The University of the State of New York

The State Education Department
State Review Officer
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No. 23-099

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Liz Vladeck, General Counsel, attorneys for petitioner, by Cynthia Sheps, Esq.

Gulkowitz Berger LLP, attorneys for the respondent, by Shaya M. Berger, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from a decision of an impartial hearing officer (IHO) which directed the district to provide direct funding to the parent's privately obtained SETSS service provider at an enhanced rate. This appeal must be sustained to the extent indicated.

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 hearing record is sparse with regard to the student's educational history. The student was almost six years old at the time the IHO issued the April 29, 2023 decision in this matter (IHO Dec. pp. 3, 6). For the 2020-21 school year, the student was enrolled in the Kids Unlimited SEIT Program and received five hours of special education itinerant teacher (SEIT) services per week from September 2020 through April 2021 (Parent Ex. B at p. 1, 3). When the student was approximately three and a half years old, a CPSE convened on April 29, 2021 and found the student eligible for special education programs and services as a preschool student with a disability (id. at p. 1). The IEP indicated the student attended a center-based program and began receiving SEIT

services in September 2020 (id. at p. 3).[1] The student's classroom consisted of a classroom teacher, a teacher assistant, and 15 students (id.). The IEP indicated that the student "would benefit from the support of SEIT services to address academic, social and communication difficulties" (id. at p. 1). The April 2021 CPSE recommended that the student receive direct one-to-one SEIT services for one hour daily, five days per week at a childcare location selected by the parent for the ten-month 2021-22 school year with a projected implementation date of May 3, 2021 (id. at pp. 1, 3, 10, 13).

A. Due Process Complaint Notice

By due process complaint notice dated September 6, 2022, the parent alleged that the district failed to provide the student with the program recommended in the April 2021 IEP for the 2022-23 school year (Parent Ex. A at p. 1). Initially, the parent requested a pendency hearing, asserting that the April 2021 IEP, which mandated that the student receive five sessions per week of SEIT services constituted the student's pendency program (id.).[2] The parent asserted that the district failed to develop any subsequent appropriate program for the student after the April 2021 IEP and that the student was still eligible to receive the services mandated in the April 2021 IEP (id.). The parent argued that she was unable to locate providers for the student at the district's standard rates for the 2022-23 school year, so she contracted with a provider which charged rates higher than the standard district rate (id.).

As relief, the parent sought an order directing the district to continue to fund the student's SEIT and related services under the April 2021 IEP pursuant to pendency (Parent Ex. A at p. 2). The parent further requested an order awarding the student five sessions of SEIT services per week at an enhanced rate for the 2022-23 school year and directing the district to fund the same at the unilaterally obtained provider's rate (id.).

B. Impartial Hearing Officer Decision

Following a pre-hearing conference held on October 7, 2022; a pendency hearing was held on October 31, 2022; status conferences were held on December 1, 2022, January 12, 2023, February 13, 2023, and March 20, 2023, and a hearing on the substantive issues raised in the due process complaint notice was held on March 30, 2023 (Tr. pp. 1-79). In an interim decision dated October 31, 2022, the IHO determined that the student's pendency placement consisted of five hours per week of SEIT services and the IHO directed the district to pay for such services until the matter was resolved, retroactive to the filing of the due process complaint notice (Interim IHO

[1] The name of the student's childcare location selected by the parent was identified on the April 2021 IEP (see Parent Ex. B at p. 1).

[2] Although the IHO referred to the April 29, 2021 IEP as an "IESP," this is in error as the student was in preschool at that time. State guidance explains that section 3602-c "pertains only to parental placements in nonpublic elementary and secondary schools. It does not apply to a child who is less than compulsory school age continuing in a preschool program, even if the preschool program is located in the same building as a kindergarten or other elementary grade classrooms. These students would continue to be the responsibility of the district of residence through the CSE" ("Chapter 378 of the Laws of 2007–Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the Individuals with Disabilities Education Act (IDEA) 2004 and New York State (NYS) Education Law Section 3602-c," Attachment 1 at p. 13, VESID Mem. [Sept. 2007], available at http://www.p12.nysed.gov/specialed/publications/policy/nonpublic907.pdf).

Decision at pp. 4, 5). In a decision dated April 29, 2023, the IHO found that the district failed to implement the student's IEP for the 2022-23 school year (IHO Decision at p. 6).

The IHO noted that the district "conceded that it did not provide the services mandated on the [s]tudent's [IEP]" and that the district "did not present a case and provided no documentary or testimonial evidence" (IHO Decision at pp. 3, 5). In her decision, the IHO documented that the student was classified as a preschool student with a disability; that the district's CSE created an April 2021 IEP recommending five hours per week of SEIT services to be implemented beginning on May 3, 2021; that when the student started kindergarten for the 2022-23 school year the district had not provided the student with a provider willing to provide services at the district's standard rates; the parent thereafter located a provider; the student is currently receiving three hours per week of special education teacher support services (SETSS) per week for the 2022-23 school year; that the parent's agency confirmed that it provides the student with five hours per week of SETSS per week and charges $150 per hour for such services; and that a November 2022 quarterly progress report showed that the student made progress from the beginning of the school year (id. at p. 4). The IHO determined that she did not find any of the district's arguments regarding the reasonableness of the parent's actions to be persuasive and held that the parent showed sufficient proof of a contractual relationship for the student's SETSS to support an award of direct payment to the provider (id. at pp. 5-6). The IHO directed the district to directly pay the parent's chosen provider, Children's Resources, for services at the rate of $150 per hour (IHO Decision at p. 6).

IV. Appeal for State-Level Review

The district appeals the IHO's decision and asserts that the IHO erred in finding that the parent sustained her burden on Prong II with respect to the student's unilateral placement. The district briefly recites the facts of the matter, mainly that the CPSE met in April 2021 to create an IEP that recommended five hours of SEIT services per week and that the student attended preschool for the 2021-22 school year. The district indicates that the CSE met again on May 11, 2022 to create an IEP for the student and attaches the May 2022 IEP, a May 26, 2022 prior written notice, and a June 15, 2022 school location letter as exhibits to be considered as additional evidence (see Req. for Rev. Exs. 1-3). The district alleges that the parent unilaterally placed the student in a general education classroom in a nonpublic school for the 2022-23 school year and that the parent contracted for the unilateral provision of home-based SETSS through Children's Resources.

The district acknowledges that it did not defend the provision of a FAPE to the student at the hearing, but that it did object to the parent's request for five hours per week of home-based SETSS through a private agency. The district argues that the IHO erred in finding that the parent sustained her burden of proving the appropriateness of five hours per week of home-based SETSS, especially because the parent "failed to attend any hearing date" and "did not submit any testimonial evidence" to support her burden of proof. The district further argues that the IHO's determination to proceed with the hearing despite the parent's absence was an abuse of discretion.

The district cites to the Order of Pendency, affirming that the student's pendency consisted of five hours per week of SEIT services as of September 6, 2022 (Req. for Rev. at p. 5). The district alleges that the record reflects that the SEIT services provided to the student for preschool were provided to her in the classroom of her nonpublic school, and because the parent unilaterally contracted for home-based SETSS for the student's kindergarten year, the parent had to prove the

appropriateness of home-based SETSS as opposed to in-class SETSS (id. at pp. 5, 8). The district specifically argues that "[t]he sole basis for the IHO's finding for the [p]arent and awarding the [p]arent the requested relief is the following statement: '[t]he [s]tudent is receiving such services through a qualified private provider and is entitled to have the [district] pay her provider for the SETSS services'" and contends that the IHO's finding is conclusory and "unsupported by citation to applicable law." The district further asserts that the parent failed to produce any "programs, goals, objectives, or assessments" or input from the student's SETSS provider or classroom teachers as evidence to allow for a determination of the appropriateness of the SETSS delivered to the student. The district further argues that the parent is not entitled to an order directing the district to fund SETSS unilaterally obtained by the parent for the 2022-23 school year because there is no evidence in the hearing record of a written or enforceable contract between Children's Resources and the parent. The district alleges that the IHO's reliance on the affidavit of the executive director of Children's Resources was in error because the affidavit fails to mention any contractual relationship between Children's Resources and the parent, makes no mention of billing practices, doesn't contain evidence of invoices or payments, and fails to specify a timeline for when the SETSS provider must provide the services. The district further argues that equitable considerations do not support the parent's request for relief because the hearing record lacks any evidence that the parent provided the district with the required 10-business day notice of the parent's intent to obtain unilateral services for the student.

In an answer, the parent asserts that the student's right to pendency for the remainder of the 2022-23 school year renders the case moot and that the district's appeal should be dismissed. The parent also argues that her attorney appeared on her behalf at the hearing and, therefore, her personal appearance was not required. The parent argues that the district's additional evidence should not be considered as it was not entered into evidence during the impartial hearing and that the new arguments the district makes in its request for review were waived as the district failed to raise them before the IHO's decision was rendered. Finally, the parent argues that her request for reimbursement for the student's SETSS should not be analyzed under the Burlington-Carter standard and, therefore, the parent did not bear the burden of proof that the services were appropriate. The parent argues that even though she did not bear the burden of proof on the issue of the unilaterally obtained SETSS sessions, the record demonstrates that the services provided by Children's Resources to the student were appropriate to address the student's unique needs (id. at p. 6).

In a reply, the district asserts that the parent's argument that the district's appeal is moot must be rejected because pendency cases are capable of repetition and the district requests that its additional evidence be considered. The district also attached an additional exhibit, which is a copy of a letter from the parent dated May 1, 2023 (see Reply Ex. 1). The district asserts that, as the responding party, it is not precluded from arguing on appeal that the student's May 2022 IEP, which was not admitted into the hearing record, demonstrates that the parent's unilateral provision of SETSS was not appropriate, nor is the district prevented from arguing that the parent failed to submit a 10-business day notice. The district reasserts its position that the parent bears the burden of proving that the unilateral provision of services was appropriate and that the parent failed to sustain this burden.

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 FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. 386, 399 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 580 U.S. at 404). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations

omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 580 U.S. at 403 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).[3]

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., 694 F.3d at 184-85; T.P., 554 F.3d at 252). 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, 489 F.3d at 111; Cerra, 427 F.3d at 192). "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 at 184-85).

[3] The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 580 U.S. at 402).

VI. Discussion

A. Preliminary Matters - Additional Evidence

The district requests that the following post-hearing exhibits be admitted as additional evidence in support of its appeal: a May 11, 2022 IEP; a May 26, 2022 prior written notice; a June 15, 2022 school location letter; and a May 1, 2023, letter from the parent to the district discussing the student's private placement and services for the 2023-24 school year (Req. for Rev. ¶ 4; Reply ¶ 4; see Req, for Rev. Exs. 1-3; Reply Ex. 1). Notably, these exhibits were not admitted into evidence during the impartial hearing (see, Req. for Rev. ¶ 4, Reply ¶ 4). The parent objects to the admission of these proposed additional exhibits (Answer ¶ 24). [I]n general, documentary evidence not presented at an impartial hearing may be considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]).

Given that the impartial hearing occurred during March 2023, the exhibits related to the May 2022 CSE meeting were all available for the district to have included as evidence. However, in this instance, while the district on appeal argues that it is not challenging any finding related to the district's failure to offer the student a FAPE for the 2022-23 school year, it appears to dispute the parent's allegation that it failed to develop an IEP for the 2022-23 school year and further claims that the parent did not provide it with the requisite 10-business day notice before obtaining private SETSS for the student. In support of these arguments, the district now seeks to admit its proposed additional evidence. A review of the district's May 11, 2022 IEP reveals that the CSE recommended that the student receive three hours per week of SETTS for math and three hours per week of SETSS for English language arts (ELA), or essentially six hours of SETSS per week as special education services for the 2022-23 school year (compare Parent Ex. B at p. 10 with Req. for Rev. Ex. 1 at pp. 9-10). Accordingly, the circumstances here present the rare case where the additional evidence submitted, while available at the time of the hearing, assists in determining whether the district has presented a cognizable claim of error with respect to the IHO's finding that the parent met the burden of establishing the appropriateness of the unilaterally obtained SETSS. Accordingly, I will accept the May 2022 IEP as additional evidence for that limited purpose.

B. Appropriateness of Unilaterally Obtained SETSS

Initially, as neither party has appealed 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, that finding 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]). Accordingly, the remaining issues to be addressed are discussed below. However, it bears mentioning that the district failed to appear at any of the status conferences, the prehearing conference, or the pendency hearing and when the district appeared at the hearing the attorney for the district stated that the district would not "be able to prove right now

that [it] offered providers to the parents at [district] approved rate[s] that were acceptable" (Tr. pp. 2, 8, 14, 17, 21, 25, 32-33 Interim Decision at p. 3).

Next, before discussing the adequacy of the unilaterally obtained services, I note that both parties and the IHO tend to use the terms SEIT services and SETSS interchangeably, and while individuals may provide similar services irrespective of what they are labeled, using these terms as synonyms obscures, rather than clarifies, what special education services might have been appropriate for the student at different points in his education. For instance, SETSS is not defined in the State continuum of special education services (see 8 NYCRR 200.6) and it is not defined in the hearing record in this proceeding. State law defines SEIT services as "an approved program provided by a certified special education teacher . . . , at a site . . . , including but not limited to an approved or licensed prekindergarten or head start program; the child's home; . . . or a child care location" (Educ. Law § 4410[1][k]; 8 NYCRR 200.16[i][3][ii]; see "Special Education Itinerant Services for Preschool Children with Disabilities," Office of Special Educ. Field Advisory [Oct. 2015], available at http://www.p12.nysed.gov/specialed/publications/2015memos/documents/SpecialEducationItinerantServicesforPreschoolChildrenwithDisabilities.pdf; "Approved Preschool Special Education Programs Providing Special Education Itinerant Teacher Services," Office of Special Educ. [June 2011], available at http://www.p12.nysed.gov/specialed/publications/SEITjointmemo.pdf). In addition, SEIT services are "for the purpose of providing specialized individual or group instruction and/or indirect services to preschool students with disabilities" (8 NYCRR 200.16[i][3][ii] [emphasis added]). In this matter, the IHO ordered continuing the student's SEIT services through pendency during the 2019-20 (first grade) school year (Corrected Interim Order on Pendency at p. 10). In the due process complaint notice, the parent requested funding for five hours per week for "the student's special education teacher provider/agency" (Parent Ex. A at p. 2). The April 2021 CPSE IEP recommended five hours per week of SEIT services (Parent Ex. B). The May 2021 IEP recommended six periods per week of SETSS (Req. for Rev. Ex. 1 at pp. 9-10).

As has been noted by SROs in previous cases, in a case such as this where SEIT services are the main form of relief sought by the parent, but by regulation such services are typically not allowed for school-aged students whereas SETSS could be permissibly recommended for the student, 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.[4]

The next issue to decide is whether the IHO correctly found that that SETSS the parent obtained for the student during the 2022-23 school year were appropriate to address the student's needs. The IHO found that the student did not receive the services as recommended for her in the April 2021 preschool IEP (IHO Decision at p. 6). The IHO stated that "[t]he [s]tudent is receiving

[4] In order to maintain consistency, in this decision, although it is not entirely clear from the hearing record, the analysis will describe the services of a special education teacher for the student during the 2022-23 school year as SETSS.

such services through a qualified private provider and is entitled to have the [district] pay her provider for the SETSS services" (id.).

Prior to reaching the substance of the parties' arguments, some consideration must be given to the appropriate legal standard to be applied. In this matter, the student has been parentally placed in a nonpublic school and the parent does not seek tuition reimbursement for the cost of the student's attendance there. The parent alleged that she unilaterally obtained private services from Children's Resources for the student and then commenced due process to obtain remuneration for the services provided by Children's Resources. Accordingly, the issue in this matter is whether the SETSS obtained by the parent constituted appropriate unilaterally obtained services for the student such that the cost is reimbursable to the parent or, alternatively, should be directly paid by the district to Children's Resources upon proof that the parent has paid for the services or is legally obligated to pay but does not have adequate funds to do so. "Parents who are dissatisfied with their child's education can unilaterally change their child's placement . . . and can, for example, pay for private services, including private schooling. They do so, however, at their own financial risk. They can obtain retroactive reimbursement from the school district after the IEP dispute is resolved, if they satisfy a three-part test that has come to be known as the Burlington-Carter test" (Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 526 [2d Cir. 2020] [internal quotations and citations omitted], cert. denied sub nom., Paulino v. NYC Dep't of Educ., 2021 WL 78218 [U.S. Jan. 11, 2021], reh'g denied sub nom., De Paulino v. NYC Dep't of Educ., 2021 WL 850719 [U.S. Mar. 8, 2021]; see Carter, 510 U.S. at 14 [finding that the "Parents' failure to select a program known to be approved by the State in favor of an unapproved option is not itself a bar to reimbursement."]). Accordingly, the parent's request for district funding of the privately obtained SETSS at issue here must be assessed under this framework.

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 (id. at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 207 [1982]). 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).

Although the student's needs are not directly in dispute, a discussion thereof provides context for the discussion of the remaining issue; namely, whether the IHO correctly held that the SETSS sessions the parent unilaterally obtained for the student through Children's Resources were appropriate to address the student's needs. Additionally, although the hearing record is limited as to the student's needs, because they are not in dispute and the district conceded its burden of proving it offered the student a FAPE, the hearing record as supplemented with the additional exhibits submitted by the district, provides a sufficient explanation of the student's academic and social needs to determine whether the educational program consisting of the services awarded by the IHO was sufficiently appropriate.

Initially, the hearing record does not include any formal testing or criteria based evaluative data about the student (see Parent Exs. A-E, SRO Exs. 1-4, and Tr. pp. 1- 79). The April 2021 CPSE IEP included informal anecdotal information about the student's present levels of academic ability, social development, and physical development when she was an almost four-year-old preschool student with a disability (Parent Ex. B at pp. 3-4). Although the hearing record includes a November 2022 quarterly progress report from the Children's Circle, neither the report nor the rest of the hearing record include any assessment information that shows how the student's needs were identified, what skills the student needed to address either in school or at home, or whether

home services were necessary for the student (Parent Ex. C at p. 6; see Parent Exs. A-E and Tr. pp. 1- 79).[5]

A review of the April 2021 IEP indicates that the student was a happy child who enjoyed coloring, pretend play with dolls and playdoh, and displayed a strong interest in playing with peers (Parent Ex. B at p. 3). The IEP indicated that student's difficulty with expressive and receptive language affected her social skills such that she was unable to take turns in play, share her possessions and sustain play with a friend (id.). According to the IEP, the student needed to be encouraged and redirected to focus and participate in structured activities (id.). In addition, she needed prompting to follow directions (id.). The IEP noted the parent's concerns regarding the student's overall speech development (id.).

Socially, the April 2021 IEP indicated the student had "difficulty identifying and expressing her emotions" and instead she would cry and required redirection (Parent Ex. B at p. 3). The student was, at times, self-directed and she tended to tantrum when things did not go as she had anticipated (id.). She required prompting and redirection to modify and adjust her behavior (id.). The IEP noted that the student presented with "overall limited social skills" and played mostly on her own (id.). The student required prompting and modeling to initiate play, take turns, share, and follow directions (id. at pp. 3-4).

Physically, the April 2021 IEP indicated the student had an awkward gait, was clumsy, exhibited poor coordination, and bumped into things (Parent Ex. B at p. 4). The student also exhibited sensory integration difficulties and a weak and poor grasp (id.). The student needed "hand over hand assistance to snap/unsnap blocks during play, hold utensils, hold/cut with scissors, and color" (id. at p. 4).

The April 2021 IEP indicated the student was able to participate in age-appropriate activities (Parent Ex. B at p. 5). The IEP also noted that the resources needed to address the student's management needs included the provision of models, prompting, cues, and repetition of directions (id.).

Turning to the May 2022 IEP, it demonstrates that the district, which has challenged the IHO's finding that the unilaterally obtained five sessions of SETSS was appropriate to remedy the district's denial of a FAPE to the student for the 2022-23 school year, ultimately recommended six sessions of SETSS as an appropriate program for the student for the 2022-23. Specifically, at the time the May 2022 IEP was developed, the student was attending a full-day pre-kindergarten program at a private school where she received five hours per week of SEIT services (SRO Ex. 1 at p. 1). According to the IEP, the student's SEIT provider reported that the student could feed herself, was toilet trained, and sometimes needed help with zipping (id.). The student learned best

[5] Testimony by the executive director of Children's Resources indicated that she was the executive director of two separate entities that provided special education services, but that both entities used the "same app" (Tr. p. 51). The name of the agency was Children's Circle but the agency had a few different departments (Tr. p. 49). The entities noted were Children's Circle, which provided early intervention and SEIT services, and Children's Resources which provided SETSS (Tr. p. 50). Since the executive director identified herself as the executive director of Children's Resources in her affidavit she will be referred to as such herein (see Parent Ex. D).

through visual and auditory modalities, a hands-on approach, and repetition (id.). The student required simplified instructions and visual prompting to process information (id.).

The May 2022 IEP referenced a SEIT progress report dated February 1, 2022, which noted that the student began receiving her mandated five hours of SEIT services in her classroom at the private school in September 2020 (Req. for Rev. Ex. 1 at p. 1). As recorded in the IEP, the SEIT progress report indicated that the student continued to demonstrate noticeable progress, but she required "a lot of support in preacademic as well as social-emotional developments" (id.). Additional information provided by the student's general education teacher indicated the student engaged in parallel play and that she liked her friends, but she needed assistance to begin and follow through with play (id. at p. 1-2). Socially, the May 2022 IEP indicated the student needed support with verbally communicating her needs and wants (id. at p. 2). The student benefited from modeling, role playing, reinforcement, and opportunities to practice (id. at pp. 2-3). With regard to management needs, the May 2022 IEP indicated the student learned best with small group instruction, specifically in ELA and math (id. at p. 3). Notably, the student needed redirection and visual/verbal prompts and cues to help her maintain focus and stay on task, tasks broken down into small components to simplify learning, reinforcement and review of new material, models, repetition of instructions and directions, and positive reinforcement (id.). The May 2022 IEP noted that the student benefited from the support of SETSS in ELA and math (id.).

The May 2022 CSE recommended that the student receive six periods per week of SETSS in a general education classroom (Req. for Rev. Ex. 1 at pp. 2, 9-10). In addition, the IEP noted that it would be beneficial for the student to receive speech-language therapy to help improve her expressive language skills; however, the IEP did not include a recommendation for speech-language therapy or any other related services (id.).[6]

The hearing record included a November 10, 2022 quarterly progress report (SETSS progress report) from Children's Circle, the entity that provided SETSS to the student during the 2022-23 school year (Parent Ex. C). The SETSS progress report indicated the student was in kindergarten, that she received five one-hour sessions of SETSS per week, and that the SETSS services occurred at home (id. at pp. 1, 6). With regard to interventions, the SETSS progress report stated, "[student] will have her homework presented at the session. She was provided with worksheets to enhance and reinforce her learnings at her school" (id. at p. 6). With regard to the student's present levels of performance in November 2022, the SETSS progress report, indicated that the student struggled with comprehension questions related to a story that was read (id. at p. 1). In addition, the student did not write her name clearly (id.). The rest of the six-page progress report briefly indicated what the student could do in math, reading, writing, language, social/emotional, and interpersonal areas (id. at pp. 1, 4-6). Overall, the progress report included approximately 73 goals, all to be achieved "within a year," many of which appeared to be beyond developmental expectations for a kindergarten student, let alone a student with the needs noted in the April 2021 and May 2022 IEPs (see Parent Exs. B at pp. 1-; C; see SRO Ex. 1).

[6] According to the IEP, the parent agreed and stated that she would reach out to the CPSE about initiating speech-language services (Req. for Rev. Ex. 1 at p. 2).

The provision of SETSS services at home appears to contradict the recommendations found in the April 2021 and May 2022 IEPs (compare Parent Ex. C at p. 6 and Parent Ex. B at pp. 1-4; SRO Ex. 1 at pp. 1-3). However, at the time the parent made her decision to unilaterally obtain services for the student for the 2022-23 school year, there is no indication that the district was actually offering or attempting to implement the programs recommended in the April 2021 or May 2022 IEPs. Rather, the district conceded that it did not offer the student a FAPE for the 2022-23 school year and the parent was forced to obtain services on her own. It is well settled that parents need not show that their unilateral placement provides every service necessary to maximize the student's potential (M.H., 685 F.3d at 252; Gagliardo, 489 F.3d at 112; Frank G., 459 F.3d at 365; Stevens v. New York City Dep't of Educ., 2010 WL 1005165, at *9 [S.D.N.Y. Mar. 18, 2010]).

Based on the above, given the district's recommendation consisting of six sessions of SETSS as an appropriate special education program designed to meet the student's needs for the 2022-23 school year, the district's argument on appeal that the IHO erred by finding five sessions of SETSS to constitute a sufficiently appropriate unilaterally obtained service for the student for the 2022-23 school year is unavailing. The fact that the services provided were home-based rather than school-based does not, in and of itself, make them inappropriate.

The district further argues that the parent is not entitled to payment for the SETSS services she unilaterally obtained for the student for the 2022-23 school year because the hearing record fails to establish an enforceable contract between the parent and Children's Resources. The district contends that the parent effectively has conceded that no contract exists and the hearing record also fails to contain any other evidence of a financial obligation of the parent to Children's Resources. While the IHO noted that "[t]he most compelling of [the district's] arguments [at the impartial hearing] center[ed] on the [p]arent's obligation to demonstrate a contractual relationship or other obligation to pay for the services that are the basis of the [p]arent's reimbursement claim" she ultimately found that the executive director's affidavit testimony "minimally establishe[d] that a contractual obligation [was] in place for the [s]tudent's SETSS and appropriately supports the [p]arent's claim for direct payment to the [p]rovider" (IHO Decision at p. 6).

The executive director's March 29, 2023 affidavit indicated that Children's Resources had been providing five 60-minute periods per week of SETSS to the student since September 15, 2022 (Parent Ex. D ¶ 3). According to the affidavit, the executive director anticipated Children's Resources' delivery of the service would continue through the end of the 2022-23 school year (id.). The affidavit indicated that, as of March 2023, there had been weeks in the past and there might be weeks in the future when more or less than five periods of SETSS per week were or would be provided due to scheduling conflicts that could arise from time to time (id.). The affidavit also indicated the agency charged $150 per hour for SETSS (id.).

The executive director testified that all Children's Resources' SETSS providers wrote progress reports every three months (Tr. pp. 48, 51, 56-57). The executive director testified that there were people in her agency who maintained service records, oversaw compliance, and made sure everything was done according to policies and procedures, and monitored quality assurance, but that was not her direct role and that she preferred not to answer questions about compliance (Tr. pp. 65-66). Although the director testified that Children's Resources maintained records that reflected specific hours when students received services, the records were not part of the hearing record (Tr. pp. 67-68). With regard to billing, the executive director noted Children's Resources

had a head of billing (Tr. p. 68). The executive director knew the company charged $150 per hour for sessions provided to the student during the 2022-23 school year, as well as for all SETSS students, but she did not know about the details of billing or how invoices were prepared (Tr. pp. 69-70, 73). The executive director had no familiarity with a contract for the student for the 2022-23 school year (Tr. p. 71).

The IHO noted that the district "raised several concerns challenging the reasonableness of the [p]arent's actions" and that the IHO "did not find any of the [district's] arguments to be persuasive (IHO Decision at p. 6). Ultimately, the IHO ordered the district to "directly pay [the parent's] provider for [] services a[t] the rate of $150/hr" (IHO Decision at p. 6). Due to the limited information available as to when services were delivered to the student, although the district's arguments do not provide a sufficient basis to overturn the IHO's findings, there is sufficient reason to modify the award slightly to ensure payment is only made for services provided by a teacher who is appropriately certified. Accordingly, the IHO's order will be modified to direct that the district fund, upon presentation of proof of delivery of services, instruction provided to the student by a special education teacher during the 2022-23 school year at no more than five hours per week.

VII. Conclusion

In consideration of the above, the IHO's finding that five hours per week of SETSS was an appropriate educational program for the student for the 2022-23 school year is upheld and the ordered relief is modified as indicated above. I have considered the parties' remaining contentions and find that I need not address them in light of my determinations herein.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision dated April 29, 2023 is modified by changing the awarded services so that the district is directed to fund the costs of up to five periods per week of SETSS provided to the student during the 2022-23 school year at the requested rate of $150 per hour, upon presentation of proof of delivery of services by a certified special education teacher.

Dated: **Albany, New York**
July 5, 2023

STEVEN KROLAK
STATE REVIEW OFFICER