



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 24-131

**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 Hanna Giuntini,, 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, in part, her request that respondent (the district) directly fund the costs of her son's special education teacher support services (SETSS) delivered by EDopt, LLC (EDopt) at a specified rate for the 2023-24 school year. The district cross-appeals from the portion of the IHO's decision that failed to address the appropriateness of the SETSS provided by EDopt. The appeal must be dismissed. The cross-appeal must be sustained.

### **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, 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 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

A CSE convened on March 28, 2023, determined the student was eligible for special education as a student with a learning disability, and developed the student's IESP with a projected implementation date of April 17, 2023 (Dist. Ex. 2 at p. 1).<sup>1</sup> The March 2023 CSE recommended that the student receive five sessions of group SETSS in English, two 30-minute sessions of individual occupational therapy (OT), and two 30-minute sessions of counseling (one individual, one group) per week (*id.* at p. 10).

On May 31, 2023, the parent sent a notice to the district that the student would be parentally placed at the nonpublic school Tifereth Elimelech for the 2023-24 school year and requested special education services be delivered by the district under the dual enrollment statute (Parent Ex. D).

On August 22, 2023, the parent executed a contract with EDopt to provide services to the student by assigned providers based on the student's specific needs (Parent Ex. E at p. 1).<sup>2</sup> The contract included a general listing of EDopt's rates (\$195 per 60-minute individual session; \$145 per 60-minute group session) for special education or related services but did not list the specific services to be provided to the student (*id.* at p. 3).

In a 10-day notice dated August 23, 2023, the parent, through her advocate, informed the district that it had not assigned the student any providers to deliver the student's mandated services and requested that the district "fulfill the mandate" or the parent would have to unilaterally obtain the services "through a private agency at an enhanced rate" (Parent Ex. C). The hearing record did not include a district response to the parent's August 2023 notice (*see* Parent Exs. A-G; Dist. Exs. 1-3).

#### A. Due Process Complaint Notice

In a due process complaint notice dated September 8, 2023, the parent, through an attorney with Prime Advocacy LLC,<sup>3</sup> alleged that the district denied the student a free appropriate public education (FAPE) for the 2023-24 school year by failing to implement the services contained in the March 2023 IESP (*see* Parent Ex. A). The parent asserted that the district had not supplied

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<sup>1</sup> The student's eligibility for special education as a student with a learning disability is not in dispute (*see* 34 CFR 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

<sup>2</sup> EDopt has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (*see* 8 NYCRR 200.1[d], 200.7). The contract between EDopt and the parent also refers to the name "EdZone" (Parent Ex. E at p. 1), which has been named in other due process proceedings (Application of the Dep't of Educ., Appeal No. 24-223; Application of a Student with a Disability, Appeal No. 24-026).

<sup>3</sup> I note that the attorney who signed the due process complaint notice, Gershon Kopel, Esq., was using a Prime Advocacy email address in his filing (*see* Due Process Compl. Not. at p. 3). Suffice it to say, the attorney's current or former business relationship with Prime Advocacy in this proceeding is far from clear. Another attorney appeared at the first status conference (Tr. p. 2).

providers for the services recommended for the student, and because the parent could not procure providers at the district's rates, the parent "had no choice but to retain the services of an agency to provide the mandated services at an enhanced rate" (*id.* at p. 2). The parent also requested a pendency order based on the March 2023 IESP consisting of five sessions of group SETSS, two 30-minute sessions of individual OT, and two 30-minute sessions of counseling (one individual, one group) per week (*id.* at pp. 2-3). As relief, the parent requested an order awarding funding for payment to the student's provider/agency for SETSS, OT and counseling services at "an enhanced rate" for the 2023-24 school year and a bank of compensatory education to "make-up for any mandated services not provided by the [district]" (*id.* at p. 4).

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

An IHO was assigned to the matter and the parties proceeded to three status conferences held between October 17, 2023, and January 5, 2024, and an impartial hearing was conducted on February 14, 2024, which concluded on the same day (Tr. pp. 1-72).<sup>4</sup>

In a decision dated March 6, 2024, the IHO found that the student was entitled to services in accordance with the March 2023 IESP consisting of SETSS five periods per week in a group, OT, and counseling (IHO Decision at p. 4). The IHO determined that it was unclear from the evidence whether the services provided to the student virtually by EDopt through Zoom met the student's needs but concluded that "[s]urely, he derived some benefit, even if they were not fully appropriate" (*id.* at p. 5). However, the IHO found that a reduction to the rate charged was necessary because the services were not provided in person (*id.* at pp. 5-6). The IHO noted that the student was "only [receiving] a fraction of the services he need[ed]" via Zoom – one to two periods per week of SETSS and was not receiving any related services (*id.* at p. 5). In addition, the IHO found that the parent's request that services be delivered at 7:00 p.m. instead of during the school day limited the availability of possible providers, as well as the ability to form a group for services (*id.*). The IHO also determined that a rate of \$195 per hour for SETSS was "exorbitant" in relation to the amount paid by EDopt to the SETSS provider and thus warranted a reduction (*id.*). The IHO also noted that the contract did not obligate the parent "to obtain any specific services" (*id.*). Accordingly, the IHO ordered the district to locate a SETSS provider and "providers for related services including make-up services for the 2023-24 school year"; and fund up to five periods of SETSS per week, provided to the student for the 2023-24 school year, upon proof of service and attendance, at a rate of \$125 per hour "until the date the [district] locates a SETSS provider, initiates services and provides notice to the [p]arent" (*id.* at p. 6).

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<sup>4</sup> On October 16, 2023, the district executed a pendency agreement reflecting that the student's pendency placement was based on the March 2023 IESP and consisted of the five periods per week of group SETSS, two 30-minute sessions per week of individual OT and one 30-minute individual and one 30-minute group session per week of counseling provided by a private provider (Pend. Implementation Form).

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

The parent appeals through another representative of Prime Advocacy, alleging that the IHO erred in reducing the rate for the awarded SETSS.<sup>5</sup> The parent also asserts additional claims on appeal, namely: (1) the IHO erred in her determination that the student was only entitled to group services; (2) the IHO erred in her determination that the SETSS delivered through Zoom were inappropriate; and (3) the IHO erred in her determination that the contract with EDopt did not obligate the parent to obtain any specific services. The parent requests an award for SETSS at a rate of \$195 per hour for the 2023-24 school year.

The district cross-appeals and argues that the IHO erred in failing to consider the appropriateness of the SETSS obtained by the parent. The district asserts that the IHO erred in failing to apply a Burlington/Carter analysis to the parent's claims and requests that relief be denied in full or the matter remanded back the IHO. The district also asserts that the IHO was correct in reducing the rate for SETSS.

#### 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

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<sup>5</sup> State regulation provides that a petitioner shall file notice of intention to seek review, notice of request for review, request for review, and proof of service with the Office of State Review (8 NYCRR 279.4[e]). Although the parent's advocate filled out an electronic filing form with the Office of State Review indicating that she included a notice of intention to seek review and an affidavit of service of the notice of intention to seek review, petitioner failed to file a notice of intention to seek review and proof of service of the notice of intention to seek review. The district does not allege that service of the documents in this matter was defective and submitted a certified hearing record to the Office of State Review. Nevertheless, the parent's advocate is 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 reject a request for review, an SRO may be more inclined to do so after a party or an advocate's repeated failure to comply with the practice requirements (see Application of a Student with a Disability, Appeal No. 21-102; 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).

services is made (Educ. Law § 3602-c[2]).<sup>6</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 public or nonpublic schools located within the school district (*id.*).<sup>7</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**

As an initial matter, neither party has specifically appealed the portions of the IHO's decision which directed the district to locate a provider for SETSS and providers for related services, including make-up services, for the 2023-24 school year (see IHO Decision at pp. 5-6). Accordingly, these findings have become final and binding on the parties and will not be further discussed, except for the portion that relates to appropriateness of the private SETSS at an

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<sup>6</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]).

<sup>7</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 (Questions and Answers), VESID Mem. [Sept. 2007], available at <https://www.nysed.gov/special-education/guidance-parentally-placed-nonpublic-elementary-and-secondary-school-students>). 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.*). The guidance has recently been reorganized on the State's web site and the paginated pdf versions of the documents previously available do not currently appear there, having been updated with web based versions.

enhanced rate (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at \*6-\*7, \*10 [S.D.N.Y. Mar. 21, 2013]).

### **A. Legal Framework**

In this matter, the student has been parentally placed in a nonpublic school and the parents do not seek tuition reimbursement from the district for the cost of the student's placement in the nonpublic school. Instead, the parents alleged that the district failed to implement the student's mandated public special education services under the State's dual enrollment statute for the 2023-24 school year and, as a self-help remedy, they unilaterally obtained private SETSS from EDOpt without the consent of the school district officials, and then commenced due process to obtain remuneration for the costs thereof. Generally, districts who fail to comply with their statutory mandates to provide special education can be made to pay for special education services privately obtained for which a parent paid or became legally obligated to pay, a process that is essentially the same as the federal process under IDEA. Accordingly, the issue in this matter is whether the parents are entitled to public funding of the costs of the private services. "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 district funding of privately obtained services must be assessed under this framework. Thus, 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]).<sup>8</sup> 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

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<sup>8</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 EDOpt (Educ. Law § 4404[1][c]).

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]). Citing the Rowley standard, the Supreme Court has explained that "when a public school system has defaulted on its obligations under the Act, a private school placement is 'proper under the Act' if the education provided by the private school is 'reasonably calculated to enable the child to receive educational benefits'" (Carter, 510 U.S. at 11; see Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 203-04 [1982]; Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see also 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 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., 459 F.3d at 364; 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). 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).

Here, the district is correct in its argument that the IHO did not apply the correct legal standard when determining if the SETSS provided to the student by EDOpt during the 2023-24 school year was appropriate. In this instance, the parent's claims involve a self-help remedy seeking public funding of the special education services that she privately obtained from EDOpt without the consent of school district officials. That is the hallmark of a Burlington/Carter style of claim and analysis, and such relief is permissible if the parent meets the evidentiary burden of showing that the private services she obtained were appropriate under the totality of the circumstances.

The IHO determined that the student was entitled to the services recommended in the March 2023 IESP but did not otherwise make any further findings about the appropriateness of the private SETSS obtained by the parent other than stating "[i]t [wa]s unclear whether services provided by Zoom met the [s]tudent's needs" but "[s]urley, he derived some benefit, even if they were not fully appropriate" (IHO Decision at pp. 4-5). Although the parent arranged for private SETSS, the district has alleged claims that EDOpt did not provide SETSS specifically designed to meet the student's unique needs, thus the appropriateness of the services delivered by EDOpt during the 2023-24 school year are directly in dispute in this matter and the IHO erred when she failed to address the appropriateness of the unilaterally obtained SETSS under the Burlington/Carter unilateral placement framework (see id. at pp. 3-6). Given that the district does not contest that it failed to offer the student a FAPE by failing to find providers to implement the March 2023 IESP, I will now turn to address whether the SETSS unilaterally obtained for the student by the parent were appropriate to meet the student's needs.

## **B. Unilaterally Obtained SETSS**

The hearing record contains evidence of the student's needs as described in the March 2023 IESP which are not in dispute, and a review thereof provides context to determine whether the SETSS unilaterally obtained from EDOpt for the student by the parent were appropriate to address those needs.<sup>9</sup>

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

According to the March 2023 IESP, intelligence testing of the student, conducted in January 2022, yielded verbal (100), non-verbal (90), and full scale (94) IQ scores in the average range (Dist. Ex. 2 at pp. 1, 2). The IESP noted that the student exhibited difficulties on all visual/spatial tasks "where details were necessary" or the student was required to recognize three dimensionality (id.). The student also had difficulty discriminating between left and right (id.). The IESP indicated that the student "display[ed] deficits in reading and decoding which [held] him

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<sup>9</sup> Although the parent did not challenge the appropriateness of the special education services recommended in the March 2023 IESP (see Dist. Ex. 2) and requested funding for all services as indicated in the March 2023 IESP in her due process complaint notice (see Parent Ex. A at p. 3), the EDOpt SETSS supervisor testified the agency was not asked to provide OT or counseling services to the student (Tr. p. 62).

back from being able to follow along adequately in the mainstream classroom" and he had visual and perceptual "weaknesses that cause[ed] his delays in reading" (id. at p. 2). The IESP further indicated that with much of the learning being text based, the student had "significant delays academically" and his underlying visual weaknesses also caused delays in mathematics and writing (id.). The IESP noted that the student was unable to follow "any written direction or instructions in the classroom" and the student became discouraged easily due to these difficulties (id.). The student was said to require "motivation, encouragement. . . simplification and repetition of instructions in a structured environment to help him" (id.). According to the IESP, these supports were provided to the student in a 1:1 setting (id.).

The IESP reflected the results of a January 2022 administration of the Woodcock-Johnson IV-Tests of Achievement (WJ IV Tests of Achievement) which indicated the student performed in the average range on the passage comprehension, applied problems and calculation subtests; low average range on the letter-word identification subtest; and borderline impaired range on the spelling subtest (id. at pp. 1-2). Based on a January 2022 special education progress report, the IESP indicated that the student's decoding skills were below grade level, he experienced difficulty decoding new words, and did not read accurately or fluently (Dist. Ex. 2 at p. 3). With respect to comprehension, the student could conceptualize and answer higher order thinking questions when listening to a grade level story but when decoding a text independently the student struggled to make sense of what he had read due to the effort he invested in decoding (id.). The student was unable to find the main idea, provide story elements, make predictions, participate in a discussion, or compare and contrast; however, with assistance he could try to make an inference (id.).

The March 2023 IESP indicated that the student was able to write a paragraph with a topic sentence and concluding sentence "most of the time" but that his writing was below grade level (Dist. Ex. 2 at p. 3). The student struggled with spelling, writing his thoughts, and expressing his ideas and required assistance (id.). The student was unable to write an essay (id.).

In math, the March 2023 IESP stated that the student did not demonstrate an "adequate understanding of number recognition or place value," and had not mastered the concept of integers (Dist. Ex. 2 at p. 3). He struggled with operations containing fractions and decimals, specifically all operations related to decimals as well as comparing and ordering them (id.). The parent reported that math was a struggle for the student (id. at p. 4).

Socially, the March 2023 IESP indicated that according to the student's "[p]rior IESP," the student was charming and sensitive, had age-appropriate friends, and was entertaining, but did not follow classroom directions promptly (Dist. Ex. 2 at p. 4). The IESP indicated that the student needed reminders to start and complete his work, had difficulty adapting to change, and struggled with problem solving but was able to ask for help (id.). The IESP noted that the student's learning difficulties affected his self-concept and self-esteem, that he viewed himself as inadequate, and that he did not "trust his ability to do well in school" (id.). The March 2023 CSE recommended counseling to address the student's social/emotional needs and stated that the parent had reported that counseling for the student had not been accessed due to scheduling conflicts (Dist. Ex. 2 at pp. 1, 9).

In terms of the student's physical development, the parent indicated that the student was born legally blind in one eye and deaf in one ear, but that his hearing had improved to "almost. . . 100%," and his vision had improved with glasses (Dist. Ex. 2 at p. 5). The March 2023 IESP noted that the student had received OT previously, as he had presented with upper extremity weakness and decreased fine motor skills, and that the student had not received OT during the 2022-23 school year, but the parent had requested that it be "reinstated" (id.). The IESP cited an OT progress report from June 2020 that indicated the student had decreased sensory processing skills that made it difficult for him to focus in the classroom (id.). According to the IESP, the student enjoyed a variety of physical activities and played sports but needed to improve his strength, fine motor skills, attention, and ability to transition, and to reduce his distractibility (id.).

An EDOpt SETSS report from about a year later, dated February 7, 2024, described the student's needs at that time (Parent Ex. G).<sup>10</sup> According to the SETSS report, the student's decoding and comprehension skills were challenges for him and, as an eighth-grade student, his reading skills were equivalent to a sixth-grade level (Parent Ex. G at p.1). The report noted that while the student exhibited a "creative flair" in his writing, he presented with challenges with organization, "clarity and flow of his compositions," grammar, and punctuation (Parent Ex. G at p. 2). In addition, with regard to mathematics, the SETSS report indicated that the student demonstrated difficulty with equations, specifically word problems, and that he "frequently ma[de] simple errors that impede[d] accurate calculations" (Parent Ex. G at p. 2). The SETSS report also noted that the student demonstrated frustration, "particularly when he [felt] overwhelmed by his workload or encounter[ed] challenges in grasping certain concepts" (Parent Ex. G at p. 3).

## **2. EDOpt Services and Specially Designed Instruction**

At the impartial hearing, the SETSS supervisor from EDOpt confirmed that the enrollment agreement the parent executed with the agency indicated the rates for all services the agency provides but did not specify what services would be provided to the student (Tr. pp. 50-52). According to the enrollment contract, the agency charged \$195 per hour for SETSS and \$145 per hour for group SETSS (Parent Ex. E at p. 3). The enrollment contract indicated that the \$195 rate was "established based on reasonable market rate for similar agencies providing similar services to students in New York City as well as on the rates approved and offered by the New York City Department of Education to similar agencies providing similar services to NYC students during the 2022-23 school year" (id.). The SETSS supervisor testified the provider was an employee of the agency and was paid at a rate of \$80 an hour (Tr. p. 50). The agency also paid for employee benefits including "taxes [and] insurance" (id.).

In her affidavit, the EDOpt SETSS supervisor stated that although she had been assigned as the student's SETSS supervisor in August, 2023, it took "significant time" to secure a SETSS provider for the student (Parent Ex. F ¶ 7). She testified that around January 4, 2024, the student began receiving one to two SETSS sessions per week via Zoom in the evening because the parent wanted him to have it then and because the student's private school would not allow outside

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<sup>10</sup> As noted above, the hearing record shows that the student began receiving SETSS from EDOpt on or about January 4, 2024 (Parent Ex. F ¶ 7).

providers to come into the school (Tr. pp. 45-48; see Tr. p. 62; Parent Ex. F ¶ 8). The supervisor further testified that SETSS were provided via Zoom because the provider and the student lived in different boroughs (Tr. p. 46). The supervisor also testified that the reason the student only received one to two sessions per week was because the services were provided around the student's schedule, and he was not available for more than one to two sessions per week (Tr. p. 47). There is no documentation (service records or invoices) in the hearing record detailing the number of sessions that were delivered to the student. There is also no indication that the student received any related services during the 2023-24 school year. The supervisor indicated that EDopt was able to provide OT and counseling, but it was not asked to provide these services to the student (Tr. p. 62). She further testified that SETSS were provided one-on-one because no other student the agency provided services to had similar needs to the student and could meet on Zoom at that specific time for group sessions (Tr. p. 55). In her direct testimony by affidavit, the supervisor indicated that the student continued to require the CSE's recommended five sessions of SETSS per week to make progress and meet his goals (Parent Ex. F ¶ 14). She also opined that the student benefited greatly from one-on-one services (Tr. p. 56).

The supervisor testified that the SETSS lessons via Zoom were presented on the screen with both the provider's and student's camera on and that they both had access to the material being presented which enabled them to communicate, learn and teach (Tr. p. 46). The supervisor opined that the student was getting "as much out of the sessions" via Zoom as he would if the services were provided in-person (Tr. p. 47).

According to the SETSS supervisor, the student's provider stated that the student had been "making significant progress in learning" (Tr. p. 48). The supervisor testified that the student tended to rush his work, and overlook details which hindered his comprehension and to address such need the provider was teaching the student how to pace himself when doing work independently (id.). In addition, the student "[ost] various details" when he rushed and therefore the provider had to repeat lessons multiple times for the student to fully comprehend and understand the subject matter (id.).

The February 2024 SETSS progress report noted that the "SETSS provider play[ed] a pivotal role in supporting [the student], particularly in addressing his math homework and struggles with academic focus" (Parent Ex. G at p. 1). Further, the report stated that "[t]hrough consistent support, the aim [was] to mitigate challenges, enhance [the student's] academic performance, and cultivate strategies to manage frustration, fostering a more positive and productive learning environment" (id.).

To assist the student with improving his reading and decoding skills, the February SETSS report indicated that a tailored instructional approach was essential and that individualized instruction that included "gradually introducing more challenging texts" could provide a supportive framework (Parent Ex. G at pp. 1-2). The SETSS report also indicated that "incorporating multisensory techniques, such as engaging phonics games," could "enhance [the student's] learning experience" (id. at p. 2). The SETSS provider opined that "careful" book selection to align with the student's interests and then current reading level would create a balance between "enjoyment and growth" (id.). The provider noted that implementation of "reading support programs within the school, including small group sessions and one-on-one interactions

with a reading specialist, c[ould] offer additional resources," however, the hearing record does not indicate that such support was offered during the school day to the student (id.). The SETSS provider reported that encouragement and positive reinforcement" played a pivotal role in building [the student's] confidence, ensuring that progress is acknowledged, and achievements are celebrated, fostering both academic and emotional development" (id.).

To address the student's writing needs, the SETSS provider indicated that "[p]roviding explicit instruction on organizational strategies, such as outlining and structuring paragraphs, [could] enhance the coherence of [the student's] writing," and incorporating grammar and punctuation exercises into his learning plan would contribute to "refining the technical aspects of [the student's] compositions" (Parent Ex. G at p. 2). In addition, the provider noted that peer reviews and constructive feedback would further develop the student's writing skills by exposing him to diverse perspectives and refining his ability to revise and edit his work (id.).

Turning to mathematics, the February 2024 progress note stated that SETSS played a "crucial role in assisting [the student] by incorporating manipulatives and reinforcing concepts to enhance his mathematical comprehension (Parent Ex. G at p. 2). The provider noted that the student benefited from visual learning aids, and a "step-by-step instruction list prominently displayed" and that supports and interventions were imperative to address the student's delay in math skills (id.). In addition, the progress note indicated that the consistent support of prompting, modeling and repetitive practice was "instrumental" in improving the student's math skills (id.).

In terms of the student's learning style, the SETSS provider reported that the student demonstrated improved focus when provided with direct instructions and noted that when faced with difficulty or uncertainty the student refrained from seeking clarification and tended to lose focus or dismiss instructions (Parent Ex. G at p. 3). The SETSS provider stated that he used diverse methods with the student including "prompting, modeling, and redundancy," and that these techniques helped the student break down complex concepts to help ensure his understanding (id.). In addition, the provider incorporated task lists, manipulatives and visual cues to support the student's learning (id.). EDOpt The SETSS provider described the student as a "highly sociable individual" and noted that the student shared his "passion for sports" with the provider by detailing games and activities he had participated in (id.). The EDOpt SETSS supervisor stated that she had last observed the student on February 1, 2024 and that collaboration with his provider had led to "visible improvements, creating a supportive environment for his success and overall growth" (Parent Ex. F ¶¶ 7, 13).

The February 2024 progress note contained six goals that targeted the student's needs in the areas of math pacing and operations, reading comprehension, improvement of reading level, organization of written material, and improvement of vocabulary and expressive communication (Parent Ex. G at p. 4). The SETSS provider indicated that due to the student's needs, he "strongly recommended" that the student receive SETSS five periods per week (id.).

As noted above, to qualify for reimbursement under the IDEA, parents must demonstrate that the unilateral placement provided instruction specially designed to meet the student's unique needs, supported by services necessary to permit the student to benefit from instruction (Gagliardo, 489 F.3d at 112; see Frank G., 459 F.3d at 364-65). Regulations define specially designed

instruction, in part, as "adapting, as appropriate to the needs of an eligible student under this Part, the content, methodology, or delivery of instruction to address the unique needs that result from the student's disability" (8 NYCRR 200.1[vv]; see 34 CFR 300.39[b][3]). Thus, based on the totality of the circumstances, there is insufficient evidence in the hearing record to support a finding that the unilaterally obtained SETSS provided to the student by EDOpt constituted specially designed instruction sufficient to meet the student's identified needs. The parent selected and arranged for the services from EDOpt when signing the contract on August 22, 2023, but the evidence shows that no special education services were provided by EDOpt at all during fall 2023 until approximately January 4, 2024 (Parent Ex. E at p. 2 F at ¶ 7). Then, while the SETSS provider described some of the strategies that he employed or could employ while working with the student, such as prompting, modeling, and repetition and the use of supportive tools such as task lists, manipulatives, and visual cues; the evidence shows that student received SETSS only one or two time a week versus the five times "strongly recommended" by the student's EDOpt provider (Parent Ex. G at pp. 1-3).

Based on the foregoing, I find the totality of the evidence in the hearing record does not demonstrate that the unilaterally obtained SETSS provided to the student by EDOpt during the 2023-24 school year constituted specially designed instruction which addressed the student's unique needs and provided him with educational benefit. Here, the evidence shows that the student had difficulty following classroom instructions and displaying appropriate behavior within a classroom (Dist. Ex. 2 at p. 3). In addition, the student did not always join activities or appropriately engage in social interactions (*id.* at p. 4). The student's classroom struggles also undermined his self-confidence and the student did "not trust his ability to do well in school" (*id.*). The parent expressed concern regarding the student's executive functioning and sustained attention (Dist. Ex. 2 at pp. 2, 3). Although the student struggled in his mainstream classroom, none of the services recommended to support the student were provided in the student's nonpublic school. Moreover, there is no evidence that the SETSS provider collaborated with the student's private school to discuss how to meet the student's needs in that setting. Also, as indicated above, there was no evidence that the student received any related services during the 2023-24 school year. Although the EDOpt supervisor indicated that EDOpt was able to provide OT and counseling, she indicated the agency was not asked to provide these services (see Tr. p. 62). Moreover, neither party has defined what SETSS are and SETSS is not defined in the State continuum of special education services (see 8 NYCRR 200.6). As has been laid out in prior administrative proceedings, the term is not used anywhere other than within this school district and a static and reliable definition of "SETSS" does not exist within the district Accordingly, the parent failed to meet her burden to prove that the services she privately obtained from EDOpt specially designed instruction that was "reasonably calculated to enable the [student] to receive educational benefits (Carter, 510 U.S. at 11) under the totality of the circumstances and thus the IHO's order for the district to fund five periods of SETSS per week for the 2023-24 school year must be reversed.

## **B. Relief**

In the present matter, the services at issue are SETSS, which as stated above the parties have failed to define, but at times in the past, SETSS has been described as a hybrid of resource room services and/or consultant teacher services (see Application of a Student with a Disability, Appeal No. 16-056), each of which are included in the State's definition of "special education"

(Educ. Law § 4401[1]-[2]). The March 2023 CSE recommended five hours of group SETSS per week and related services, however, the evidence in the hearing record suggests that SETSS are no longer sufficient to address the student's needs given the student's limited availability, the fact that SETSS cannot be provided at the student's school and the parent's willingness to accept services (see Tr. p. 45). The hearing record shows that the student was mandated to receive five hours of group SETSS per week during the 2023-24 school year; however, even when private services were employed from EDOpt, the student still received only one to two individual sessions per week via Zoom (Tr. pp. 46-47). The hearing record also shows that the March 2023 CSE also recommended OT and counseling services but that the parent did not contract with EDOpt for such services though the EDOpt supervisor testified there were OT and counseling providers available (see generally Tr. p. 62).

I am concerned that the part of the unappealed aspects of the IHO's award directed the district to locate a provider for SETSS and providers for related services, including make-up services, for the 2023-24 school year, and in my view this order will be difficult to effectuate given the circumstances surrounding the student's schedule and his private school's unwillingness to allow any outside providers in the school during school hours (see IHO Decision at p. 6; Tr. pp. 45-47).

Thus, I find it necessary in addition to order the parties to reconvene the CSE to meet and discuss how equitable services can be provided to the student during the 2024-25 school year, including potential makeup services the parties agree to, in his private school as the student's needs appear to require services inside the classroom and as additional support. The parties are expected to cooperate with each other, and the discussion should include whether it is feasible to add special education services to assist the student in the classroom as there is evidence in the hearing record that the student is anxious, not focused, and is becoming overwhelmed within his classroom which is hindering his learning abilities (see generally Parent Exs. F ¶ 13; G at p. 3; Dist. Ex. 2 at pp. 5-6). In this instance, the district must ensure that it invites representatives from Tifereth Elimelech to attend the CSE meeting. The parents and private school participants are reminded that while the parent is free to select a private school of their choosing, the parent and private school do not hold an absolute veto over how a public school district provides publicly funded special education services (see T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009] [noting that the IDEA gives parents the right to participate in the development of their child's special education programming, not a veto power over those aspects of the programming with which they do not agree]).

## **VII. Conclusion**

Having determined that the evidence in the hearing record does not support the IHO's awarded relief in the form of district funding for services delivered by EDOpt during the 2023-24 school year, such determination is reversed. Additionally, for the reasons stated above, I find that the parties should meet to discuss how equitable services can be provided to the student during the 2024-25 school year in his nonpublic school.

I have considered the parties' remaining contentions and find them unnecessary to address given the determinations above.

**THE APPEAL IS DISMISSED.**

**THE CROSS-APPEAL IS SUSTAINED.**

**IT IS ORDERED** that the IHO's decision, dated March 6, 2024, is modified by reversing that portion which directed the district to fund the costs of the student's unilaterally obtained SETSS provided by EDopt for the 2023-24 school year; and

**IT IS FURTHER ORDERED** that the district shall reconvene the CSE within 30 days and the parties shall consider the topics as described above and, within 10 days thereafter the district shall provide the parents with prior written notice documenting the CSE's determinations in conformity with State and federal regulations and the body of this decision.

**Dated: Albany, New York  
July 8, 2024**

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**JUSTYN P. BATES  
STATE REVIEW OFFICER**