



The University of the State of New York

The State Education Department

State Review Officer

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No. 23-144

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

Appearances:

Liz Vladeck, General Counsel, attorneys for respondent, by Sarah M. Pourhosseini, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied, in part, her request to be reimbursed for, or for respondent (the district) to directly fund, special education teacher support services (SETSS) and occupational therapy (OT) services at the requested hourly rates for the 2022-23 school year and which wholly denied her request for compensatory educational services. The district cross-appeals from the IHO's determination ordering any and all relief to the parent. The appeal must be sustained in part, the cross-appeal must be dismissed, and as explained below, the matter must be remanded for further administrative proceedings.

II. Overview—Administrative Procedures

When a student who resides in New York is eligible for special education services and attends a nonpublic school, Article 73 of the New York State Education Law allows for the creation of an individualized education services program (IESP) under the State's so-called "dual enrollment" statute (see Educ. Law §3602-c). The task of creating an IESP is assigned to the same committee that designs educational programming for students with disabilities under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482), namely a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law §§ 3602-c; 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 related to IESPs, State law provides that "[r]eview of the recommendation of the committee on special education may be obtained by the parent or person in parental relation of the pupil pursuant to the provisions of [Education Law § 4404]," which effectuates the due process provisions called for by the IDEA (Educ. Law § 3602-c[2][b][1]). Incorporated among the procedural protections of the IDEA and the analogous State law provisions 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[a]). 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 in this case has continuously attended a religious, nonpublic school; the parent contacted the district in January 2022, during the 2021-22 school year when the student was in fourth grade, seeking a reevaluation of the student (see Dist. Ex. 4 at pp. 5-6; Parent Exs. B at p. 1; I at p. 1). Evidence in the hearing record reflects that the district had not evaluated the student since December 2018, prior to the development of the student's January 2019 IESP (see Parent Ex. Q ¶ 2; see also Parent Ex. F at pp. 1-2). In mid-January 2022, the district scheduled an appointment for March 15, 2022 to reevaluate the student, and by early February 2022, the parent—through her advocate—sent emails to the district strongly suggesting that the district convene a CSE meeting prior to the completion of the student's reevaluation and prior to an upcoming school holiday to develop an "interim IESP" for the student (Parent Ex. F at pp. 1-2; see Dist. Ex. 4 at pp. 4-6). The parent's advocate indicated that they would "forward all necessary progress reports and [she further indicated] the parent and teacher w[ould] be there to discuss [the student's] history and current issues" (Parent Ex. F at pp. 1-2). On February 3, 2022, district staff contacted the parent and "advised her that [the district] w[ould] update [the student's] IESP" at an annual review meeting, but the student's "services would remain the same," as the student was scheduled for a "mandated three year evaluation in March as well as updated testing" (Dist. Ex. 4 at p. 4).

Consistent with the parent's request, a CSE convened, on February 9, 2022, to develop an IESP for the student with a projected implementation date of February 23, 2022 and a projected annual review date of February 9, 2023 (see Parent Ex. B at pp. 1, 12). Finding that the student remained eligible for special education as a student with a speech or language impairment, the February 2022 CSE recommended that the student receive three periods per week of SETSS in a group, two 30-minute sessions per week of individual speech-language therapy, and two 30-minute sessions per week of individual OT (id. at pp. 1, 9).¹

Following the February 2022 CSE meeting, the parent missed the March 15, 2022 appointment scheduled to reevaluate the student (see Dist. Ex. 4 at pp. 2-3). At that time, a district school psychologist telephoned the parent, who, after expressing some confusion about the "testing appointment," agreed to reschedule the student's reevaluation appointment for May 3, 2022 (id. at pp. 2-3).

Thereafter, in an email dated April 6, 2022, the parent—through her advocate—forwarded copies of a SETSS progress report and a teacher report to district staff, which included the same district school psychologist who had been in contact with the parent when she did not appear for the student's March 15, 2022 reevaluation appointment (compare Parent Ex. G, with Dist. Ex. 4 at pp. 2-3; see generally Parent Exs. I-J). In the email, the parent's advocate noted that she was forwarding the "SETSS progress report and teacher report to set up a meeting" for the student, and she wished to be included "in all correspondence in scheduling" the IESP meeting (Parent Ex. G).²

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

² The evidence reflects that the district received the SETSS progress report, dated March 1, 2022, and the teacher report, dated March 2, 2022, because the district school psychologist appeared to have eventually uploaded the

The evidence reflects that the parent missed the May 3, 2022 appointment scheduled to reevaluate the student (see Dist. Ex. 4 at p. 2). Reaching out to the parent, the district school psychologist who had previously been in contact with the parent "[i]nformed [her] that she c[ould] request a reevaluation in the future," when the parent had more availability (id.). The evidence further reflects that the parent emailed the district on May 9, 2022, indicating that she had been out of town and had "forgot[ten] to call to cancel the second scheduled testing appointment" (id.).

In an email to the district school psychologist dated June 21, 2022, the parent—through her advocate—questioned how the "February IESP meeting" occurred without the "participation of the school [or] teacher and a SETSS progress report," and further noted that "[t]his was a request for an increase with explicit reports of [the student's] poor classroom functioning" (Parent Ex. H at pp. 2-3). In addition, the email noted that, "[d]uring the [ti]me of the first scheduled IESP meeting," the family had experienced a death and were in the midst of that process (id. at p. 2). In the email, the parent apologized for not making the district aware of those events (id.). In closing, the parent's advocate indicated "[a]ny additional information or evidence of parent correspondence would be very helpful" (id. at p. 3).

On June 21, 2022, the parent emailed the district seeking to reschedule the student's reevaluation appointment; the district school psychologist responded to the parent—who then indicated that she would not be available during the summer—and the school psychologist advised her to contact the district in September to arrange a reevaluation appointment (see Dist. Ex. 4 at p. 1).

In an email dated August 15, 2022 to district staff, which included the district school psychologist, the parent—through her advocate—sought information about the "student's request for reconvene" (Parent Ex. H at p. 2). The email indicated that the parent "never participated in a Feb[ruary] 2022 IESP," and thus, "in effect, no IESP meeting took place" (id.). In addition, the email noted that the student's "last IESP review took place in January 2019," and the parent's advocate requested that district staff "arrange for a summer team to review the student's programming" (id.). In response, district staff emailed the parent's advocate on August 15, 2022, indicating that a "February 2022 IESP" was seen in the student's records, but that a "team w[ould] review this request" (id. at p. 1).

On August 17, 2022, the parent executed a contract with Benchmark Student Services (Benchmark) to provide the student with SETSS at a rate of \$175.00 per hour for the 2022-23 school year (see Parent Ex. D at pp. 1-2).

Evidence reflects that the district sent the parent a copy of the student's IESP via email on August 22, 2022 (see Dist. Ex. 5 at p. 3). On September 14, 2022, the district school psychologist

documents into the district's computer system ("SEGIS events log") on June 22, 2022 (Dist. Ex. 4 at p. 2; see Parent Exs. I at pp. 1, 5; J at pp. 1, 6). The SETSS progress report reflects that the student was receiving SETSS from an agency, but not from Benchmark Student Services, which was the agency the parent eventually contracted with in August 2022 to provide SETSS and OT to the student during the 2022-23 school year (compare Parent Ex. I at p. 1, with Parent Ex. D at p. 1, and Parent Ex. E at p. 1). Based on this evidence, as of March 2022, the student was receiving three hours per week of SETSS to address her needs in mathematics (see Parent Ex. J at p. 6; see generally Parent Ex. I).

emailed the parent to inquire about the student's reevaluation, and the parent eventually agreed to an appointment scheduled for November 17, 2022 (id.).

In a letter to the district dated August 30, 2022, the parent indicated that a CSE last met for the student to develop an IESP on January 24, 2019, and that, since that time, the district had failed to implement the mandated services (see Parent Ex. C at p. 1). The parent noted that the January 2019 IESP included the following recommendations: three periods per week of SETSS in a group, two 30-minute sessions per week of individual speech-language therapy, and two 30-minute sessions per week of OT (id.). The parent further noted that if the district failed to provide the student with her recommended services, she would be "forced to contract with a private agency for the provision of those services" and pursue reimbursement for the costs of those services (id.).

On September 6, 2022, the parent executed a contract with Benchmark to provide the student with OT services at a rate of \$150.00 per 30-minute session for the 2022-23 school year starting on the submission of a due process complaint notice to the district (see Parent Ex. E at pp. 1-2).

On November 17, 2022, the district school psychologist who had been in contact with the parent since approximately March 2022 conducted the student's reevaluation and completed a psychoeducational evaluation of the student (November 2022 psychoeducational evaluation) (compare Dist. Ex. 4 at pp. 1-3, and Dist. Ex. 5 at p. 3, with Dist. Ex. 3 at p. 1). An administration of the Wechsler Intelligence Scale for Children, Fifth Edition (WISC-V) to the student revealed standard scores within the average range on all indices and subtests administered and a full-scale intelligence quotient (IQ) of 101 (average range) (see Dist. Ex. 3 at pp. 2-4). On the Woodcock-Johnson Tests of Achievement, Fourth Edition (WJ ACH IV), the student's standard scores fell within the low average range on letter-word identification and math facts fluency subtests, but otherwise fell within the average range on the remaining subtests or clusters (id. at pp. 3-5). The school psychologist indicated that, based on her cognitive testing results, the student demonstrated strengths in her "ability to solve nonverbal patterns and her weakest ability was found in recreating picture designs using blocks" (id. at p. 5). Based on the student's achievement testing results, the school psychologist found that the student demonstrated low average skills in "decoding and solving quick math facts" (id.).

The district events log indicated that on or about December 13, 2022, the district school psychologist requested progress reports for the student and sent out a "Notice of IEP Meeting: Reevaluation/Annual Review" related to this student (Dist. Ex. 5 at p. 2).

On January 4, 2023, a CSE convened to conduct the student's annual review and developed an IESP with a projected implementation date of January 18, 2023 and a projected annual review date of January 4, 2024 (see Parent Ex. K at pp. 1, 10). Finding that the student remained eligible for special education as a student with a speech or language impairment, the January 2023 CSE recommended that the student receive related services, consisting of two 30-minute sessions per week of individual speech-language therapy, two 30-minute sessions per week of individual OT, and one 30-minute session per week of individual counseling services (id. at p. 7). In a prior written notice to the parent dated January 9, 2023, the district summarized the special education recommendations in the January 2023 IESP and identified the student's November 2022

psychoeducational evaluation as the assessment relied upon by the CSE in its decision-making (see Parent Ex. L at pp. 1-2).³

A. Due Process Complaint Notice

By due process complaint notice dated February 17, 2023, the parent alleged that the district failed to offer the student equitable services pursuant to section 3602-c, and thus, failed to offer the student a free appropriate public education (FAPE) for the 2022-23 school year (see Parent Ex. A at p. 1). Generally, the parent asserted that the district failed to offer the student an "appropriate program of special education services and supports to address [her] documented disabilities" and failed to "implement any of the mandated services" (*id.*). More specifically, the parent alleged that the district failed to implement the services in the student's IESP in place at the start of the 2022-23 school year—the February 2022 IESP, which included recommendations for SETSS, OT, and speech-language therapy—and thereby failed to provide the student with equitable services and a FAPE (*id.* at pp. 1-2).

Next, the parent asserted that the district's psychoeducational evaluation failed to fully assess the student in all areas of suspected disabilities and "did not identify the source and reason of the student's deficits" (Parent Ex. A at p. 2). In addition, the parent alleged that the district failed to conduct a classroom observation of the student and failed to evaluate the student in an "environment that was most similar to a classroom setting, with all its natural distractions, and rested on only one intelligence score obtained during 1:1 testing in a distraction free closed door room" (*id.*). Therefore, the parent disagreed with the district's evaluation and requested an independent educational evaluation (IEE) at public expense (*id.*).

With respect to the January 2023 CSE meeting, the parent asserted that the district provided her with "minimal notice," which prevented her from preparing for the meeting and "meaningfully participat[ing]" at the CSE meeting (Parent Ex. A at p. 2). The parent also asserted that the district failed to "confirm" whether she received notice of the January 2023 CSE meeting, and "surpris[ed]" her with a sudden telephone call to join the CSE meeting (*id.*). In addition, the parent alleged that the district failed to provide her with a copy of the procedural safeguards or "properly outline her parental rights" (*id.*). The parent also alleged that the January 2023 CSE failed to "solicit any teacher report, SETSS reports, or related services reports"; the student's teachers and service providers were not invited to the CSE meeting, which limited the evaluative information available to the CSE; the CSE was not properly composed; and the CSE ignored the parent's concerns (*id.*).

With regard to the January 2023 IESP, the parent contended that the CSE improperly discontinued the student's SETSS and "only added" counseling services for the student (Parent Ex. A at p. 2). The parent also contended that she and the student's school staff "had previously requested increases in SETSS services, as the student d[id] not function in the classroom and [wa]s not making headway towards her academic goals" (*id.*). However, according to the parent, the

³ Although the January 9, 2023 prior written notice identified December 1, 2022, as the date of the psychoeducational evaluation of the student, the evaluation report itself reflects an evaluation date of November 17, 2022 (compare Parent Ex. L at p. 1, with Dist. Ex. 3 at p. 1). For the sake of clarity, the psychoeducational evaluation will be referred to as the November 2022 psychoeducational evaluation within this decision.

CSE's failure to consider "complete data and input, which would surely [have] support[ed] an increase in SETSS," resulted in the January 2023 CSE removing the service altogether (*id.*). As a result, the parent asserted that the January 2023 IESP failed to address the student's deficits and did not include consideration of "what all involved parties kn[ew]—that [the student] need[ed] more help and support, not less" (*id.*).

In addition, notwithstanding the recommendations in the January 2023 IESP, the parent indicated that the district failed to implement the mandated services, and therefore, the parent was forced to locate and secure providers on her own (*see* Parent Ex. A at p. 2). The parent further indicated that she "exerted extensive efforts to find SETSS and [r]elated [s]ervice providers" that would accept the district's rates, but was unable to do so (*id.* at pp. 2-3). Therefore, the parent implemented the student's services through an agency at "enhanced rates" (*id.* at p. 3).

As relief, the parent initially sought an order directing the district to provide the student with pendency services based on the last-agreed upon IESP, dated January 2019: "SETSS [three] periods group," two 30-minute sessions of individual speech-language therapy," and two 30-minute sessions of individual OT (Parent Ex. A at p. 3). In addition, the parent requested an order directing the district to provide the student with six periods per week of SETSS for the entirety of the 2022-23 school year, an order directing the district to implement the student's SETSS and related services at enhanced rates, and an order directing the district to provide a bank of compensatory educational services for services not provided during the 2022-23 school year (*id.*).

B. Impartial Hearing Officer Decision

On March 23, 2023, the parties appeared before an IHO with the Office of Administrative Trials and Hearings (OATH) for a prehearing conference (*see* Mar. 23, 2023 Tr. pp. 1, 5; IHO Ex. I).⁴ At the prehearing conference, the parent's advocate noted that, for pendency, the student's services should be based on the February 2022 IESP, as the "last implemented IESP," rather than the IESP referred to in the due process complaint notice (Mar. 23, 2023 Tr. pp. 6-7).⁵ She further indicated that the parent disagreed with the district's decision to remove SETSS from the student's program and sought a program of services consisting of six periods per week of SETSS (*see* Mar. 23, 2023 Tr. pp. 8-9).⁶

⁴ The transcripts from the impartial hearing in this matter were not consecutively paginated throughout the impartial hearing; for clarity, transcript citations in this decision will refer to the date of the impartial hearing and the page number, such as "Mar. 23, 2023 Tr. p. 1."

⁵ Despite this assertion at the impartial hearing, the administrative hearing record on appeal includes a fully executed pendency implementation form, which indicates that the parties agreed that the January 2019 IESP formed the basis for pendency services and consisted of the following: three periods per week of SETSS in a group, two 30-minute sessions per week of individual speech-language therapy, and two 30-minute sessions per week of individual OT (*see* Pendency Implementation Form at pp. 1-2). The pendency implementation form did not include, however, any information concerning the implementation of the student's pendency services, such as whether the district would deliver the services or whether the district would simply fund a privately obtained provider (either directly to the provider or as reimbursement or as both) (*id.* at p. 1).

⁶ According to the administrative hearing record submitted on appeal, the IHO held two additional "status conferences" on April 4, 2023, and April 19, 2023, with the parties, but both conferences were held "off the

On April 27, 2023, the impartial hearing resumed (see Apr. 27, 2023 Tr. p. 1). As the IHO questioned the parties about the case, and more specifically, about the relief sought by the parent, the parent withdrew her request for speech-language therapy services because the district had already implemented those services (see Apr. 27, 2023 Tr. p. 14). In addition, the district representative stated that the district did not object to the parent's request for a "bank of 20 hours" for counseling sessions (id.). The district representative further acknowledged that the student was entitled to receive three periods per week of SETSS under the February 2022 IESP, up until the new IESP was developed in January 2023 (see Apr. 27, 2023 Tr. p. 15). The district representative continued to object, however, to the parent's request for six periods per week of SETSS (id.). The IHO directed the parent's advocate to prepare a statement regarding the bank of compensatory educational services the parent sought for SETSS, which the advocate agreed to do, and then the parent's advocate clarified that the student had received three periods per week of SETSS pursuant to pendency for "most of the school year" and that the student had also received all of the services she was entitled to receive under the February 2022 IESP (Apr. 27, 2023 Tr. pp. 15-16). At that point, the IHO turned to each party's proffered documentary evidence, opening statements, and the presentation of testimonial evidence (Apr. 27, 2023 Tr. pp. 16-114).

When the impartial hearing resumed on May 17, 2023, the parent finished the presentation of her case-in-chief, each party gave a closing statement, and the impartial hearing concluded (see May 17, 2023 Tr. pp. 7-83).⁷

In a decision dated May 31, 2023, the IHO concluded that although the district sustained its burden to establish that the February 2022 IESP and the January 2023 IESP both offered the student a FAPE, the evidence demonstrated that the district failed to implement both IESPs, which denied the student a FAPE for the 2022-23 school year (see IHO Decision at pp. 1-4). The IHO also found that the student was entitled to receive the services recommended in the February 2022 and January 2023 IESPs, and the parent had located providers to implement the services in the IESPs "at an enhanced rate" (id. at p. 4). However, the IHO noted that the parent did not "propose a rate for the speech-language therapy or counseling" services, therefore, the IHO found that \$150.00 was a "reasonable" rate (id.).

As relief, the IHO ordered the district to fund the following services from the start of the 2022-23 school year through January 18, 2023: three periods per week of SETSS delivered by a provider selected by the parent at a rate up to \$175.00 per hour, two 30-minute sessions per week of individual speech-language therapy delivered by a provider selected by the parent at a rate up to \$150.00 per hour, and two 30-minute sessions per week of individual OT delivered by a provider selected by the parent at a rate up to \$150.00 per hour (see IHO Decision at p. 4). The IHO also ordered the district to fund the following from January 18, 2023 through the end of the 2022-23

record" and without providing hearing transcripts or summaries of these conferences (see Admin. Hr'g Ex. 6). As a reminder to the IHO, State regulations require the IHO to enter either a "transcript or a written summary" of any prehearing conference into the hearing record (8 NYCRR 200.5[j][3][xi]).

⁷ For reasons unexplained, the IHO entered copies of the April 2023 and May 2023 hearing transcripts into the hearing record as evidence, marked as IHO exhibits "II" and "III" respectively (IHO Exs. II-III); however, for consistency citations to the transcripts will be made by date as noted above. Additionally, given that the hearing record already includes copies of the transcripts, it was unnecessary to enter the same transcripts into evidence as exhibits.

school year: two 30-minute sessions per week of individual speech-language therapy delivered by a provider selected by the parent at a rate up to \$150.00 per hour, two 30-minute sessions per week of individual OT delivered by a provider selected by the parent at a rate up to \$150.00 per hour, and one 30-minute session per week of individual counseling services delivered by a provider selected by the parent at a rate up to \$150.00 per hour (id. at pp. 4-5). In addition, the IHO ordered the parent to be reimbursed within 30 days upon receipt of proof of payment for such services, or to pay the providers directly within 30 days upon receipt of invoices for services rendered (id. at p. 5). The IHO indicated that any services ordered therein must be provided to the student by June 30, 2024, or "any remaining services shall expire" (id.). Finally, the IHO denied with prejudice the parent's request for compensatory educational services consisting of six periods per week of SETSS for the 2022-23 school year (id.).

IV. Appeal for State-Level Review

The parent appeals, arguing that the IHO erred by failing to address the procedural inadequacies surrounding the development of the February 2022 IESP, such as the absence of any new evaluations or information about the student, the failure to solicit any reports or invite any of the student's teachers or providers to the CSE meeting, the predetermination of the student's program recommendations prior to the CSE meeting, and the parent's inability to meaningfully participate at the CSE meeting due to the lack of prior notice. The parent argues that the IHO improperly limited her review to the January 2023 IESP, and thus, failed to address or analyze the start of the 2022-23 school year. Next, the parent argues that the November 2022 psychoeducational evaluation was insufficient, and although not specifically required by State regulations, the district failed to conduct a classroom observation as part of the student's reevaluation. Relatedly, the parent contends that the district failed to obtain any classroom-based observation data, pursuant to State regulations. The parent further argues that the district failed to administer any formal assessments of the student's executive functioning.

Next, the parent argues that, as set forth in a prior written notice, the January 2023 CSE "only considered the [November 2022] psychoeducational assessment," and "did not review any other tests or materials," notwithstanding that the parent had "shared progress reports with the CSE in April 2022," including a February 2022 teacher report and a March 2022 SETSS progress report. As a result, the January 2023 CSE did not have an accurate view of the student's needs, which resulted in "recommendations [that] were deeply flawed." The parent contends that, if the January 2023 CSE did not have sufficient evaluative information, the CSE should have invited those individuals who worked with the student and who had knowledge of her present levels of performance and needs to the meeting. Additionally, the parent asserts that the January 2023 CSE failed to include either a regular education teacher or a special education teacher of the student, per State regulations, and thus, the CSE was not properly composed.

Next, the parent argues that the IHO erred by ignoring evidence in the hearing record presented by the parent, which reflected the student's needs and deficits in all academic and social/emotional domains and which reflected information from a current provider of the student with respect to the student's delays in reading, writing, mathematics, and other skills areas. The parent contends that she also presented evidence, which the IHO ignored, in support of her request for six periods per week of individual SETSS for the student. According to the parent, all of this information should have been before the January 2023 CSE.

Finally, the parent asserts that the IHO erred by reducing the rate for the parent's contracted OT services without any basis in the hearing record, and moreover, the IHO's order directing the district to fund the student's speech-language therapy and counseling services at a rate of \$150.00 per hour was not based on any evidence in the hearing record. The parent contends that the IHO erred by relying on judicial notice to assign hourly rates for these services.

As relief, the parent seeks findings that the February 2022 and January 2023 IESPs were not appropriate to meet the student's needs, and the student was entitled to receive six periods per week of SETSS for the 2022-23 school year. The parent also seeks an order directing the district to fund the SETSS and OT services obtained for the student at the contracted rates, and to order the district to provide a bank of SETSS services to compensate the student for the six hours of SETSS the student should have received during the 2022-23 school year. Finally, the parent requests that the IHO's decision be modified so that the rates for the awarded compensatory services be "market rates."

In an answer, the district responds to the parent's allegations and initially argues to dismiss the request for review because the parent untimely filed it with the Office of State Review. The district also argues that contrary to the parent's assertions, the IHO did not fail to address alleged procedural deficiencies in the development of the February 2022 IESP—such as insufficient evaluative information, predetermination, and the denial of meaningful parent participation—because the parent never raised these issues in the due process complaint notice. The district avers that the parent did not raise any procedural or substantive deficiencies with respect to the February 2022 IESP, but instead, alleged that the district failed to implement the mandated services. As such, the district asserts that the due process complaint notice cannot be reasonably read to include these issues, and the district's witness at the impartial hearing—who only participated at the January 2023 CSE meeting—did not otherwise open the door to such issues. Therefore, the district contends that the IHO properly focused the analysis of the February 2022 IESP on the parent's implementation claim, which the parent properly raised in the due process complaint notice. Alternatively, the district asserts that parent's allegations about the February 2022 IESP are without merit, and the IHO's finding that the February 2022 IESP was appropriate should be upheld.

With respect to the January 2023 IESP, the district argues that the IHO properly found that it offered the student a FAPE and did not shift the burden of proof to the parent. The district also argues that the IHO did not ignore the parent's evidence, but correctly focused on the evaluative information available to the January 2023 CSE, noting further that the parent's witness did not attend the January 2023 CSE meeting and, although requested, the district did not receive any updated progress reports prior to the meeting. To the extent that the IHO made a credibility determination, the district argues that it must be upheld. Next, the district argues that the remaining portions of the parent's request for review merely restates alleged district error, with regard to the appropriateness of the January 2023 IESP, and fails to identify a specific ruling or failure to rule for review on appeal. The district further argues that the IHO made specific findings with respect to the sufficiency of the evaluative information, which the parent did not challenge on appeal and which should therefore be deemed final and binding. Additionally, the district notes that the parent did not allege that the IHO failed to rule on her CSE composition claims, and the evidence in the hearing record supports a finding that the January 2023 CSE included both a regular education teacher and a special education teacher. Finally, the district asserts that the IHO properly denied the parent's request for compensatory educational services.

As a cross-appeal, the district argues that the IHO erred by failing to deny the parent's request for any and all relief based on equitable considerations. The district asserts that the parent failed to provide the district with a 10-day notice of unilateral placement and that the parent failed to demonstrate a legal obligation to pay for the SETSS and OT obtained for the student because the contract language was insufficient to establish a meeting of the minds. As relief, the district seeks to dismiss the parent's request for review and to annul the relief awarded by the IHO.

In a reply to the district's answer, the parent initially responds to the district's assertion that she failed to timely file the request for review with the Office of State Review. The parent also asserts that, contrary to the district's assertion in its answer, the district opened the door to procedural deficiencies related to the development of the February 2022 IESP through opening and closing statements, and by submitting the February 2022 IESP and SESIS events log into the hearing record as evidence. As a result, the parent contends that the IHO erred by failing to rule on the sufficiency of the February 2022 IESP "operative at the start of the school year." Next, the parent responds to the district's assertion that the January 2023 IESP was appropriate, and argues that the district had both a February 2022 teacher report and a March 2022 SETSS report in its possession at the time of the January 2023 CSE meeting. The parent further argues that the January 2023 CSE was not properly composed, notwithstanding the district's contention that the CSE included an individual dually certified in both regular education and special education; the parent attaches additional documentary evidence on this issue for consideration on appeal (see generally Reply & Answer to Cr. App. SRO Exs. 1-2).⁸ Next, the parent asserts that the student was entitled to compensatory educational services as relief, consisting of six sessions per week of SETSS for the 2022-23 school year.

As an answer to the district's cross-appeal, the parent alleges that, with regard to equitable considerations, she did not unilaterally obtain services above the mandates in the student's IESP, therefore, she was not required to place the district on notice of any other disagreements. The parent also claims that her 10-day notice was timely. Finally, the parent argues that the contract language was sufficient to establish that the parent was legally bound by the contracts to pay for the unilaterally obtained SETSS and OT services.

V. Applicable Standards

A board of education must offer a FAPE to each student with a disability residing in the school district who requires special education services or programs (20 U.S.C. § 1412[a][1][A]; Educ. Law § 4402[2][a], [b][2]). However, the IDEA confers no individual entitlement to special education or related services upon students who are enrolled by their parents in nonpublic schools (see 34 CFR 300.137[a]). Although districts are required by the IDEA to participate in a

⁸ Generally, documentary evidence not presented at an impartial hearing is 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]). Upon review, the parent's additional documentary evidence submitted with respect to the issue of whether the January 2023 CSE was properly composed appears to have been available at the time of the impartial hearing, and is not now necessary to render a decision in this matter. Considering this, I decline to consider the parent's additional documentary evidence.

consultation process for making special education services available to students who are enrolled privately by their parents in nonpublic schools, such students are not individually entitled under the IDEA to receive some or all of the special education and related services they would receive if enrolled in a public school (see 34 CFR 300.134, 300.137[a], [c], 300.138[b]).

However, under State law, parents of a student with a disability who have privately enrolled their child in a nonpublic school may seek to obtain educational "services" for their child by filing a request for such services in the district of location where the nonpublic school is located on or before the first day of June preceding the school year for which the request for services is made (Educ. Law § 3602-c[2]).⁹ "Boards of education of all school districts of the state shall furnish services to students who are residents of this state and who attend nonpublic schools located in such school districts, upon the written request of the parent" (Educ. Law § 3602-c[2][a]). In such circumstances, the district of location's CSE must review the request for services and "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an [IEP]" (Educ. Law § 3602-c[2][b][1]). The CSE must "assure that special education programs and services are made available to students with disabilities attending nonpublic schools located within the school district on an equitable basis, as compared to special education programs and services provided to other students with disabilities attending public or nonpublic schools located within the school district (id.)."¹⁰

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).

VI. Discussion

A. Preliminary Matters

1. Timeliness of Filing

The districts asserts that the parent's request for review should be dismissed because the parent failed to comply with practice regulations, which required petitioner to file the request for review within two days after the completion of service upon the district. The parent admits that the request for review was untimely filed with the Office of State Review, but seeks to excuse the

⁹ State law provides that "services" includes "education for students with disabilities," which means "special educational programs designed to serve persons who meet the definition of children with disabilities set forth in [Education Law § 4401(1)]" (Educ. Law § 3602-c[1][a], [d]).

¹⁰ State guidance explains that providing services on an "equitable basis" means that "special education services are provided to parentally placed nonpublic school students with disabilities in the same manner as compared to other students with disabilities attending public or nonpublic schools located within the school district" ("Chapter 378 of the Laws of 2007—Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the Individuals with Disabilities Education Act (IDEA) 2004 and New York State (NYS) Education Law Section 3602-c," Attachment 1 at p. 11, VESID Mem. [Sept. 2007], available at <http://www.p12.nysed.gov/specialed/publications/policy/nonpublic907.pdf>). The guidance document further provides that "parentally placed nonpublic students must be provided services based on need and the same range of services provided by the district of location to its public school students must be made available to nonpublic students, taking into account the student's placement in the nonpublic school program" (id.).

late submission. The parent argues that the district was not prejudiced by the late submission because the district received an extension of time to serve and file its answer.

State regulation requires a petitioner to file the "notice of intention to seek review, notice of request for review, request for review, and proof of service with the Office of State Review of the State Education Department within two days after service of the request for review is complete" (8 NYCRR 279.4[e]). State regulation also authorizes an SRO with the discretion to "dismiss sua sponte a late request for review" or to "excuse a failure to timely serve or file a request for review within the time specified [in section 279.4 of this Part] for good cause shown" (8 NYCRR 279.13). According to the regulation, the "reasons for such failure shall be set forth in the request for review" (8 NYCRR 279.13).

In this instance, the parent, as petitioner, personally served the district with the request for review on July 10, 2023 (Parent Aff. of Service). Pursuant to State regulation, the parent was required to file the request for review with the Office of State Review two days thereafter, or no later than July 12, 2023. However, as the parent admits, the request for review was not filed with the Office of State Review until July 19, 2023, due to a "technical error by the parent advocate's office" (Reply & Answer to Cr. App. ¶ 1). The parent also failed to comply with the requirement in section 279.13 mandating her to set forth good cause in the request for review for the failure to timely file (see generally Req. for Rev.).

Generally, the failure to comply with the practice requirements of Part 279 of the State regulations may result in the rejection of the submitted documents or the dismissal of a request for review by an SRO (8 NYCRR 279.8[a]; 279.13; see M.C. v. Mamaroneck Union Free Sch. Dist., 2018 WL 4997516, at *23 [S.D.N.Y. Sept. 28, 2018] [upholding dismissal of allegations set forth in an appeal to an SRO for "failure to identify the precise rulings presented for review and [failure] to cite to the pertinent portions of the record on appeal, as required in order to raise an issue" for review on appeal]; T.W. v. Spencerport Cent. Sch. Dist., 891 F. Supp. 2d 438, 440-41 [W.D.N.Y. 2012] [upholding dismissal of a petition for review that was untimely and exceeded page limitations]). However, "judgments rendered solely on the basis of easily corrected procedural errors or 'mere technicalities,' are generally disfavored" (J.E. v. Chappaqua Cent. Sch. Dist., 2015 WL 4934535, at *4-*6 [S.D.N.Y. Aug. 17, 2015], quoting Foman v. Davis, 371 U.S. 178 [1962]).

However, there is no indication that the untimely filing of the request for review prevented the district from being able to formulate an answer to the issues raised on appeal or that the district suffered any prejudice, or now claims any prejudice, as a result—especially when, as here, the parent had timely served the district with the request for review on July 10, 2023, and the district requested and received an extension to serve and file the answer and cross-appeal until July 31, 2023. Accordingly, I decline under these circumstances to exercise my discretion to dismiss the request for review. Although the parent's failure to comply with the practice regulations will not ultimately result in a dismissal of their appeal, the parent—and her advocate—are cautioned that, while a singular failure to comply with the practice requirements of Part 279 may not warrant an SRO exercising his or her discretion to dismiss a request for review (8 NYCRR 279.8[a]; 279.13; see Application of a Student with a Disability, Appeal No. 16-040), an SRO may be more inclined to do so after a party's repeated failure to comply with the practice requirements (see Application of a Student with a Disability, Appeal No. 18-010; Application of a Student with a Disability, Appeal No. 17-101; Application of a Student with a Disability, Appeal No. 16-060; see also

Application of a Student with a Disability, Appeal No. 17-015; Application of a Student with a Disability, Appeal No. 16-040). In light of the foregoing, the district's arguments regarding the parent's failure to timely file the request for review with the Office of State Review are dismissed.

2. Scope of Review

Before addressing the merits of the parties' respective contentions on appeal, a determination must be made regarding which claims are properly before me. The parent contends that the IHO erred by failing to address procedural inadequacies with respect to the February 2022 CSE meeting process related to the development of the February 2022 IESP. The district argues that the IHO did not err because the parent did not raise any procedural or substantive deficiencies with respect to the February 2022 IESP in the due process complaint notice, and thus, the IHO properly focused the analysis on whether the district implemented the services mandated in the February 2022 IESP. The parent, in her reply to the district's answer, argues that the district opened the door to procedural deficiencies related to the February 2022 IESP through opening and closing statements and by submitting the February 2022 IESP and the SESIS events log into the hearing record as evidence.

Generally, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). Under the IDEA and its implementing regulations, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.507[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the original due process complaint notice is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]). Indeed, "[t]he parent must state all of the alleged deficiencies in the IEP in their initial due process complaint in order for the resolution period to function. To permit [the parents] to add a new claim after the resolution period has expired would allow them to sandbag the school district" (R.E., 694 F.3d 167 at 187-88 n.4; see also B.M. v. New York City Dep't of Educ., 569 Fed. App'x 57, 58-59 [2d Cir. June 18, 2014]).

Beyond alleging that the district failed to implement the February 2022 IESP, the parent's due process complaint notice cannot be reasonably read to include any other procedural or substantive allegations concerning the February 2022 CSE meeting process or the IESP itself, not to mention the more specific allegations about procedural inadequacies, such as predetermination, parent participation, untimely notice of the CSE meeting, or insufficient evaluative information (see generally Parent Ex. A). Moreover, in her reply to the district's answer, the parent does not argue that such allegations were included in her due process complaint notice, but instead, asserts that the district opened the door to these claims. The Second Circuit has held that issues not included in a due process complaint notice may be ruled on by an administrative hearing officer when the district "opens the door" to such issues with the purpose of defeating a claim that was raised in the due process complaint notice (M.H., 685 F.3d at 250-51; see Bd. of Educ. of Mamaroneck Union Free Sch. Dist. v. A.D., 739 Fed. App'x 79 [2d Cir. Oct. 12, 2018]; B.M., 569 Fed. App'x at 59; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 585 [S.D.N.Y.

2013]; A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 282-84 [S.D.N.Y. 2013]; J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *9 [Aug. 5, 2013]).

A review of the evidence in the hearing record demonstrates that the district did not open the door to such issues at the impartial hearing, as the district did not present evidence with regard to defeating any claims concerning the February 2022 CSE meeting process or the February 2022 IESP (see generally Apr. 27, 2023 Tr. pp. 24-38, 74-75; Dist. Exs. 1-6). To the extent that the district representative mentioned the February 2022 CSE meeting or the February 2022 IESP in opening and closing statements, such statements appear to have been for the purpose of providing background information and by themselves are not considered evidence. Therefore, the district representative's statements could not be considered as attempting to defeat a claim raised in the due process complaint notice—especially where, as here, the parent did not raise any procedural or substantive issues concerning the February 2022 CSE meeting process or the February 2022 IESP. In addition, the district representative at the impartial hearing objected to any attempts by the parent's advocate to cross-examine the district's sole witness—the district school psychologist who only attended the January 2023 CSE meeting—about the February 2022 CSE meeting process and resulting IESP (see, e.g., Apr. 27, 2023 Tr. pp. 42-45, 48-49). Thus, contrary to the parent's contentions, the evidence in the hearing record does not support her contentions on appeal that the IHO failed to address procedural inadequacies with respect to the February 2022 CSE meeting process or the February 2022 IESP, because the parent did not raise those issues in the due process complaint notice and the district did not otherwise open the door to them. Consequently, the parent's contentions must be dismissed.

B. January 2023 CSE Process—Evaluative Information

The parent contends that the November 2022 psychoeducational evaluation of the student was insufficient because it included the administration of only two assessments, the WISC-V and the WJ ACH IV, and failed to include a classroom observation of the student. Alternatively, the parent asserts that even if the district was not required to conduct a classroom observation of the student, State regulation required the district to "review existing evaluation data on the student, including evaluations and information provided by the parents of the student, current classroom-based assessments, local or State assessments, classroom-based observations, and observations by teachers and related services providers" (Req. for Rev. ¶ 9, citing 8 NYCRR 200.4[b][5]).

A district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that

may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services' needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]).¹¹

In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]). Furthermore, although federal and State regulations require that an IEP report the student's present levels of academic achievement and functional performance, those regulations do not mandate or specify a particular source from which that information must come, and teacher estimates may be an acceptable method of evaluating a student's academic functioning. When a student has not been attending public school, it is also appropriate for the CSE to rely on the assessments, classroom observations, or teacher reports provided by the student's nonpublic school (*S.F. v. New York City Dep't of Educ.*, 2011 WL 5419847, at *10 [S.D.N.Y. Nov. 9, 2011] [indicating that based upon 20 U.S.C. § 1414 (c)(1)(A), a CSE is required in part to "review existing evaluation data on the child, including (i) evaluations and information provided by the parents of the child; (ii) current classroom-based, local, or State assessments, and classroom-based observations; and (iii) observations by teachers and related services providers"]).

According to the January 9, 2023 prior written notice and as reflected in the January 2023 IESP, the CSE considered the November 2022 psychoeducational evaluation report in the development of the student's IESP (see Parent Exs. K at pp. 1-3; L at p. 1).¹² Additionally, the district school psychologist who conducted the November 2022 psychoeducational evaluation testified that, prior to the January 2023 CSE meeting, he reviewed the student's February 2022 IESP, which made him aware of the student's needs as described in that IESP and the special education program—i.e., SETSS, OT, and speech-language therapy—the student was receiving at that time (see Apr. 27, 2023 Tr. pp. 27-28, 45-47). The January 2023 CSE noted in the IESP that SETSS and speech-language progress reports were not available for the meeting (see Parent Ex. K at p. 2). At the impartial hearing, the school psychologist testified that he did not have any data

¹¹ While State regulations do not specify what assessments a district must complete in order to conduct a reevaluation, State regulations do list the required components of an initial evaluation: a physical examination, a psychological evaluation, a social history, a classroom observation of the student, and any other "appropriate assessments or evaluations" as necessary to determine factors contributing to the student's disability (8 NYCRR 200.4[b][1]).

¹² The school psychologist testified that the parent requested a reevaluation due to general concerns related to the student's academic capabilities, and district staff wanted to conduct standardized testing to assess how the student was doing in a number of areas; therefore, according to the district school psychologist, a classroom observation of the student did not seem necessary at that time (see Apr. 27, 2023 Tr. p. 78).

that reflected the student's performance on classroom assessments at the CSE meeting, but that results of the November 2022 psychoeducational evaluation demonstrated the student could access any given general education curriculum (see Apr. 27, 2023 Tr. p. 71).¹³

The report of the November 2022 psychoeducational evaluation indicated that the district initiated a reevaluation to determine if the student's learning needs and educational disability required the continuation of special education services (see Dist. Ex. 3 at p. 1). At the time of the November 2022 psychoeducational evaluation the student was attending fifth grade at her religious, nonpublic school (id.). The evaluator noted that the student completed all of the requested tasks, and he observed the student to be happy and cooperative during the evaluation (id. at p. 2). Accordingly, the evaluator reported that the assessment results were valid as the student "appeared to deliver her best effort during [the] evaluation" (id.). The November 2022 psychoeducational evaluation report indicated that the assessments used to determine the student's abilities included a student interview; an informal observation; a records review; and administration of the WISC-V, the WJ ACH IV, and a sentence completion test (id.).

Administration of the WISC-V to the student yielded a full-scale IQ, verbal comprehension index, fluid reasoning index, and subtest standard scores all within the average range (see Dist. Ex. 3 at pp. 2-4). With respect to academic skills, the student achieved WJ ACH IV standard scores in the average range for the overall reading and math clusters, which included passage comprehension, sentence reading fluency, word attack, applied problems, and calculation subtests (id. at p. 3). The student performed in the low average range with respect to the letter-word identification and math fact fluency subtests (id. at pp. 4-5). The November 2022 psychoeducational evaluation report also reflected that measures of social/emotional development indicated the student had appropriate interests and engaged in age-appropriate activities (id. at p. 5).

While the November 2022 psychoeducational evaluation report provided the January 2023 CSE with information about the student's cognitive skills and academic achievement, the evidence in the hearing record indicates that the CSE had other evaluative information available that could have been reviewed, but, based on the January 2023 IESP present levels of performance and the prior written notice, the CSE did not consider any additional information in the development of the IESP (compare Parent Ex. K at pp. 1-4, and Dist. Ex. 6, with Parent Exs. B; I; J). For example, on April 6, 2022, the parent's advocate emailed a February 2022 teacher report and a March 2022 SETSS progress report to district staff, including the school psychologist who conducted the student's November 2022 psychological evaluation and served as the CSE chairperson and district representative at the January 2023 CSE meeting (Parent Exs. G; K at p. 10; Dist. Ex. 3 at p. 1; see Parent Exs. I; J). The November 2022 psychoeducational evaluation report indicated that the school psychologist also reviewed the student's records and "online file" that included a 2018 psychoeducational evaluation report and the February 2022 IESP (Dist. Ex. 3 at pp. 1-2; see Parent Ex. B).

¹³ The school psychologist testified that neither a social history nor a classroom observation was necessary in this instance because it was a reevaluation and not an initial evaluation (see Apr. 27, 2023 Tr. pp. 71-72, 74). He also testified that the CSE did not typically invite other teachers or providers to the CSE meetings unless instructed by the parent in an effort to protect student privacy and confidentiality (see Apr. 27, 2023 Tr. p. 74).

The school psychologist testified that prior to the January 2023 CSE meeting he took note of the information in the student's February 2022 IESP, including that although the student had made "notable progress in key academic areas with her special education services," she continued to exhibit delays in reading, writing, and math, had difficulty putting thoughts on paper, and needed extra time to process information and answer questions when taking tests (Apr. 27, 2023 Tr. pp. 46-47; see Parent Ex. B at p. 3). He also noted the parent's concerns that the student was at least two years behind her peers in reading, math, and writing skills, and that she struggled with reading comprehension and basic mechanics of multiplication and division (Apr. 27, 2023 Tr. p. 47; see Parent Ex. B at p. 3).

The February 2022 teacher report indicated that results of a November 2021 Fountas & Pinnell assessment showed that the student was performing at a beginning third grade level in reading for decoding and comprehension (Parent Ex. J at p. 1). The teacher reported that the student had difficulty decoding age-appropriate words and her struggle to decode words negatively impacted her comprehension of the text (id. at p. 2). She also identified the student's challenges with answering basic questions following a reading passage, summarizing, sequencing, making inferences, finding the main idea, and identifying important facts (id.). Regarding the student's writing skills, teacher assessment results indicated that she was performing at a middle second grade level in written language, spelling, and organization (id. at p. 1). The teacher reported that the student's "assigned and applied" spelling skills were poor, she had difficulty with sentence structure, she tended to write in "fragments or run-ons," and she had difficulty with organization, punctuation, and capitalization (id. at p. 2). The teacher also reported that the student wrote slowly, her handwriting was "immature," she wrote "in big letters," and her words were not spaced appropriately (id. at p. 5). With respect to mathematics, the teacher report also indicated that, by informal assessment, the student demonstrated abilities at the middle third grade level with respect to calculations, and the middle second grade level with regard to problem solving (id. at p. 1). The teacher reported that the student completed basic addition and subtraction problems but noted that she was "careless and ma[de] many mistakes [and]/or omissions" (id. at p. 3). By report, the student had not mastered multiplication tables and had a difficult time identifying which operation to use in word problems (id.).

The February 2022 teacher report included descriptions of the student's receptive and expressive language deficits (Parent Ex. J at p. 4). Specifically, the teacher indicated that the student had difficulty understanding directions and concepts taught in class, and that she required constant repetition, reteaching, and reinforcement (id.). The teacher report indicated that the student articulated her thoughts clearly, had age-appropriate vocabulary, and expressed herself well verbally in class but she had difficulty providing decontextualized answers to questions based on the reading material (id.). Socially, according to the teacher report the student interacted in a "childish manner" with teachers and peers, she presented with a short attention span, and she needed constant refocusing (id.). The teacher report indicated that the student had difficulty transitioning between activities, she "always" required assistance, she could not complete classwork without help from others, and she did not complete her assignments in a timely manner (id. at p. 5). Additionally, the teacher reported that the student was disorganized and had difficulty finding the materials she needed for class (id.). The teacher recommended that the student receive additional SETSS hours, in addition to the three hours she received for math, to address her delays in reading (id. at p. 6).

The March 2022 SETSS progress report, prepared while the student was in fourth grade, indicated that the student was performing at a third grade level in reading and math (Parent Ex. I at pp. 1, 5). With respect to reading, the provider reported that the student presented with "significant delays" in reading skills for both decoding and reading comprehension and opined that the student "need[ed] a lot of 1:1 SETSS support" to address her reading needs and so she could "learn to read on grade level" (*id.* at p. 1). The report indicated that the student exhibited "great delays" in spelling, grammar, and writing, noting that the student did not write words appropriately in sentences and her written grammar was incorrect (*id.*). In mathematics, the provider reported that student had difficulty remembering multiplication facts, completing addition, subtraction, and multiplication problems with multiple digits, solving word problems and problems involving regrouping, and lining digits up correctly (*id.*). The SETSS provider described the student as having "a very hard time staying on task and focusing," and difficulty following multistep directions for which she required "a lot of reminders" (*id.* at p. 3). According to the report, the student needed "a lot of 1:1 repetition" to accurately complete tasks and therefore benefitted from 1:1 SETSS instruction (*id.*). Due to the student's academic delays, the SETSS provider "strongly recommended" that the student receive "at least" six hours of SETSS support "to reach grade level academic goals and expectations" (*id.*).

In addition, the evidence in the hearing record includes an April 2023 SETSS progress report, which, while not available to the January 2023 CSE, reflected the student's performance on the spring 2022 State examinations in mathematics and reading (Apr. 27, 2023 Tr. p. 107; Parent Ex. M at p. 2). The student achieved scores of "1" in both reading and mathematics, which the SETSS supervisor testified was considered by the State to be "well below proficient" and showing "limited knowledge and skills" to follow the curriculum (Apr. 27, 2023 Tr. pp. 88, 107-08; Parent Ex. M at p. 2).

The school psychologist testified that he could not "speak to [the student's] performance in the classroom," and that the CSE did not "have any data showing [the student's] performance on any given classroom assessments" (Apr. 27, 2023 Tr. p. 71).¹⁴ However, according to the evidence in the hearing record, as described above, the district was provided with the student's February 2022 teacher report and the March 2022 SETSS progress report, and had access to the student's spring 2022 State test results for ELA and mathematics, all of which suggested that the student was performing significantly below grade level in all academic areas despite her average scores on the November 2022 psychoeducational evaluation. Therefore, while the November 2022 psychoeducational evaluation may have been conducted appropriately, the district had access to other information about the student's academic performance that the CSE should have considered when developing the January 2023 IESP. Therefore, the hearing record supports the parent's contention that the January 2023 CSE did not rely on sufficient evaluative information to develop

¹⁴ The school psychologist testified that for a reevaluation, once he would have been made aware of the case, he would have been able to access the student's information in the computer system and see any relevant document that was created for the student, dating back to probably her preschool years (Apr. 27, 2023 Tr. p. 72). He stated that he would have been able "to see everything in our computer system, and IESP or any standardized tests that were done with her, any reports that were uploaded into the system " (Apr. 27, 2023 Tr. p. 72). He testified that this would provide access to determine what was done and what may be needed at the time of the reevaluation (Apr. 27, 2023 Tr. pp. 72-73).

the student's IESP and the IHO's determination that the January 2023 IESP was appropriate must be reversed.

C. Unilaterally Obtained Services

As the IHO determined that the student was denied a FAPE for the beginning of the 2022-23 school year due to the district's failure to implement the February 2022 IESP and, as discussed above, having found that for the latter portion of the 2022-23 school year the January 2023 IESP was not appropriate, the next issue relates to the type of relief the parent is requesting. Here, the parent asserts that the IHO improperly reduced the hourly rate awarded for the unilaterally obtained OT services as part of the relief awarded and specifically requests that the district "fund the SETSS and OT services contracted for by the parent, at the rates requested by the parent." In its answer and cross-appeal, the district does not directly address the parent's argument concerning the rate the IHO awarded for OT services, but generally asserts that equitable considerations do not weigh in favor of any of the parent's requested relief because the parent failed to timely provide the district with a proper 10-day notice of unilateral placement before the start of the 2022-23 school year, and the hearing record failed to contain sufficient evidence that the parent was obligated to pay for the requested services.

Initially, it is undisputed that the parent unilaterally obtained some OT services for the student during the 2022-23 school year, as the parent executed a contract with Benchmark on September 6, 2022 for the delivery of OT services (see Parent Ex. E at pp. 1-2). Contrary to the district's assertion, the contract specifically reflects that Benchmark's rate for OT services was \$150.00 "per 30-minute session" and not \$150.00 per hour, as awarded by the IHO (compare Parent Ex. E at p. 1, with IHO Decision at pp. 4-5 [emphasis added]). Also contrary to the district's contention, the Benchmark contract for OT services sets forth sufficient terms to find that the parent was legally obligated to pay for those services, the hourly rate was clearly and plainly set forth in the contract, and the parent testified that she had not made any payments because she could not afford to do so (see Parent Exs. E at pp. 1-2; Q ¶ 10). Therefore, the IHO erred by directing the district to fund the student's OT services up to the rate of \$150.00 per hour, rather than at the contracted rate of \$150.00 per 30-minute session.

However, the hearing record does not identify when the student began receiving privately obtained OT services or the frequency of the contracted for OT services. For example, the contract indicates it is for the 2022-23 school year; however, instead of having a set start date for the delivery of OT services, the contract indicates that services would begin "on or about the submission of a Due Process Complaint to the [district]," which was not submitted until February 17, 2023 in this proceeding (Parent Ex. E at p. 1; see Parent Ex. A). Similarly, the hearing record fails to identify a start date for the delivery of the privately obtained SETSS. The parent signed a contract for SETSS for the 2022-23 school year on August 17, 2022; however, the contract did not identify a start date, instead providing that services would "begin as soon as documentation is submitted and processed for the school year" (Parent Ex. D at p. 1).

Currently, the hearing record includes some evidence that the student may have received SETSS and OT services under pendency—as well as speech-language therapy services; however, such delivery would have only occurred after the parent filed her February 17, 2023 due process

complaint notice (see Pendency Implementation Form at pp. 1-2).¹⁵ Additionally, the hearing record contains some evidence that the student received all of the services mandated in her February 2022 IESP, as acknowledged at the impartial hearing—which mandated services of SETSS, OT, and speech-language therapy (see Apr. 27, 2023 Tr. pp. 15-16). However, the hearing record does not further specify how the student received those services or what agency provided those services (see generally Mar. 23, 2023 Tr. pp. 1-18; Apr. 27, 2023 Tr. pp. 1-118; May 17, 2023 Tr. pp. 1-85; Parent Exs. A-Q; Dist. Exs. 1-6; IHO Exs. I-III). The hearing record includes an OT progress report, dated April 21, 2023, which recommended that the student continue to receive two 30-minute sessions per week of OT services; however, the progress report did not indicate when the student began receiving OT services during the 2022-23 school year (Parent Ex. N). While the student presumably received the same level of OT services, the hearing record does not clarify this point, or, as stated above identify when the student's OT services started (see generally Mar. 23, 2023 Tr. pp. 1-18; Apr. 27, 2023 Tr. pp. 1-118; May 17, 2023 Tr. pp. 1-85; Parent Exs. A-Q; Dist. Exs. 1-6; IHO Exs. I-III). Similarly, with respect to SETSS, the hearing record includes an undated SETSS progress report, which indicated that the student was currently attending fifth grade and was currently receiving three hours of SETSS per week (Parent Ex. M). However, the hearing record does not identify when the student began receiving SETSS during the 2022-23 school year, or identify if the student continued to receive the same three hours of privately obtained SETSS for the whole school year.

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 the district did not implement the student's February 2022 IESP for the 2022-23 school year and that the January 2023 IESP was inappropriate and was not implemented and, as a self-help remedy, she unilaterally obtained private services from Benchmark for the student without the consent of the school district officials, and then commenced due process to obtain remuneration for the costs thereof (see Parent Ex. A). Accordingly, the issue in this matter is whether the parent is entitled to public funding of the costs of the private SETSS and OT services the parent obtained for the student during the 2022-23 school year. "Parents who are dissatisfied with their child's education can unilaterally change their child's placement . . . and can, for example, pay for private services, including private schooling. They do so, however, at their own financial risk. They can obtain retroactive reimbursement from the school district after the [IESP] dispute is resolved, if they satisfy a three-part test that has come to be known as the Burlington-Carter test" (Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 526 [2d Cir. 2020] [internal quotations and citations omitted]; see Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 14 [1993] [finding that the "Parents' failure to select a program known to be approved by the State in favor of an unapproved option is not itself a bar to reimbursement"]).

The parent's request for privately-obtained services must be assessed under this framework. That is, 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 (Carter, 510 U.S. 7; Sch.

¹⁵ The parent does not assert that the student did not fully receive the pendency placement services (see generally Req. for Rev.; Reply & Answer to Cr. App.).

Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 252 [2d Cir. 2009]). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

Turning to a review of the appropriateness of the unilaterally obtained services, the federal standard is instructive. A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998]). 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).

Based on the above, the IHO was required to assess the parent's request for district funding of the privately obtained SETSS and individual OT services under this framework, and the IHO failed to do so prior to awarding the parent's requested relief (see generally IHO Decision). When an IHO has not addressed claims set forth in a due process complaint notice, an SRO may consider whether the case should be remanded to the IHO for a determination of the claims that the IHO did not address (8 NYCRR 279.10[c]; see Educ. Law § 4404[2]; F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 589 [S.D.N.Y. 2013] [indicating that the SRO may remand matters to the IHO to address claims set forth in the due process complaint notice that were unaddressed by the IHO], citing J.F. v. New York City Dep't of Educ., 2012 WL 5984915, at *9 n.4 [S.D.N.Y. Nov. 27, 2012]; see also D.N. v. New York City Dep't of Educ., 2013 WL 245780, at *3 [S.D.N.Y. Jan. 22, 2013]).

In this matter, the application of the Burlington-Carter test to determine whether the parent's unilaterally obtained services were appropriate to meet the student's needs is inherent to—and a necessary predicate for—a determination of whether the parent may be awarded reimbursement, or direct funding, of unilaterally obtained services. As it does not appear that the hearing record was developed with an eye towards applying the correct legal standard, rather than denying the parent's request for funding of the unilaterally obtained services due to a failure to present sufficient evidence, the matter is remanded for a determination as to whether the privately obtained SETSS and OT services constituted an appropriate unilateral placement of the student such that the cost of the services are reimbursable to the parent or, alternatively, should be directly paid by the district to the provider. In making this determination, the IHO will need to assess if, or when, the SETSS and OT services were delivered to the student and by whom they were delivered, as well as whether or not the services that were delivered were sufficient to address the student's needs. To that end, the parent appears to argue that the three hours per week of unilaterally obtained services were both an appropriate service to address the student's needs, and, also, of an insufficient frequency to fully address the student's needs—having asserted that the student required six hours per week of SETSS for the 2022-23 school year (see Parent Ex. A).¹⁶

¹⁶ The Second Circuit's approach to compensatory education may leave room for unique circumstances where an award of compensatory education may be warranted where, for example, a student is unilaterally placed but the parent's request for tuition reimbursement is denied under a Burlington/Carter analysis (see Application of a Student with a Disability, Appeal No. 16-050), or where a student is unilaterally placed but additional related services are required in order for the placement to provide the student with a FAPE (see V.W. v. New York City Dep't of Educ., 2022 WL 3448096, at *5-7 [S.D.N.Y. Aug. 17, 2022] [finding that awards of tuition reimbursement and compensatory education are not mutually exclusive and that an award of "both education

IX. Conclusion

Having found that, contrary to the IHO's decision, the January 2023 IESP failed to offer the student appropriate equitable services , and, as the IHO did not address the appropriateness of the parent's unilaterally obtained services or equitable considerations and the hearing record is insufficiently developed on these issues, this matter is remanded to the IHO to make determinations on these issues after further development of the hearing record.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS DISMISSED.

IT IS FURTHER ORDERED that the IHO's decision, dated May 31, 2023, is modified by reversing the determination that the January 2023 IESP offered the student a FAPE for a portion of the 2022-23 school year from January 18, 2023 through June 30, 2023; and,

IT IS FURTHER ORDERED that the matter is remanded to the IHO for further proceedings regarding the appropriateness of the parent's unilaterally obtained services for the 2022-23 school year and a weighing of equitable considerations in accordance with this decision.

**Dated: Albany, New York
October 2, 2023**

**STEVEN KROLAK
STATE REVIEW OFFICER**

placement and additional services may be necessary to provide a particular student with a FAPE"). One court has recently endorsed a combined award of tuition reimbursement—or in this matter, an award of reimbursement for unilaterally obtained services—and compensatory education based on a denial of FAPE for the same time period (V.W., 2022 WL 3448096, at *5-*6).