



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 24-124

**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:**

Liz Vladeck, General Counsel, attorneys for respondent, by Cynthia Sheps, 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 a decision of an impartial hearing officer (IHO) which denied his request that respondent (the district) fund the costs of his son's special education teacher support services (SETSS) for the 2023-24 school year and also denied his request for compensatory education related to the 2023-24 school year. The district cross-appeals from the relief awarded by the IHO. The appeal must be sustained in part. The cross-appeal must be dismissed.

### **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 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 § 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 CSE last convened to formulate an IESP for the student on November 13, 2018 (see generally Parent Ex. B).<sup>1</sup> The November 2018 CSE determined that the student was eligible for

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<sup>1</sup> Prior to the start of the hearing, the parent made a motion for an interim order based on the district's failure to respond to the parent's due process complaint notice (Interim IHO Decision). As part of that application a number of exhibits were entered into the hearing record (Interim Parent Exs. A-C; Dist. Exs. 1-2; IHO Exs. I-III). During the hearing, the district's next exhibit was entered consecutively from the interim exhibits; however, the

special education as a student with a learning disability and recommended five periods per week of direct group SETSS (Yiddish) and two 30-minute sessions per week of individual counseling (Yiddish) (id. at pp. 1, 5).

Via letter dated May 16, 2023, the parent notified the district of the student's residence within the district and informed the district that he was parentally placing the student in a private school for the 2023-24 school year (Parent Ex. G at p. 2). The parent requested the district provide the student with all required special education and related services for the 2023-24 school year (id.). On July 17, 2023, the parent entered into a contract with Hatafkid Inc. (Hatafkid) to provide five periods per week of SETSS to the student at a rate of \$195 per hour (see Parent Ex. D). In a letter dated September 6, 2023, the parent notified the district that he had been unable to locate providers at the district's "standard rate" and he "ha[d] no choice but to implement" the student's IESP on his own and seek reimbursement or direct payment from the district (Parent Ex. C at p. 2).<sup>2</sup>

### **A. Due Process Complaint Notice**

In a due process complaint notice dated January 1, 2024, the parent alleged that the district denied the student a free appropriate public education (FAPE) for the 2023-24 school year (see Parent Ex. A). Specifically, the parent alleged that the CSE's failure to reconvene since the November 2018 IESP denied the student a FAPE for the 2023-24 school year (id. at p. 2). The parent further argues that the district's failure to provide the student with the SETSS and related services recommended in the November 2018 IESP denied the student a FAPE for the 2023-24 school year (id.). As relief, the parent sought an order directing the district to implement the recommended services and sought a bank of compensatory services (id. at p. 3).

### **B. Impartial Hearing Officer Decision**

An impartial hearing convened on February 2, 2024 and concluded on March 5, 2024 after two days of proceedings (Tr. pp. 1-66). In a decision dated March 6, 2024, the IHO determined that the district failed to offer the student a free appropriate public education (FAPE) for the 2023-24 school year, but also held that the parent failed to prove that the SETSS provided by Hatafkid's was specially designed to meet the student's needs and, therefore, the IHO denied the parents' request for SETSS funding at a rate of \$195 per hour (IHO Decision at pp. 4, 8, 10-11). The IHO went on to find that equitable considerations weighed in favor of the parents' request for an award of tuition reimbursement (IHO Decision at p. 12). Finally, the IHO addressed the parent's request for compensatory pendency services and acknowledging that the only IESP in the hearing record was six years old, found that there was insufficient evidence to determine an appropriate program for the student going forward (id. at p. 13). Accordingly, the IHO found that "rather than providing a bank of compensatory hours for services recommended six years ago, more appropriate relief in

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numbering of the parent exhibits restarted; accordingly, the interim parent exhibits will be cited to by indicating they were part of the interim package of exhibits and the remaining exhibits in the hearing record will be referenced without an additional designation (Interim Parent Exs. A-C; Parent Exs. A-I; Dist. Exs. 1-3; IHO Exs. I-III).

<sup>2</sup> The parent's 10-day notice was emailed to the district on September 7, 2023 (Parent Ex. C at p. 1).

this matter would be for the CSE to be directed to convene and develop an appropriate educational program for the student" (*id.* at pp. 13-14). As relief, the IHO ordered the district to conduct a comprehensive reevaluation of the student, convene the CSE to propose a new IESP, and provide the student with five periods per week of SETSS in Yiddish and two 30-minute sessions per week of individual counseling services in Yiddish pending the creation of a new IESP: (IHO Decision at p. 15).

#### **IV. Appeal for State-Level Review**

The parent appeals and the district cross-appeals from the IHO's decision. 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 and, therefore, the allegations and arguments will not be recited here. The gravamen of the parties' dispute on appeal is: whether the IHO erred in determining that the parent failed to meet his burden of proving that the SETSS program provided by Hatafkid was reasonably calculated to meet the student's needs; whether the IHO erred in not awarding a bank of compensatory pendency services, and whether the IHO's order for the district to reevaluate the student and reconvene the CSE was in error.

#### **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 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 public school 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]).<sup>3</sup> "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

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<sup>3</sup> 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]).

public or nonpublic schools located within the school district (*id.*).<sup>4</sup> Thus, under State law an eligible New York State resident student may be voluntarily enrolled by a parent in a nonpublic school, but at the same time the student is also enrolled in the public school district, that is dually enrolled, for the purpose of receiving special education programming under Education Law § 3602-c, dual enrollment services for which a public school district may be held accountable through an impartial hearing.

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. v. New York City Dep't of Educ., 694 F.3d 167, 184-85 [2d Cir. 2012]).

## **VI. Discussion**

### **A. Unilaterally-Obtained Services**

In his appeal the parent argues that the IHO erred in finding that he failed to sustain his burden to show that the unilaterally-obtained services provided by Hatafkid during the 2023-24 school year were specially designed to meet the unique needs of the student. 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 at the student's private school. Rather, the parent seeks public funding of the costs of the unilaterally-obtained services from Hatafkid. "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"]).<sup>5</sup>

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<sup>4</sup> 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.*).

<sup>5</sup> State law provides that the parent has the obligation to establish that a unilateral placement is appropriate, which in this case is the special education services that the parent obtained from Hatafkid for the student (Educ. Law § 4404[1][c]).

The parent's request for unilaterally-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. 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).

### **1. Student's Needs**

Although not in dispute, a brief description of the student's special education needs is necessary to address the issues raised on appeal. Here, the only available information to describe the student's needs aside from a progress report dated January 2024, is the November 14, 2018 IESP (see Parent Exs. B; E).<sup>6</sup>

The student's November 2018 IESP contained information from a November 19, 2016 psychoeducational evaluation, which reflected that administration of the Weschler Intelligence Scale for Children—Fifth Edition (WISC-V) to the student yielded a full scale IQ and a verbal comprehension score within the average range, and visual spatial and fluid reasoning scores within the high average range (Parent Ex. B at p. 1). The IESP reported that the student, who was in seventh grade when the IESP was prepared, had "age level graphomotor skills" (id.). Academically, the student presented with "some" delays, but the parent reported no academic developmental concerns (id.). Socially, the student presented with some anxiety regarding verbal expression, demonstrated age-appropriate social interests, and the parent reported no social development concerns at that time (id. at pp. 1-2). With respect to physical development, the student was able to ambulate independently, and the parent reported no concerns (id. at p. 2). The IESP included annual goals for reading, writing, and math, and a counseling goal related to reducing the student's frustration level, implementing anxiety reducing techniques, and demonstrating the ability to verbalize his concerns (id. at pp. 4-5).

The hearing record included a January 2024 Hatafkid progress report,, prepared by the student's SETSS provider during the 2023-24 school year (11th grade), which reflected the student's present levels of functioning and goals to improve his reading, math, written language,

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<sup>6</sup> With this appeal the parent submits what he describes as a Hatafkid "new progress report dated 3/1/2024"; however a review of the submitted progress report shows that it was dated January 1, 2024 and is identical to the January 1, 2024 progress report already in the hearing record (compare Req. for Rev., with Parent Ex. E).

and social/emotional skills (see Parent Ex. E).<sup>7</sup> Regarding the student's reading needs, the progress report indicated that administration of a Fountas and Pinnell assessment to the student reflected performance at a level "U" and that although the student lacked fluency and read at a slow pace, the student was able to "decode about 90 words per minute with 85 [percent] accuracy" (*id.* at p. 2).<sup>8</sup> The report noted that the student demonstrated weak focusing skills which impeded his reading comprehension, often failed to apply himself, missed important details, and was unable to answer critical thinking questions "on the text" (*id.*).

With respect to written language skills, the SETSS provider reported that results of an informal assessment of the student's writing indicated skills at a third grade level, which indicated a significant weaknesses in his writing skills, evidenced by his inability "to compose a coherent paragraph independently" (Parent Ex. E at p. 3).

In the area of math, the progress report revealed that the results of an informal assessment administered to the student indicated skills at a fourth grade level (Parent Ex. E at p. 1). The report further noted that the student's math skills were delayed and although he was able to solve single digit examples involving the four operations, he got lost easily when solving a multi-step problem or a problem with multiple digits and was unable to solve operations involving regrouping, borrowing, and long multiplication and division (*id.* at p. 2).

Regarding language skills, the progress report indicated that the student exhibited "deficient" expressive and receptive language skills reflected by his struggles with word retrieval, a weak attention span, and his "need[] to move around" after a few minutes of learning (Parent Ex. E at pp. 3-4). Speaking to the student's social/emotional development, the report noted that the student was "deficient" in this domain on the basis that, although he was able to interact well with peers and maintain a proper conversation, he failed to understand others' point of view, tended to think only of himself, and struggled to keep a structured routine evidenced by difficulty with following rules and time management (*id.* at p. 4).

To address the student's academic and social/emotional needs, the progress report indicated that the SETSS provider's intervention generally focused on "building skills in the reading, writing, math and language domains" through the use of books, graphic organizers, modeling, manipulatives, and positive reinforcement (Parent Ex. E at p. 4). The report concluded that the student was then-currently functioning "way below grade level in reading, writing, math, language, and social skills" (*id.*).

## **2. Hatafkid Services**

According to the parent, the student struggled in many academic and social/emotional areas and would "not be able to maintain his mainstream placement" without assistance (Parent Ex. I at

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<sup>7</sup> The hearing record does not explain why the student, who was reported as being in 7th grade during the 2018-19 school year, was reported as being in 11th grade during the 2023-24 school year, although it can be assumed that the student was retained for one grade level at some point in the interim time period.

<sup>8</sup> The educational coordinator from Hatafkid testified that reading level "U" was equivalent to a fifth grade reading level (Tr. p. 42; Parent Ex. H ¶ 4).



¶ 2). The parent testified that the student was recommended for five periods per week of SETSS in 2018 and for the 2023-24 school year, the district did not make a provider available (*id.* at ¶¶ 3-4). However, the hearing record does not indicate what happened with the student between the 2018-19 school year and the 2023-24 school year.

For the 2023-24 school year, the parent contracted with Hatafkids for the delivery of five periods per week of SETSS to the student (Parent Ex. D). The parent testified that he was unable to locate an approved provider from the district's approved provider list to implement the student's weekly SETSS services (Tr. p. 54). The parent testified that he "called about [10] or 15" providers on the district's approved provider list and "spoke to three" but the approved providers he spoke with "weren't willing to take on the case" and "the rest that [he] called [did not] pick up" (*id.*). The parent testified that he learned about Hatafkid "from the community . . . my friends" and he retained Hatafkid to provide the student's SETSS (*id.*). The educational coordinator from Hatafkid (educational coordinator) testified at the impartial hearing regarding the amount of SETSS the agency provided to the student for the 2023-24 school year, the amount charged for services, and the name and qualifications of the student's SETSS provider (*see* Tr. pp. 43-44, 46, 47-48; Parent Ex. H ¶¶ 4, 7, 8, 11, 12). The student's SETSS provider did not testify regarding the specially designed instruction provided to the student during the 2023-24 school year (*see* Tr. pp. 1-66).

The January 2024 progress report indicated that Hatafkid provided five hours per week of SETSS to the student (Parent Ex. E at p. 1). According to the educational coordinator, the person who provided the student's SETSS was certified in New York State to teach students with disabilities and was a bilingual Yiddish provider (Parent Ex. H ¶¶ 11-12). The educational coordinator testified that the student's SETSS provider was "qualified to teach special education for . . . high schoolers that [we]re at the level that [the student] [wa]s at" but that it was correct that the SETSS provider was only certified to teach students with disabilities for birth through second grade (Tr. pp. 43-44; Parent Ex. F). According to the educational coordinator's affidavit, the SETSS provider provided direct 1:1 services to the student, prepared for sessions, created goals which were reviewed quarterly, wrote progress reports, and met with teachers and parents (Parent Ex. H ¶¶ 14-15). The educational coordinator testified that the January 2024 Hatafkid progress report was "an accurate representation of what [the SETSS's provider] ha[d] been working on with [the student], including goals, over the course of the 2023-24 school year" (*id.* ¶ 16). The educational coordinator's affidavit reflected that SETSS was provided to the student "outside of the classroom" and the student's sessions were "individualized" and included "a great deal of specialized instruction" (*id.* ¶ 17). Finally, the educational coordinator's affidavit reflected that the student showed "signs of progress with" SETSS; however, the student continued to present with "academic delays" (*id.* ¶ 18).

Given the above, the IHO correctly noted that while the evidence in the hearing record reflected information about the student's then-current academic needs, it did not explain how the instruction the student received from the SETSS provider was specially designed to address his unique needs during the 2023-24 school year (IHO Decision at p. 10).

Additionally, it must be noted that the hearing record lacks information as to what happened with the student from the 2018-19 school year through the current 2023-24 school year. The most troubling part of this lack of information is that a review of the November 2018 IESP shows that the student was reported as "having age appropriate academic interests" and that "[n]o

academic development concerns were reported"; however, moving forward six years, the student was reported as functioning significantly below grade level in reading, writing, and math (compare Parent Ex. B at p. 1, with Parent Ex. E). This raises a question as to how five hours per week of SETSS, a service designed for the student when there was less concern over his academic performance, could be sufficient to address the student's unique special education needs when his academic delays appear to have become more severe.

Based on the foregoing, I find that the evidence in the hearing record supports the IHO's finding that the parent failed to sustain his burden to demonstrate the appropriateness of the unilaterally-obtained services. Although the parent's and educational coordinator's affidavits provided general statements about the services provided to the student and frequency, the hearing record lacks evidence sufficient to support a finding that the services from Hatafkid provided specially designed instruction to address the student's needs (see Gagliardo, 489 F.3d at 112; Frank G., 459 F.3d at 364-65). Of particular concern, is that while results of the student's 2016 psychoeducational evaluation indicated that his cognitive skills were in the average to high average range, during the 2023-24 school year the student was in an 11th grade mainstream classroom but functioning at an elementary school level academically (compare Parent Ex. B at p. 1 and Parent Ex. I ¶ 2, with Parent Ex. E).<sup>9</sup>

Although the educational coordinator testified that the "[g]oals were created for [the student] to work on during the 2023-2024 school year and [we]re reviewed quarterly," and the student "ha[d] already shown signs of progress with his SETSS service provider" (Parent Ex. H ¶¶ 15, 18), the description of the actual instruction provided merely states that the student was working on "building skills in the reading, writing, math and language domains" through the use of books, graphic organizers, modeling, manipulatives, and positive reinforcement while acknowledging that the student was functioning "way below grade level in reading, writing, math, language, and social skills" (Parent Ex. E at p. 4).<sup>10</sup> Likewise, the hearing record does not include any records of attendance or a schedule of services in relation to the 2023-24 school year, nor does it include reports or testimony from the provider that described the service provided to the student for the 2023-24 school year and how it was specially designed to address the student's unique needs (see generally Parent Exs. A-I; Tr. pp. 1-66). Neither the progress report, nor any other evidence in the hearing record, explains how the use by the provider of general educational tools such as, for instance, books and graphic organizers, constitutes specialized instruction to meet the student's unique needs, especially with the student reported as functioning "way below grade level" in all academic areas despite having average cognitive abilities. As a result, there is no basis in the hearing record to disturb the IHO's finding that the parent failed to meet his burden to

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<sup>9</sup> The January 2024 progress report reflects that "[r]esults of assessment indicate student to be at 4th grade level in math skills," "grade 3 in writing skills," and "way below grade level in reading" (Parent Ex. E at pp. 1, 3, 4).

<sup>10</sup> In reviewing the goals included in the January 2024 progress report that the provider was purportedly working on with the student, it is worth noting that the student was reported as being in the 11th grade and as reading at a 5th grade level, but was expected to read "grade-level text with purpose and understanding" (Parent Ex. E at pp. 1, 2; see Tr. p. 42). Without further clarification, it is difficult to understand how such a goal would be appropriate for the student at that time.

demonstrate that the unilaterally-obtained services provided by Hatafkid were appropriate for the student for the 2023-24 school year.

## **B. Relief - Compensatory Education**

The parent contends that the student is entitled to a bank of counseling services for the entire 2023-24 school year as a result of the district's failure to provide counseling services under pendency. The IHO found that rather than providing a bank of compensatory hours for services recommended by the CSE for the student "six years ago, more appropriate relief in this matter would be for the CSE to be directed to convene and develop an appropriate program for the [s]tudent" and ordered that "pending the reevaluation and creation of a new IESP for the [s]tudent," the district was to provide the student with five periods per week of group SETSS, as well as individual counseling services "in Yiddish language, 2 times per week for 30 minutes per session at a separate location" (IHO Decision at pp. 14, 15).

In his January 1, 2024 due process complaint notice, the parent requested pendency services pursuant to the November 2018 IESP, as well as a bank of compensatory services for any services owed to the student under pendency but not provided to him (see Parent Ex. A).

In an answer and cross appeal, the district asserts that the IHO properly denied the parent's request for compensatory counseling services. According to the district, it is obligated to deliver counseling services pursuant to the student pursuant to pendency and it performed its obligations by providing the parent with a related services authorization (RSA) for the student to receive individual counseling sessions. According to the district, the RSA afforded the student two 30-minute sessions per week of individual counseling services from January 2, 2024, through "the conclusion of the case." The district concedes that the student is entitled to an RSA for a bank of compensatory pendency counseling services from the date of the due process complaint through the conclusion of this matter since the student has not received any pendency counseling services. Therefore, the student is entitled to a bank of compensatory counseling services at a frequency of two 30-minute sessions per week from January 2, 2024 through the date of this decision, or 18 weeks at two times per week equaling a bank of 36 30-minute sessions of counseling services.

The district appeals from that portion of the IHO's order directing it to provide the student with five periods per week of SETSS and two sessions per week of counseling services pending the completion of a reevaluation and the creation of a new IESP, arguing that the IHO's relief "has the effect of circumventing the statutory process." Generally, an award of prospective relief in the form of IEP amendments or the prospective placement of a student in a particular type of program and placement, under certain circumstances, has the effect of circumventing the statutory process, pursuant to which the CSE is tasked with reviewing information about the student's progress under current educational programming and periodically assessing the student's needs (see Adams v. Dist. of Columbia, 285 F. Supp. 3d 381, 393, 396-97 [D.D.C. 2018] [noting with approval the hearing officer's finding "that the directives of IDEA would be best effectuated by ordering an IEP review and revision, rather than prospective placement in a private school"]; see also Student X, 2008 WL 4890440, at \*16 [noting that "services found to be appropriate for a student during one school year are not necessarily appropriate for the student during a subsequent school year"])). However, in this instance, having reviewed the IHO's order, I disagree with the district's interpretation of the order. A CSE has not convened to develop an educational plan for the student

since the 2018-19 school year and the IHO explicitly directed the CSE to reconvene to develop an appropriate plan for the student. Here, the IHO's relief is more compensatory in nature, in that it is encouraging the parties to move forward with the statutory process of convening a CSE to develop an educational plan for the student going forward, while at the same time ensuring the student does not go without any services in the interim. Accordingly, I find that portion of the IHO's order to be an appropriate compensatory education award based on the IHO's finding that the student was denied a FAPE for the 2023-24 school year.

## **VII. Conclusion**

Having determined that the IHO was correct in concluding that the parent failed to sustain his burden to demonstrate the appropriateness of the unilaterally-obtained services, the parent's request for the district to fund the cost of the unilaterally obtained services is denied. Additionally, the district's request to overturn the IHO's awarded relief is denied as the IHO's award was a proper exercise of his authority to grant relief for a denial of FAPE. Additionally, as discussed above, the student is award compensatory counseling services pursuant to pendency.

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

**THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.**

**THE CROSS-APPEAL IS DISMISSED.**

**IT IS ORDERED** that the district is directed to provide the student with a bank of 36 30-minute sessions of individual counseling sessions in the Yiddish language for failure to deliver services pursuant to pendency.

**Dated:**           **Albany, New York**  
                          **May 13, 2024**

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**STEVEN KROLAK**  
**STATE REVIEW OFFICER**