language therapy (Parent Ex. K at p. 1).⁴ The report indicated that the student had made minimal progress toward his IEP goal "due to ongoing social/emotional/behavioral concerns that occur[ed] frequently in each area of development throughout the school day" (id. at p. 2).

A. Due Process Complaint Notice

In an amended due process complaint notice dated January 28, 2023, the parent asserted the district failed to offer the student a free appropriate public education (FAPE) for the 10-month 2022-23 school year beginning in September 2022 (Parent Ex. A at p.1).⁵ The parents noted they agreed with the June 2022 CPSE IEP developed for summer 2022, which mandated 10 hours per week of SEIT services (id.).

The parents contended that May 2022 IEP created for the 10-month portion of the 2022-23 school year was not appropriate because it did not recommend "individualized special education instruction and support" for the student similar to SEIT services delivered over summer 2022 (Parent Ex. A at p. 1). Further, the parents asserted that they did not receive notice of an assigned public school site that would have been able to implement the IEP (id.).

The parents also alleged that, because of the district's failures, the parents "were required to find a school on their own" and that, for the 10-month portion of the 2022-23 school year, the district failed to offer any providers to deliver SEIT or counseling services to the student pursuant to its obligation to maintain the student's pendency placement (Parent Ex. A at p. 2). The parents indicated that they identified private providers to deliver the student's services for the 10-month portion of the 2022-23 school year but "at rates higher than [the] standard [district] rate" (id.).

⁴ At times in the hearing record, the services the student received from Special Edge during the 2022-23 school year are referred to interchangeably as SEIT or SETSS. In a case such as this where SEIT services are the main form of relief sought by the parent, but by State law and regulation such services are typically not allowed for school-aged students (see Educ. Law § 4410[1][k]; 8 NYCRR 200.16[i][3][ii]), whereas SETSS could be permissibly recommended for the student but is not defined in the State's continuum (see 8 NYCRR 200.6), it is not helpful that the hearing record lacks more testimony or evidence that clearly defines the contours and features of SETSS (versus SEIT services) as understood by the parties. However, whether denominated as SEIT services or SETSS, the substance of the relief sought in the instant matter is the provision to the student of educational services by a special education teacher who assists the student in addition to the student's classroom program.

⁵ The initial due process complaint was dated September 19, 2022 (see Sept. 19, 2022 Due Proc. Compl. Not.).

For relief, the parent requested funding for 10 hours per week of special education teacher services at the enhanced rate "for the entire 2022-23 school year" (Parent Ex. A at p. 2). The parent also requested funding or related services authorizations (RSAs) for "related services and aides" identified on "the [s]ummer IEP" (id.).

B. Impartial Hearing Officer Decision

The parties proceeded to impartial hearing before the Office of Administrative Trials and Hearings (OATH), which concluded on March 27, 2023 following three days of proceedings (Dec. 22, 2022 Tr. pp. 1-14; Jan. 30, 2023 Tr. pp. 1-7; Mar. 27, 2023 Tr. pp. 1-48). During the impartial hearing, the district declined to put on testimonial evidence to defend its offer of a FAPE to the student but stated its intent to challenge the "appropriateness of the relief being sought" by the parents: specifically, the SETSS provided at the student's private school (Mar. 27, 2023 Tr. pp. 9-10). Also during the impartial hearing, the parents requested to withdraw their request for RSAs or funding for counseling services without prejudice, to which the district did not object (Mar. 27, 2023 Tr. p. 46).

In a decision dated April 7, 2023, the IHO held that the district "essentially conceded a denial of FAPE for the 2022-23 10-month school year" and failed to meet its burden of proof (IHO Decision at pp. 5, 14). The IHO, however, went on to find that there was a "considerable" amount of evidence in the hearing record to suggest that the May 2022 IEP was more appropriate for the student than the June 2022 CPSE IEP (id. at p. 14). The IHO determined that it was reasonable to conclude that full day support of a behavioral paraprofessional would have been more effective for the student (id.). Specifically, the IHO indicated that, had the district not conceded the issue of FAPE, there was "evidence to suggest that [the district] may have prevailed" (id. at p. 15). In addition, the IHO did not credit the parents' assertion that the district did not offer the student a school placement because the hearing record contained a notice identifying an assigned school site and there was no testimony that the parents did not receive this letter (id. at p. 6). Regarding the claim that the district did not offer the student a service provider for SEIT services or SETSS, the IHO held that the district did not recommend either service and was under no obligation to implement either (id. at pp. 6-7).

Next, the IHO found that the unilaterally obtained services, consisting of 10 hours of SETSS delivered by Special Edge, were not appropriate for the student as there was no indication in the hearing that the student's SETSS were uniquely tailored to meet the student's needs, "which were largely behavioral" (IHO Decision at p. 15). The IHO found that Special Edge did not make its own assessment of the student's needs and "abdicated any programming decisions in favor of accepting a parent's preferred IEP" no matter how old (id.). Additionally, the IHO noted evidence that the student's provider agreed with the CSE that the student needed support of a behavior paraprofessional and that SEIT support was insufficient to address the student's behavioral needs, and further found no indication that the SETSS provider was implementing the student's BIP (id. at pp. 15-16). The IHO noted that the parents did not present the student's SETSS provider as a witness (id. at p. 15). The IHO determined the student did not make meaningful progress from SETSS as the parent's testimony regarding the student's progress was not "persuasive" and other evidence in the hearing record demonstrated that the student was making minimal progress (id. at p. 16). Lastly, the IHO noted that, for those months for which invoices were included in the hearing

record (September through December 2022), other than two weeks, the student did not even receive the full ten hours of SETSS per week (id.).

The IHO addressed equitable considerations and found that, had the parents met their burden to prove the unilaterally obtained SETSS were appropriate, the parents' requested relief would have been reduced or denied on equitable grounds (IHO Decision at p. 16). The IHO noted that there was no evidence the parents sent the district a 10-day notice letter or that the parents attempted to visit the proposed school location (id. at pp. 6, 16). In addressing the contract for services, the IHO held that the documentary evidence did not support a finding that the parents had a financial obligation to pay for the SETSS as the contract was silent as to rate and frequency of the services (id. at p. 17). In addition, the IHO found that the administrator from Special Edge was not a reliable witness, noting that the administrator "was not familiar with any aspect of the student's services beyond contract invoices," "did not seem knowledgeable about the contract's terms," and was evasive in his testimony (id. at p. 8). The IHO further noted that the parents had not received any invoices for services and the hearing record only included invoices billed to the district, all dated January 31, 2023, for September 2022 through December 2022, which the IHO noted seemed to have been generated solely for the purpose of litigation and did not contain the amount due or an hourly rate for the services (id. at pp. 8-9, 17). The IHO also found the requested rate for the SETSS to be "objectively unreasonable" (id. at p. 17).

The IHO ordered the district to provide the student pendency services retroactive to the date of the filing of the due process complaint notice (September 19, 2022) up to the date of her decision based on the June 2022 CPSE IEP and consistent with the parties' agreement (IHO Decision at pp. 14, 18). However, having found that the parents failed to meet their burden to prove that the unilaterally obtained SETSS were specially designed to meet the student unique needs and that equitable considerations did not weigh in favor of an award of relief, the IHO denied the parents' request for district funding of SETSS delivered by Special Edge (id.).

IV. Appeal for State-Level Review

The parents appeal, arguing that the IHO erred in finding the unilaterally obtained SETSS were not appropriate for the student. The parents assert the IHO should not have inferred facts based on the district purportedly offering an appropriate program when the district did not take such a position. Rather, the parents contend that the district must be held to its concession that the kindergarten May 2022 IEP was not appropriate, and that IEP cannot be relied upon as an appropriate program. The parents contend that the appropriate program from the June 2022 CPSE IEP that was implemented in July and August 2022 did not become inappropriate in September just because the student entered kindergarten, and that the IHO erred in finding the paraprofessional to be a more appropriate support. The parents point to the IHO's finding that the same evaluative data underlay both the May 2022 CSE's and the June 2022 CPSE's recommendations and that the hearing record lacked evidence explaining the change in programming. The parents argue that such findings demonstrate that there was no basis to conclude "that the June 2022 CPSE IEP, which the parent sought to carry on during the 10-month 2022-23 school year, "was not unique to the Student's needs." Rather, the parents contend that the program was designed for the student to make academic gains and should have been deemed appropriate. In addition, the parents assert that there is no legal basis to deny relief because the student was making minimal progress as progress is not dispositive. Finally, regarding the number

of hours of services implemented between September and December, the parents argue that any shortfall was the district's responsibility since the district had an obligation to "at least continu[e] to provide all services on the IEP, as the last appropriate program created for the Student," and further that the question of implementation of the private services was not raised at the impartial hearing and, therefore, should not have been factored in the decision.

Turning to equitable considerations, the parents argue that, by making findings on equitable grounds, the IHO failed to acknowledge the district's concession that it did not offer the student a FAPE. The parents assert that they "cannot be found to have been acted inequitably in response to a program the [district] never argued was appropriate or was offered." Moreover, the parents allege that the district did not argue that their requested relief should be denied because they acted inequitably and, therefore, the IHO's findings on such grounds should be rejected. The parents contend that the IHO's findings regarding the contract were without merit. The parents contend that, although the terms of the contract were "perhaps" vague, the student's father testified that he was financially obligated to pay for the student's services. Finally, the parents argue that the IHO erred by finding the rate for services was not reasonable as there was no basis to make this finding.

The parents request the IHO's decision be reversed and that the district be required to fund the 10 hours per week of SETSS delivered by Special Edge during the 2022-23 school year at the rate of \$195 per hour.

In its answer, the district generally denies the material allegations set forth in the request for review and argues that the IHO's decision should be upheld in its entirety.

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 184-85 [2d Cir. 2012]; T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 252 [2d Cir. 2009]). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the

student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

The 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., 694 F.3d 167, 184-85).

Turning to the standard to apply in assessing the appropriateness of unilaterally-obtained schooling or services, 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]). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether a unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether the placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] ["evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

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

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

need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

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

VI. Discussion—Unilaterally Obtained Services

The district has not cross-appealed from the IHO's determinations that the district failed to meet its burden to prove that it offered the student a FAPE for the 2022-23 school year. Accordingly, this determination has become final and binding on the parties and will not be further discussed (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]). The crux of the dispute between the parties relates to the appropriateness of the SETSS unilaterally obtained by the parents and delivered to the student by the agency Special Edge during the 2022-23 school year.

A. Student's Needs

In order to assess the appropriateness of the unilaterally obtained services, a discussion of the student's needs is required. Here, the sufficiency and accuracy of the student's present levels of performance and the student's individual needs as described in the May 2022 IEP are not in dispute. As such, the discussion of the student's needs will be taken from those present levels of performance and other evaluative information in the hearing record.⁶

The May 2022 IEP included the results of intellectual testing conducted as part of a July 2021 psychological evaluation of the student (Dist. Exs. 1 at p. 1; 4 at p. 2).⁷ Administration of the Wechsler Preschool and Primary Scale of Intelligence, Fourth Edition (WPPSI-IV), yielded a full scale IQ of 105 (63rd percentile) that was within the average range (Dist. Exs. 1 at p. 1; 4 at p. 2). According to the IEP, the student's teacher at the time reported that the student "love[d] to learn and [was] acquiring his preacademic skills," could "label colors and shapes," and could identify letters and numerals "from 1-10" (Dist. Ex. 1 at p. 1). Consistent with the results of intelligence testing, the student's SEIT indicated in a February 2022 annual review report that, when given positive reinforcement for appropriate behavior, the student demonstrated cognitive and communication skills within normal limits as assessed by the Hawaii Early Learning Profile (HELP) and that the student was able to sort items by category, appearance, size, and function and could also discriminate objects "that [did] not belong in a category" (Dist. Ex. 9 at p. 3). The SEIT noted that the student was able to begin preferred activities without prompting and could attend to a preferred task for up to 10 minutes (id.). The SEIT also indicated that the student was able to identify upper- and lower-case letters, his own name in print, count by rote to 20, and distinguish

⁶ The parents explicitly agree with the June 2022 CPSE IEP and argue that it is appropriate. The present levels of performance in the June 2022 CPSE IEP are similar to those in the May 2022 CSE IEP (compare Dist. Ex. 1 at pp. 1-4 with Dist. Ex. 8 at pp. 4-6).

⁷ This psychological evaluation was not included in the hearing record.

bigger vs. smaller (*id.*). The SEIT reported that the student's communication skills were within normal limits but noted that the student presented with a lateral lisp (*id.* at p. 4).

With regard to physical development, the May 2022 IEP referenced the March 2022 social history update which indicated that the student had received a diagnosis of ADHD (Dist. Ex. 1 at p. 4). Further, the IEP indicated that, according to documentation submitted by the parents, the student's diagnosis of ADHD "manifest[ed] itself with impulsive behavior, aggressive behavior, and anxiety" (*id.*). The IEP noted that the student's adaptive functioning, as measured by parent response to the Vineland Adaptive Behavior Scales-Third Edition (Vineland-3), was within the moderately low range with an adaptive behavior composite score of 79 (*id.* at p. 1). The May 2022 SEIT report indicated that the student's self-help, fine, and gross motor skills were all within normal limits (Dist. Ex. 9 at p. 4).

Turning to the student's social development, May 2022 IEP indicated that, according to the student's SEIT, the student was "very self-directed" and "ha[d] difficulty complying with adult directives," was "quick to anger," and was "likely to harm other children during center-based play and routine group activities" (Dist. Ex. 1 at pp. 1-2). The IEP noted that he eloped from class sometimes and "frequently required physical removal from class group activities due to his defiance of adult directives and/or aggression toward others" (*id.* at p. 2; *see* Dist. Ex. 9 at p. 2). The May 2022 IEP indicated that, in the months he received SEIT services, the student had shown the ability to "respond well to positive reinforcement for appropriate behavior" and "[understood] the consequences for inappropriate behavior when presented by the SEIT" (Dist. Ex. 1 at p. 2). The IEP stated that, according to the student's counselor, the student was popular, "some children enjoy[ed] playing with him," and "he often play[ed] rough and sometimes the children [did not] enjoy playing with him for fear of harm" (*id.*). The counselor also noted that the student sometimes "c[ould] not control himself and use[d] his hands rather than his words to communicate with peers" and "set[] rules when playing with peers and . . . had difficulty following rules if other children decide[d] how they should play" (*id.*). Further, the counselor reported that the student "need[ed] frequent direction during circle time as he often bother[ed] the children sitting near him" (*id.*). In addition to the description of the student's social/emotional development found in the May 2022 IEP, the February 2022 SEIT report indicated that the student's social/emotional skills as measured by the HELP were at a three year old level, whereas the student was chronologically five at the time (Dist. Ex. 9 at p. 4). Additionally, in the March 2022 social history update the parents described the student's behaviors and reported that there had been "improvement" since he had started working with the SEIT but also reported that there had been neither positive nor negative changes in the student's behavior during the previous year (Dist. Ex. 7 at p. 7). The parents indicated that the student sometimes experienced problems while playing with children in the neighborhood, in a public place, or when he was told to do something he did not want to do and that the student frequently exhibited problem behaviors when getting ready for school or eating at the table at home (*id.* at p. 6). The parents reported that the student's "pre-k program ha[d] helped and prepared" him for mainstream kindergarten, that he would need a 1:1 paraprofessional, and that, due to his lisp, they would be seeking speech-language therapy services for him (*id.* at pp. 4, 7). Lastly, the May 2022 IEP stated that the parents, who participated in the CSE meeting, reported that the student was seen by an outside therapist weekly and that they were "pleased [the student would] have the individual support when he goes to kindergarten" (Dist. Ex. 1 at p. 4).

The FBA conducted in fall 2021 included two operational definitions of targeted behavior that both described and summarized the student's interfering behaviors (Dist. Ex. 4 at p. 1). The first targeted behavior included oppositional and aggressive behaviors described as "throwing toys, hitting, pushing, [and] kicking" and noted the frequency of these behaviors was "everyday throughout the day, for a duration of 5-20 minutes, whenever he [was] upset or want[ed] attention" (*id.*). The second targeted behavior included impulsive, self-directed or attention seeking behaviors described as "calling out, need[ing] immediate gratification of wants and needs, non-compliance, and poor awareness of others in space" and noted that these behaviors occurred "across all settings inconsistently but multiple times a day for short spurts of time" (*id.*). As reported in the FBA, the student's teachers indicated that he did better with structure and "a lot of positive attention but [had] difficulty sitting for long periods of time" and "sometimes act[ed] out even in the structured setting" (*id.* at pp. 2-3). As part of the FBA, the student was observed in his preschool classroom for two, one- to two-hour sessions (*id.* at p. 5). In one 30-minute time period, during "Centers time," the student exhibited behaviors of noncompliance with teacher requests, throwing toys, stealing toys from others repetitively, and disrupting others' play (*id.* at pp. 5-6). During the second observation, in a 30-minute time period, the student was observed to play disruptively with toys, threw beads three times, was noncompliant with several teacher requests, kicked another student, tried to elope when corrected, and, while at circle, took a headband from the student next to him and put it in his mouth (*id.* at pp. 6-7). The FBA indicated that the student's teacher and parent reported that the student acted out multiple times throughout each day and behaviors "crop[ped] up throughout the day and often seem[ed] to happen with no rhyme or reason," and the evaluator who conducted the FBA reported that the student presented with "extremely non-compliant often aggressive behaviors" (*id.* at p. 8).

In March 2022, the district conducted a classroom observation which indicated that the student presented as observant, active and "appeared to have a lot of knowledge regarding answering questions related to a topic discussed in class" (Dist. Ex. 6 at p. 2). The district social worker noted that the student seemed to "want to engage with peers" and "appear[ed] to want to help adults and peers" but "showed some issues with positive interactions with peers and needed to be redirected to be kind" (*id.*). In addition, the social worker reported that the student exhibited impulsive behaviors, "struggle[ed] with self-management and need[ed] consistent prompting, reminders and redirection to stay on task" (*id.*). As part of the classroom observation, the district social worker interviewed the student's teacher who reported that the student was a "very active student, who need[ed] consistent reminders, redirection and prompting," had the support of a SEIT for two hours each day, but needed the support of a "behavior para in Kindergarten" (*id.*). The student's teacher indicated the student had many academic skills but opined that "his behavior [might] eventually get in the way of academic progress if not managed" (*id.*).

Lastly, during the impartial hearing, the student's father testified and described the student's impulsivity and ability to follow teacher directives, noting that "having to follow, really, any set of orders that he may not want to when he lacks attention, it's an issue," and that "he goes zero to 60 in . . . any sort of setting in the classroom" (May 27, 2023 Tr p. 47). When asked if the student's behaviors impacted the student's ability to learn, the father replied "yes" and that it affected his ability to do "all the school work, everything that the class is supposed to be doing" (May 27, 2023 Tr. p. 48).

B. SETSS

Initially, the parents rely heavily on the fact that the private SETSS obtained for the student for the 10-month portion of the 2022-23 school year mirrored the SEIT recommendations in the June 2022 CPSE IEP. However, there is no merit to the parents' contention that the similarity of the type and amount of the special education teacher services unilaterally obtained for the 2022-23 school year to the recommendations of the June 2022 CPSE somehow alters the parent's burden in this matter. There is no dispute that the June 2022 CPSE recommended services to be delivered by the district in a preschool program over summer 2022,⁸ but, since then, the student transitioned to kindergarten and the parents obtained private services to be delivered in a parentally selected private school. While the parents may permissibly rely on the June 2022 CPSE IEP in order to define the student's stay-put placement during the pendency of this proceeding, they may not rely on that document to avoid their burden to prove that the private services they obtained were specially designed to meet the unique needs of the student during the 10-month 2022-23 school year (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison, 773 F.3d at 386; C.L., 744 F.3d at 836; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

Turning to the evidence in the hearing record, at the impartial hearing, an administrator at Special Edge (administrator) reported that the agency provided SETSS and SEIT services to students and that he had knowledge of "how [the agency] bills for services rendered" (Parent Ex. J ¶ 1). He stated that his duties included executing contracts and tracking hours and rates for the agency's students, and other administrative tasks and he was familiar with the services being provided to the student for the 2022-23 school year as he had countersigned the enrollment contract between Special Edge and the parent (Parent Ex. J ¶¶ 2, 3). The administrator indicated that Special Edge was providing SETSS to the student, that the student was entitled to 10 hours per week of SETSS, and that the agency had the capacity to provide the services "to be billed as performed" for the entire school year (id. at ¶ 3). In his testimony, the administrator indicated that he was unaware if the student had one service provider for the entire school year and that he was not involved with the student's schedule (May 27, 2023 Tr. pp. 15-16).

The student's father testified that, when planning for the 2022-23 school year, he hoped that the student would have been able to continue with the same SEIT provider from the 2021-22 preschool school year as she had worked with him "last school year and through the summer" (May 27, 2023 Tr. pp. 30-31). The father opined that it was "extremely important" that the student have a "trusting relationship with somebody he respects" and is "a special education teacher" and not a "shadow" who would exacerbate the problem (May 27, 2023 Tr. p. 31). Further, the parent stated that he felt that "continued consistency with a special education teacher . . . those few hours that they spend a day together really ha[d] a much longer lasting impact on him, both in school and outside of school" (id.). The student's father indicated that he felt SETSS was an appropriate

⁸ The June 2022 CPSE IEP was developed for summer 2022 and recommended 12-month services, the purpose of which are "to prevent substantial regression" (8 NYCRR 200.6[k][1]; see 8 NYCRR 200.1[eee]). "Substantial regression" is defined as "a student's inability to maintain developmental levels due to a loss of skill or knowledge during the months of July and August of such severity as to require an inordinate period of review at the beginning of the school year to reestablish and maintain IEP goals and objectives mastered at the end of the previous school year" (8 NYCRR 200.1[aaa]).

service to help the student with "all sorts of things in the classroom" including his impulsive behaviors, peer interactions, and interrupting the teacher when speaking (May 27, 2023 Tr. p. 33). The father stated that the district had "a different suggestion" than SETSS when planning for kindergarten for the student but that he was very focused, for the reasons listed above, on continuing the 10 hours of special education teacher services (May 27, 2023 Tr. p. 36).

The student's father testified that, during the 2022-23 school year, the student was working with a SETSS provider from Special Edge and he reported that this provider had a respectful relationship with the student, she "[worked] on this conflict resolution," and she offered "another layer to the classroom" so that the student's "impulsive or explosive moments [would not] go out of control" (May 27, 2023 Tr. p. 28). The father indicated that the SETSS provider communicated with both parents "from time to time" to discuss the student and update them on behavior strategies such as assisting the student "comprehend . . . that certain behaviors are . . . unacceptable in the class" and that there was "a way to react and still stay integrated in the class and "bring[ing] these moments that . . . could last a very long time throughout the day to . . . a much shorter amount due to her ability to work with him in that classroom setting" (May 27, 2023 Tr. p. 29). In his testimony, the parent indicated that the student was scheduled to receive ten hours of SETSS weekly and that the provider's work with the student was based on his behaviors and he did not know if she worked on academics with him (May 27, 2023 Tr. pp. 30, 35). When asked why he felt SETSS was a more appropriate service than the student being assigned a behavioral paraprofessional, the parent responded, "having somebody with him the entirety of the day one-on-one would exacerbate a lot of these issues" (May 27, 2023 Tr. p. 37).⁹ The parent opined that it was not only the SETSS teacher's relationship with the student that was "the important difference" but "specifically, also her special education training" (*id.*).

The teacher who delivered the student's SETSS during the 2022-23 school year did not testify at the impartial hearing. In a January 2023 annual report, the teacher described the student's needs as measured by administration of HELP and the teacher's observation of the student but did not specify the types of skills that she was addressing with the student during SETSS sessions, or the modifications, accommodations, or strategies utilized to address his needs beyond a reference to use of positive reinforcement for positive behaviors (Parent Ex. K). Further, other than the parents' testimony that the SETSS provider worked to teach the student to comprehend that behaviors were unacceptable (May 27, 2023 Tr. p. 29), there is no elaboration in the hearing record as to what goals were being addressed through SETSS, how the SETSS allowed the student to access the general education curriculum, or how the unilaterally obtained SETSS addressed the student's behavioral needs through use of a BIP or otherwise. Further, despite evidence that the student was engaging in frequent, aggressive, and disruptive behaviors throughout each school day, there is no indication how those needs were addressed outside of the 10 hours of weekly SETSS. For example, the parent's unilaterally obtained program did not include counseling services, paraprofessional support, or other support for the student's social/emotional needs to be available throughout the school day (*see* Dist. Exs. 6 at p. 2 [reflecting the view of the student's preschool teacher that the student would need paraprofessional support in kindergarten]; 7 at p. 7

⁹ On the other hand, both the social history update and the May 2022 IEP indicated that the parents were in agreement with the student being assigned a 1:1 behavioral paraprofessional (Dist. Exs. 1 at pp. 1, 4, 18; 7 at p. 7).

[reflecting the parents' request for paraprofessional services for the student]; 9 at p. 2 [reflecting the SEIT's report that that the student could follow directives and comply with limits during 1:1 SEIT instruction but during center-based play, "continued to require consistent intervention to maintain appropriate play with peers"]; see also Parent Ex. K at p. 1 [noting that the parents were "searching for psychological intervention" at that time]).

The evidence in the hearing record also indicates that it is not clear that the student received the SETSS 10 hours per week as planned (Parent Ex. B). Monthly service invoice forms completed by the provider reflects that Special Edge delivered 26 sessions in September 2022, 16 sessions in October 2022, 22 sessions in November 2022, and 34 sessions in December 2022 (id.). The parent argues that the shortfall in sessions delivered was due to the parochial school's schedule and several holidays for which school was closed; however, the parent did not offer a school calendar as evidence to substantiate this claim. Even considering the holidays that fall within those months, it appears that several sessions of SETSS were missed that are not explained by holidays and the IHO was right to express concern (see IHO Decision at p. 16).¹⁰

Related to the implementation of the unilaterally-obtained services during the 2022-23 school year, is the student's progress. 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).¹¹ However, a finding of progress is, nevertheless, a relevant factor to be considered (Gagliardo, 489 F.3d at 115, citing

¹⁰ In their request for review the parents assert that the district was required to implement SETSS for the 2022-23 school year and that, therefore, any shortfall in the delivery of services should be attributable to the district's failure (Req. for Rev. ¶ 19). Because the parties agreed that the June 2022 CPSE IEP constituted the student's pendency placement, the district was required to deliver special education teacher and counseling services to the student during the proceedings (see IHO Decision at p. 14; Dist. Ex. 8). There is not, however, any evidence that the district agreed to fund special education teacher services delivered by the private provider selected by the parent as the student's pendency placement (Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 533 [2d Cir. 2020] [noting that the district, not the parents, "is authorized to decide how (and where) the Students' pendency services are to be provided"]).

¹¹ Conversely, the Second Circuit has also noted that progress made in a unilateral placement, although "relevant to the court's review" of whether a unilateral placement was appropriate, is not sufficient in itself to determine that the unilateral placement offered an appropriate education (Gagliardo, 489 F.3d at 115; see Frank G., 459 F.3d at 364 [holding that although a student's "[g]rades, test scores, and regular advancement [at a private placement] may constitute evidence that a child is receiving educational benefit, . . . 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"]; Lexington County Sch. Dist. One v. Frazier, 2011 WL 4435690, at *11 [D.S.C. Sept. 22, 2011] [holding that "evidence of actual progress is also a relevant factor to a determination of whether a parental placement was reasonably calculated to confer some educational benefit"]).

Berger, 348 F.3d at 522 and Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]).

In a January 2023 annual review report, the student's SETSS provider indicated that the student's cognitive skills continued to be within normal limits and that the student was able to read simple words and phrases, write simple words without prompts, count orally to 100, "[write] numerals independently," and print all letters of the alphabet (Parent Ex. K at p. 1). The SETSS provider indicated that the student continued to be self-directed, frequently ignored directives from adults, when upset could turn over chairs and table, attempted to elope, and still hit or kicked other children, albeit less frequently (id.). She also reported that "positive reinforcement for more appropriate behaviors including breaks from class activities have been somewhat useful in limiting these behaviors" (id.). Further, the SETSS provider indicated that the student had made "minimal progress on his current IEP goal due to ongoing social/emotional/behavioral concerns that occur frequently in each area of development throughout the school day" (id. at p. 2).

Overall, there is indication in the hearing record that the parent attempted to replicate a program for the student similar to that set forth in the June 2022 CPSE IEP; however, even if the CPSE's recommendations for the summer 2022 were relevant to assessing the appropriateness of the parents' unilaterally obtained services for the 10-month portion of the 2022-23 school year, the parent must still come forward with evidence that describes the services and the delivery thereof, particularly where, as here, the district has maintained its position that the parent did not meet her burden to prove that the unilaterally-obtained services were appropriate. Here, the hearing record lacks consistent information about the level of services the student received, does not explain how the services from Special Edge addressed the student's needs, and does not show that the student made progress (see L.K., 932 F. Supp. 2d at 491 [in reviewing the appropriateness of a unilateral placement, courts prefer objective evidence over anecdotal evidence]; L.Q. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 490 [S.D.N.Y. 2013] [rejecting parents' argument that counseling services met student's social/emotional needs where "[t]here was no evidence . . . presented to establish [the counselor's] qualifications, the focus of her therapy, or the type of services provided" and, further, where "[the counselor] did not testify at the hearing and no records were introduced as to the nature of her services or how those services related to [the student's] unique needs"]; R.S. v. Lakeland Cent. Sch. Dist., 2011 WL 1198458, at *5 [S.D.N.Y. Mar. 30, 2011] [rejecting the parents' argument that speech-language therapy services met student's needs where parents "did not offer any evidence as to the qualifications of the provider of the therapy, the focus of the therapy, or when and how much therapy was provided"], aff'd, 471 Fed. App'x 77 [2d Cir. June 18, 2012]).

Consequently, the IHO correctly found that the parent did not meet her burden to establish the appropriateness of the services provided to the student by Special Edge during the 2022-23 school year.

VII. Conclusion

Having found that the parents' failed to meet their burden of demonstrating the appropriateness of the unilaterally-obtained services, the necessary inquiry is at an end and there is no need to reach the issue of whether equitable considerations support the parent's request for relief (see M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]).

In light of these determinations, I need not address the parents' remaining contentions.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
 July 14, 2023

SARAH L. HARRINGTON
STATE REVIEW OFFICER