The University of the State of New York

The State Education Department
State Review Officer
www.sro.nysed.gov

No. 23-274

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

Appearances:
Law Office of Anton G. Cohen, PC, attorneys for petitioner, by Sandra Robinson, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Nate Munk, 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 her request to be reimbursed for privately obtained special education teacher support services (SETSS) for her son for the 2023-24 school year. The appeal must be sustained in part and the matter remanded for further administrative proceedings.

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 parties' familiarity with this matter is presumed and, therefore, the facts and procedural history of the case and the IHO's decision will not be recited in detail. Briefly, the student was eligible for special education and attended district public schools beginning in kindergarten (Parent Ex. F ¶ 2). According to the parent, since the student's second grade school year, the parties have engaged in impartial hearings and settlement agreements whereby the student received 10 hours per week of at home "supplemental SETSS" in addition to his school-based programming (id. ¶ 3). The student continued to receive instruction at district schools through eighth grade (2021-22 school year) while also receiving 10 hours per week of at home SETSS (Parent Exs. C at p. 1; F ¶¶ 2, 3).

According to a December 2022 IHO Decision issued in a prior proceeding regarding the student's programming for the 2022-23 school year, on May 10, 2022, the CSE convened and, finding the student was eligible for special education as a student with a speech or language impairment, developed an IEP for the 2022-23 school year (ninth grade) (Parent Ex. B at p. 6).[1, 2] The May 2022 CSE recommended 12-month programming consisting of a 12:1+1 special class placement in an approved nonpublic school with three 30-minute sessions per week of group speech-language therapy (id.). The parent requested that the CSE recommend 10 hours per week of SETSS to be provided at home, which the CSE denied (Parent Ex. F ¶ 4). The parent accepted the CSE's recommended nonpublic school placement, but disagreed with the May 2022 IEP because it did not provide the student with 10 hours per week of home-based SETSS (id.).

The parties proceeded to an impartial hearing in the proceeding regarding the 2022-23 school year, and in a decision dated December 21, 2022, the IHO in that matter held that the May 2022 IEP denied the student a FAPE, the evidence established that the student needed 10 sessions per week of after-school SETSS, and the IHO ordered the district to fund 10 sessions per week of after-school SETSS for the 12-month 2022-23 school year (see Parent Ex. B). The executive director of the agency the student received SETSS from testified that in January or February 2023, the student began to receive 10 hours per week of SETSS from LMI Consulting Solutions, Inc. (LMI) (Tr. p. 71).

According to the information available in the hearing record, the CSE did not convene to develop an IEP for the student for the current 2023-24 school year (10th grade) (Parent Exs. A at p. 2; F ¶ 4). During this school year, the student is attending the nonpublic school recommended by the May 2022 CSE and continues to receive SETSS from LMI (Parent Exs. F ¶¶ 4, 6, 7; G ¶ 4; I). In a due process complaint notice dated June 30, 2023, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2023-24 school year (see Parent Ex. A). Also on June 30, 2023, the parent signed a contract with LMI for the agency to provide 1:1 SETSS to the student beginning July 1, 2023 through June 30, 2024 (Parent Ex. H).

Pre-hearing conferences were held on August 3, 2023 and September 5, 2023 (Tr. pp. 1-21).[3] An impartial hearing convened before the Office of Administrative Trials and Hearings (OATH) on September 28, 2023 and concluded the same day (Tr. pp. 28-88). During the impartial hearing, the district confirmed that it would be "waiving Prong I" thereby conceding that the district failed to offer the student a FAPE for the 2023-24 school year (Tr. pp. 28, 81). In a decision dated October 27, 2023, the IHO determined that the district failed to offer the student a FAPE for the 2023-24 school year before denying the parent's request for reimbursement or direct payment of the student's SETSS (IHO Decision at pp. 5, 9). The IHO determined that the parent had failed to meet her burden to prove that the privately obtained SETSS met the student's educational needs

[1] The student's eligibility for special education as a student with a speech or language impairment is not in dispute (see 34 CFR 300.8[c][11]; 8 NYCRR 200.1[zz][11]). The student had also received English as a new language services (Parent Ex. C at p. 1).

[2] The student's May 2022 IEP is not in evidence.

[3] During the September 5, 2023 status conference, the district confirmed that the district and the parent had agreed to pendency (Tr. p. 16).

(id. at pp. 7-8). The IHO additionally found that equitable considerations did not favor the parent because there was no 10-day notice of the parent's intent to privately obtain services, or a clear contract between the parent and the SETSS provider (id. at pp. 8-9).

IV. Appeal for State-Level Review

The parent appeals. The parties' familiarity with the particular issues for review on appeal in the parent's request for review and the district's answer thereto is also presumed. The following issues presented on appeal must be resolved in order to render a decision in this matter:

1. Whether the IHO improperly excluded evidence submitted by the parent with her closing brief;

2. Whether the IHO erred in placing the burden for proving the appropriateness of the SETSS on the parent and in finding that the evidence did not show that the SETSS provided by LMI during the 2023-24 school year met the student's needs;

3. Whether it was in error for the IHO to deny the parent's request for relief based on the parent's failure to submit a 10-day notice.

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]).[4]

[4] 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

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).

VI. Discussion

A. Preliminary Matter—Additional Evidence

The parent submits additional documentation with her request for review, the first of which is referred to as SRO Exhibit A, and requests that it be considered as additional evidence, reversing the IHO's decision to exclude the emails between the parent's attorney and the district, LMI invoices from July 2023 through October 2023, and a pendency implementation form (Req. for Rev. ¶ 9; SRO Ex. A).[5] The parent also submitted a November 1, 2023 letter from the nonpublic school for consideration, herein referred to as SRO Exhibit B (Req. for Rev. ¶ 10; SRO Ex. B).

Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an impartial hearing officer'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 the Dep't of Educ., Appeal No. 08-024; Application of a Student with a Disability, Appeal No. 08-003; Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 06-040; Application of a Child with a Disability, Appeal No. 05-080; Application of a Child with a Disability, Appeal No. 05-068; Application of the Bd. of Educ., Appeal No. 04-068).

The factor specific to whether the additional evidence was available or could have been offered at the time of the impartial hearing serves to encourage full development of an adequate hearing record at the first tier to enable the IHO to make a correct and well supported determination

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).

[5] The emails were not marked for identification during the hearing, the other two documents were submitted with the parents closing brief and identified as Parent Exhibits "K" and "L" (IHO Decision at p. 2, n. 3). For ease of reference, all of this additional evidence will be collectively referred to as SRO Exhibit "A."

and to prevent the party submitting the additional evidence from withholding relevant evidence during the impartial hearing, thereby shielding the additional evidence from cross-examination and later springing it on the opposing party, effectively distorting the State-level administrative review and transforming it into a trial de novo (see M.B. v. New York City Dep't of Educ., 2015 WL 6472824, at *2-*3 [S.D.N.Y. Oct. 27, 2015]; A.W. v. Bd. of Educ. of the Wallkill Cent. Sch. Dist., 2015 WL 1579186, at *2-*4 [N.D.N.Y. Apr. 9, 2015]). However, both federal and State regulations authorize SROs to seek additional evidence if necessary, and SROs have accepted evidence available at the time of the impartial hearing when necessary (34 CFR 300.514[b][2][iii]; 8 NYCRR 279.10[b]; Application of a Student with a Disability, Appeal No. 08-030; Application of a Child with a Disability, Appeal No. 00-019 [finding it necessary to accept evidence available at the time of the impartial hearing to determine the student's pendency placement]).

The parent submits invoices from LMI to establish LMI's SETSS session rate and length (Req. for Rev. ¶¶ 9, 11, 21). The parent argues that "[t]he invoices had been provided to the [district] on the regular basis so there is no element of surprise" (SRO Ex. A at p. 2). However, the invoices reflect that LMI was billing the district for both SETSS and 1:1 applied behavior analysis (ABA) "therapy" services (id. at pp. 5-10). The service agreement between the parent and LMI was for SETSS, not 1:1 ABA services (Parent Ex. H). Ann October 1, 2023 invoice for 13 hours of 1:1 ABA services from a specific provider (provider 1) and a second invoice also dated October 1, 2023 for 20 hours of SETSS services from a different provider (provider 2) was included as part of the additional evidence (SRO Ex. A at pp. 8, 10). LMI's executive director (executive director) testified that provider 2 was the student's SETSS provider, but the evidence admitted during the impartial hearing does not mention provider 1 (see Tr. pp. 1-88; Parent Exs. A-J). The parent argues that the 1:1 ABA services bill was a "typographical error"; however, this is the type of thing that should have been addressed during the hearing. Accordingly, the IHO's determination excluding this exhibit, which was only presented with the parent's closing brief, was justified. The last page of SRO Exhibit A is an August 9, 2023 pendency implementation form, which the parent asserts "is the fully executed" pendency request and submitted to "complete the hearing record" (SRO Ex. A at pp. 2, 11). As the pendency implementation form is not necessary to render a decision in this matter, I decline to accept it as additional evidence on appeal. SRO Exhibit A will not be further referenced in this decision.

The parent requests that SRO Exhibit B be admitted into the hearing record to establish that the student had been failing at the nonpublic school before he began receiving SETSS from LMI (Req. for Rev. ¶ 13; SRO Ex. B). SRO Exhibit B is a November 1, 2023 letter prepared by the assistant to the dean of specialized studies (assistant dean) of the nonpublic school the student has attended since the 2022-23 school year (see SRO Ex. B). According to the letter from the assistant dean, the student was struggling academically in the beginning of the 2022-23 school year, but made a significant improvement after the parent switched to the student's current SETSS provider (id. at p. 1). The assistant dean further asserted that the student required continuation of after-school SETSS to develop subject skillsets and acquire strategies for study skills (id. at p. 2). Although the letter is dated November 1, 2023, after the IHO rendered his decision on October 27, 2023, there is no explanation as to why the assistant dean could not have testified as to the information contained in the letter during the hearing so that the district would have had an opportunity to cross-examine him. Additionally, the November 1, 2023 letter does not provide information as to whether the student received SETSS during the 2023-24 school year or what that

service is working on with the student. As such, I decline to accept SRO Exhibit B as additional evidence and it will not be referenced further in this decision.

B. Privately Obtained SETSS

On appeal the parent argues that the IHO erred by finding that there was "no indication that the program offered to [the s]tudent was specifically designed to allow [the s]tudent to progress." (Req. for Rev. ¶ 12).[6] Next, the parent alleges that the IHO improperly discredited the executive director's testimony regarding the student's "impending discharge" from the nonpublic school at the end of the 2022-23 school year due to poor grades and asserts that this "credibility determination rested on mere subjective conjecture and must be reversed" (id. ¶ 14). The parent argues that the IHO committed additional errors including finding that there was not a clear start date for the student's SETSS, and that the purpose of the SETSS were to generalize the student's skills outside the classroom (id. ¶¶ 18).

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, 142 F.3d at 129). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether a unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether the placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003]

[6] The parent asserts that the IHO committed a factual error in finding that the parent failed to establish that the student made progress (Req. for Rev. ¶ 13). I note that most of the parent's arguments regarding the student's progress with the SETSS provided by LMI referred to progress made during the 2022-23 school year, which is not the school year in dispute (id. ¶¶ 13, 14). Regardless, it is well settled that a finding of progress is not required for a determination that a student's unilateral placement is adequate (Scarsdale Union Free Sch. Dist. v. R.C., 2013 WL 563377, at *9-*10 [S.D.N.Y. Feb. 4, 2013] [noting that evidence of academic progress is not dispositive in determining whether a unilateral placement is appropriate]; see M.B. v. Minisink Valley Cent. Sch. Dist., 523 Fed. App'x 76, 78 [2d Cir. Mar. 29, 2013]; D.D-S. v. Southold Union Free Sch. Dist., 506 Fed. App'x 80, 81 [2d Cir. Dec. 26, 2012]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 486-87 [S.D.N.Y. 2013]; C.L. v. Scarsdale Union Free Sch. Dist., 913 F. Supp. 2d 26, 34, 39 [S.D.N.Y. 2012]; G.R. v. New York City Dep't of Educ., 2009 WL 2432369, at *3 [S.D.N.Y. Aug. 7, 2009]; Omidian v. Bd. of Educ. of New Hartford Cent. Sch. Dist., 2009 WL 904077, at *22-*23 [N.D.N.Y. Mar. 31, 2009]; see also Frank G., 459 F.3d at 364). However, while not dispositive, a finding of progress is, nevertheless, a relevant factor to be considered in determining whether a unilateral placement is appropriate (Gagliardo, 489 F.3d at 115, citing Berger, 348 F.3d at 522 and Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]).

["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).

A brief discussion of the student's needs is warranted to address the issues on appeal. A March 2022 neuropsychological evaluation of the student indicated that his overall cognitive functioning and processing speed were in the low average range, with a significant deficit in verbal comprehension (very low range) (Parent Ex. C at pp. 15, 20). At that time, academically, the student exhibited significantly underdeveloped reading fluency (poor) and reading comprehension skills (very low), and "moderate deficits in word reading and phonological decoding" (low average) (id. at pp. 15, 21, 22). The student's written expression skills including sentence composition and spelling were also in the very low range (id. at pp. 15, 21). His math skills were variable, and he achieved numerical operations scores in the low average range, and math problem solving scores in the average range (id. at pp. 15, 21). The student exhibited a relative strength in math fluency, achieving scores in the average to very high range of functioning (id. at p. 21). An April 2022 bilingual speech-language evaluation indicated that the student's language dominance was English and that he was exposed to a second language at home (Parent Ex. E at pp. 1, 2). He exhibited receptive and expressive language deficits, and his pragmatic language was characterized by difficulties with conversational skills, asking for, giving, and responding to information, nonverbal communication skills, and lack of engagement in pragmatic functions such as initiating, greeting, responding, requesting, and informing (id. at p. 6). The student met the criteria for diagnoses of a language disorder, and a specific learning disability in both reading and written expression (Parent Ex. C at pp. 16-17).

Turning to the services the student received, the executive director of LMI (executive director) testified that LMI "ha[d] been employed by [the parent] . . . to provide [the student] with ten (10) hours per week of after-school individual 1:1 direct instruction by a . . . SETSS provider for the 2023-24 school year" (Parent Ex. G ¶¶ 2, 4). The executive director testified that LMI began providing 1:1 after-school SETSS to the student "in September 2023 to target significant academic delays in areas such as reading comprehension, written expression and math problem solving" (id. ¶ 9).[7] Regarding the number of SETSS hours the student received, the executive director testified that 10 hours per week was the "usual" minimum number of hours "required for making [] consistent and systemic progress" (Tr. p. 48). According to the executive director, the student received SETSS from a specific provider who was a certified special education teacher and the "principal goal" of the student's SETSS was to "promote, generalize, and increase his academic skills learned in school and transfer newly acquired learning skills and working habits to be utilized in school" (Parent Ex. G ¶¶ 10, 13). The executive director testified that the SETSS provider would "work with [the student] to complete homework assignments" and would prepare him to take three Regents examinations during the 2023-24 school year (id. ¶ 13). Additionally, the executive director testified that the student's SETSS provider was "familiar with" the program at the student's nonpublic school (Tr. p. 36).

The executive director testified that the student would receive instructional strategies to "comprehend and benefit from homework assignments" including clarification of written instructions, explicit modeling, use of graphic organizers, constant prompting and redirection, frequent breaks and positive reinforcement, sentence frames, step by step modeling, defining new vocabulary words, visuals, oral rehearsal, and identification of significant test details (Parent Ex. G ¶ 14). According to the director, the student required "intensive clarification and assistance with homework assignments," he was "unable to respond to basic questions about what he read or continue through a text appropriately without intensive 1:1 assistance," and he required "paraphrasing and descriptive explanation (id. ¶ 15). The director opined that "[w]ithout consistent prompting and assistance, [the student] cannot complete homework assignments in reading, math and writing" (id.).

Additionally, the director testified that the SETSS provider would work on the student's ability to: summarize paragraphs in his own words by answering all "wh" questions, make predictions using text evidence from grade-level texts, improve writing skills by constructing a variety of compound sentences, and solve multi-step word problems and improve basic algebra skills (Parent Ex. G ¶ 16). Further, to help the student retain the information learned, the director

[7] The IHO discussed in his decision that the evidence in the hearing record was inconsistent with regard to when LMI began providing SETSS to the student; January or February 2023, July 1, 2023, or September 2023 (IHO Decision at p. 7). He concluded that "[w]ithout a clear picture of when services began, or who was providing services, it [wa]s impossible to determine the appropriateness of said services" (id. at pp. 7-8). In the request for review, the parent asserts that "the evidence plainly establishes that the after-school SETSS began on July 11, 2023" (Req. for Rev. ¶ 18; citing to Parent Ex. H, a services agreement between LMI and the parent indicating that the agreement was "valid for services starting July 1, 2023" and referring to "LMI Invoices" not included in the hearing record). Review of the hearing record shows LMI began providing SETSS to the student in January or February 2023 during the 2022-23 school year, LMI and the parent signed an agreement for the provision of SETSS to the student for the 2023-24 school year beginning July 1, 2023, and the LMI executive director also testified that, in September 2023, LMI began providing the student with SETSS (Tr. p. 71; Parent Exs. G ¶¶ 9, 10; H).

testified that he would be provided with multiple exemplars, various manipulatives, frequent prompts, repetition, and modeling (id. ¶ 17).

The executive director testified that the student demonstrated "great progress" across all subjects, he was learning skills and how to be independent (Tr. pp. 62-63). LMI did not "issue progress reports"; however, staff "look[ed] at the progress report" that the nonpublic school prepared and was in "close contact with all the teachers that [we]re working with [the student], because they need[ed] . . . supervision and guidance" (Tr. pp. 63-64). The executive director further testified that the progress the student had made since LMI began working with him was reflected in the end of the 2022-23 school year nonpublic school progress reports (Tr. pp. 64-65). The executive director opined that the 10 hours per week of SETSS ensured the student's homework completion, reinforced the skills the student learned in his nonpublic school special education class, and prepared him for Regents examinations (Parent Ex. G ¶ 18).

The executive director's testimony shows that the SETSS LMI provided to the student relied to some extent on the instruction the student received at the nonpublic school. Turning to the nonpublic school component of the student's unilateral placement, the parent testified that the May 2022 IEP recommended a 12-month program for the student at a nonpublic school and that the parent "accepted the recommended placement; however [she] asked the CSE to supplement [the student's] school-based program with ten (10) hours of SETSS per week at home" (Parent Ex. F ¶ 4). Although the executive director testified "[i]n order for [the student] to maintain slow but steady academic progress at [the nonpublic school], it [wa]s essential for him to continue receiving ten (10) hours per week of 1:1 SETSS after school," the hearing record lacks any evidence about the nonpublic school's academic and special education instruction and related services, how the nonpublic school addressed the student's special education needs, or progress at the nonpublic school, which presumably comprised the majority of the student's special education programming (Parent Exs F ¶ 4; G ¶ 18). Rather, the parent's evidence regarding the nonpublic school primarily focused on the student's performance at the nonpublic school and the effect of the SETSS LMI provided on the student's performance during the 2022-23 school year, which is not the school year at issue on appeal (see e.g., Tr. pp. 64-65; Parent Exs. F ¶ 7; G ¶ 18).

This matter presents a unique situation in that, because the parties agreed to the nonpublic school placement, neither party presented evidence regarding the student's nonpublic school programming. However, in order to determine the appropriateness of the SETSS the student received as a component of the unilateral placement, the matter must be remanded to the IHO to complete the hearing record specifically with regard to the student's program at the nonpublic school, including the special education services and specially designed instruction he may be receiving, if any, and any progress the student may be making at the nonpublic school during the 2023-24 school.

As it currently stands, the hearing record does not establish that the 12:1+1 special class nonpublic school placement is insufficient to meet the student's special education needs such that he requires an additional 10 hours per week of SETSS in order to make progress. However, the hearing record lacks evidence as to the student's in school performance, focusing instead only on the student's after school programming. Accordingly, this matter is remanded to the IHO to make factual findings with regard to the services the student is receiving at the nonpublic school, in order to determine whether the services unilaterally obtained by the parent appropriately addressed the

student's needs. The IHO must review the totality of the circumstances in determining whether the services obtained for the student, including the school placement and after school services, were reasonably calculated to serve the student's individual needs. After the IHO finds the program was meeting the student's needs, the IHO may then determine whether the after school services exceeded the level that the student required to receive a FAPE (see Y.D. v. New York City Dep't of Educ., 2017 WL 1051129, at *8 [S.D.N.Y. Mar. 20, 2017] [finding out-of-school services were unnecessary to ensure the student made progress in the classroom and would, instead, be aimed at managing behaviors outside the school day]; R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at *15 [S.D.N.Y. Sept. 27, 2013] ["While the record indicates that [the student] may have benefited from home-based services, it contains no indication that such services were necessary"], aff'd, 589 Fed. App'x 572 [2d Cir. Oct. 29, 2014]).[8]

C. Equitable Considerations

Although the IHO found that the parent failed to meet her burden of proof that after-school SETSS were appropriate services for the student based on his needs, the IHO examined the equities in order to complete the record. The IHO held that there was no evidence in the hearing record that the parent provided the district with 10-day notice of her intent to privately obtain SETSS for the student and seek reimbursement from the district (IHO Decision at p. 9). The IHO further held that the parent failed to submit proof of a contractual obligation between the parent and the SETSS provider that delineated the amount of services to be provided or the rate to be charged (id.). The parent argues on appeal that the IHO erred in denying reimbursement or direct funding for SETSS based on the parent's failure to submit a 10-day notice and the IHO's finding that the SETSS contract provided by the parent failed to establish a financial obligation.[9] The district argues that the IHO properly weighed the equitable considerations in this matter and that his determination to deny funding for SETSS was proper.

Turning to a review of equitable considerations, the final criterion for a reimbursement award, the federal standard for adjudicating these types of disputes is instructive. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the

[8] Among other factors that may warrant a reduction in tuition under equitable considerations is whether the frequency of the services or the rate for the services were excessive (see E.M., 758 F.3d at 461 [noting that whether the amount of the private school tuition was reasonable is one factor relevant to equitable considerations]). The IHO may consider evidence regarding whether the rate charged by the private agency was unreasonable or regarding any segregable costs charged by the private agency that exceed the level that the student required to receive a FAPE (see L.K. v. New York City Dep't of Educ., 2016 WL 899321, at *7 [S.D.N.Y. Mar. 1, 2016], aff'd in part, 674 Fed. App'x 100).

[9] Regarding the SETSS contract, the parent specifically argues that the IHO improperly excluded SRO Exhibit A from the hearing record; however, as noted above, the IHO did not err in excluding the document as it was presented to the IHO with the parent's post-hearing brief and the IHO had questions regarding the veracity of the document that required further explanation. However, the parent may address this with the IHO as part of the remand.

private education was unreasonable"]; L.K. v. New York City Dep't of Educ., 674 Fed. App'x 100, 101 [2d Cir. Jan. 19, 2017]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014] [identifying factors relevant to equitable considerations, including whether the withdrawal of the student from public school was justified, whether the parent provided adequate notice, whether the amount of the private school tuition was reasonable, possible scholarships or other financial aid from the private school, and any fraud or collusion on the part of the parent or private school]; C.L., 744 F.3d at 840 [noting that "[i]mportant to the equitable consideration is whether the parents obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA"]).

Additionally, under the federal statute, reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to their removal of the student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger v. Medina City Sch. Dist., 348 F.3d 513, 523-24 [6th Cir. 2003]; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G., 459 F.3d at 376; Voluntown, 226 F.3d at 68).

It is uncontroverted that the parent failed to provide the district with a 10-day notice. Without more weighing against the parent on equitable considerations, a blanket denial of funding does not appear to be appropriate. As indicated above, the purpose of the 10 business day notice is to give the district an opportunity to determine if it can provide a suitable education to the student (see Greenland, 358 F.3d at 160). Thus, the IHO should review the events leading up to the district's denial of a FAPE to the student for the 2023-24 school year to determine if this is a situation in which a notice would have been beneficial for both parties. In addition, as the IHO determined, the contract between the parent and LMI did not identify the number of hours of SETSS to be provided to the student or the rate for the SETSS (Parent Ex. H). However, the contract indicates that the parent is financially obligated and the parent should have the opportunity to present evidence as to the extent of her obligation, as to the amount of services and the rate for services, on remand.

Upon remand, it is recommended that if the IHO finds that the parent meets her burden of proof regarding the appropriateness of the student's after-school SETSS, that the IHO reconsider the reduction amount based on the entirety of the record before him, which could include the lack of a 10-day notice and consideration of whether the after-school services were excessive. Both

parties are encouraged to present arguments to the IHO as to what would constitute a fair reduction based on equitable considerations.

VII. Conclusion

In summary, there is insufficient evidence in the hearing record to determine whether the privately obtained SETSS were appropriate for the student, or whether they were an excessive service. Typically, such a finding could result in the parent's request for reimbursement being denied; however, as the nonpublic school placement was recommended by the district both parties share some responsibility for the failure of the hearing record to include information regarding the student's in-school performance during the 2023-24 school year, and outright dismissal of the parent's appeal would be improper. Accordingly, this matter must be remanded for determinations consistent with the above.

I have considered the remaining contentions and find it is unnecessary to address them in light of my determinations above.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS 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**
February 8, 2024

STEVEN KROLAK
STATE REVIEW OFFICER