



The University of the State of New York

The State Education Department

State Review Officer

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No. 24-135

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

Appearances:

The Law Firm of Tamara Roff, PC, attorneys for petitioner, by Tamara Roff, Esq.

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 the decision of an impartial hearing officer (IHO) which denied her request that respondent (the district) fund the costs of the unilaterally-obtained special education services delivered to her daughter by Limud, Inc. (Limud) for the 2023-24 school year. The district cross-appeals from the IHO's award of a bank of related services as compensatory education. The appeal must be sustained. 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 Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482), namely a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B];

34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts related to IESPs, State law provides that "[r]eview of the recommendation of the committee on special education may be obtained by the parent or person in parental relation of the pupil pursuant to the provisions of [Education Law § 4404]," which effectuates the due process provisions called for by the IDEA (Educ. Law § 3602-c[2][b][1]). Incorporated among the procedural protections of the IDEA and the analogous State law provisions is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 300.507[a][1]). First, after an opportunity to engage in a resolution process, the parties appear at an impartial hearing conducted at the local level before an IHO (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j]). An IHO typically conducts a trial-type hearing regarding the matters in dispute in which the parties have the right to be accompanied and advised by counsel and certain other individuals with special knowledge or training; present evidence and confront, cross-examine, and compel the attendance of witnesses; prohibit the introduction of any evidence at the hearing that has not been disclosed five business days before the hearing; and obtain a verbatim record of the proceeding (20 U.S.C. § 1415[f][2][A], [h][1]-[3]; 34 CFR 300.512[a][1]-[4]; 8 NYCRR 200.5[j][3][v], [vii], [xii]). The IHO must render and transmit a final written decision in the matter to the parties not later than 45 days after the expiration period or adjusted period for the resolution process (34 CFR 300.510[b][2], [c], 300.515[a]; 8 NYCRR 200.5[j][5]). A party may seek a specific extension of time of the 45-day timeline, which the IHO may grant in accordance with State and federal regulations (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5]). The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]).

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). 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 February 22, 2022 and formulated an IESP for the student with an implementation date of March 1, 2022 and an annual review date of February 22, 2023, which recommended related services of speech-language therapy, occupational therapy (OT), and counseling (see generally IHO Ex. I).

In a letter dated May 31, 2023, the parent, through her attorney, requested that the district provided equitable services to the student at the student's nonpublic school for the 2023-24 school year (Parent Ex. D). The parent entered into a contract with Limud on July 5, 2023 for the provision of individual SETSS services to the student for the 2023-24 school year at a specified rate (Parent Ex. H).

In a due process complaint notice, dated October 24, 2023, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2023-24 school year (Parent Ex. A at p. 1). Specifically, the parent asserted that "on or about February 15, 2022, the CSE once again refused to recommend [special education teacher support services (SETSS)]" for the student, "despite the parent's request," and "[i]nstead, the CSE solely recommended that [the student] receive Speech-Language Therapy (1x45; 1:1, 1x45; group), Occupational Therapy (2x30; 1:1), and Counseling Services (2x30; group)" (*id.* at p. 2). While noting that the student had "continued to receive her last agreed upon services through an agreement with the district for the 2022-2023 school year," which included SETSS and related services, the parent alleged that the district denied the student a FAPE for the 2023-24 school year by failing to create an updated individualized education program (IEP) or IESP for that school year and also failed to provide "viable providers" to implement the student's "last agreed upon services" (*id.* at pp. 2-3). As relief, the parent sought the "[c]ontinuation/recommendation of, and funding/reimbursement for, 13 hours, per week, of 1:1 SETSS; Occupational Therapy (2x30; 1:1); Counseling Services (1x30; 1:1; 1x30; group); and Speech-Language Therapy (1x45; 1:1, 1x45; group) all to be provided at an enhanced/market rate in the absence of a procedurally valid and substantively appropriate educational plan in a timely manner for the 2023-2024 school year" (*id.* at p. 3).

After a prehearing conference on November 29, 2023 and status conferences on December 14, 2023 and January 16, 2024, an impartial hearing convened on February 21, 2024 before an IHO with the Office of Administrative Trials and Hearings (OATH) (Tr. pp. 1-94). In a decision dated March 7, 2024, the IHO found that the district failed to meet its burden to prove that it offered the student a FAPE for the 2023-24 school year (IHO Decision at p. 8).¹ As a result, the IHO determined that the issue before her to be resolved was "whether the [p]arent's unilateral program of 13 hours per week of 1:1 SETSS . . . was appropriate for the [s]tudent" under a Burlington/Carter analysis (*id.*). Despite acknowledging that there was a detailed progress report in the hearing record and that the SETSS were delivered to the student by duly certified special education teachers provided by Limud, the IHO found that the parent did not meet her burden of

¹ The district agreed that the student's pendency placement was based on a prior November 2021 unappealed IHO decision and included district funding of 13 hours per week of 1:1 SETSS from Limud and two 30-minute sessions per week of individual speech-language therapy from a specified private provider, as well as district provision or funding of OT and counseling from providers to be determined (Pendency Implementation Form).

establishing that the services were "reasonably calculated" to provide the student with educational benefits (id. at pp. 9-10). Specifically, the IHO found that the testimony by the Limud supervisor was too vague and nonspecific to support a finding that the unilaterally-obtained SETSS constituted specially designed instruction which addressed the student's unique needs, and further found that there was conflicting information in the hearing record between the progress report and the parent's testimony as to whether the student was making progress during the 2023-24 school year with the 13 hours of SETSS provided to her (id. at pp. 9-10). Accordingly, the IHO denied the parent any funding or reimbursement for the unilaterally-obtained SETSS (id. at p. 10).

With respect to the issue of related services, the IHO noted the parent had testified that she was unable to find related services providers to implement the student's speech-language therapy, OT, and counseling (IHO Decision at pp. 8-9). Finding that it was undisputed the district had failed to implement the student's related services and that it was the district's burden to propose an appropriate compensatory award for its failure to offer FAPE to the student for the 2023-24 school year, the IHO awarded "a bank" of compensatory education consisting of 40 hours of speech-language therapy, 40 hours of OT, and 30 hours of counseling from providers of the parent's choosing at reasonable market rates (id. at pp. 11-12).

IV. Appeal for State-Level Review

The parent appeals, and the district cross-appeals. The parties' familiarity with the particular issues for review on appeal is presumed and will not be recited here in detail. The main issues raised by the parties on appeal include whether the IHO erred in denying the parent's request for funding from the district for the SETSS services she unilaterally-obtained to remedy the district's failure to offer the student a FAPE or equitable services for the 2023-24 school year and whether the IHO erred by awarding the parent a bank of compensatory education for the related services of speech-language therapy, OT, and counseling.

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 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]). "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.*).² 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 its answer and cross-appeal, the district does not appeal from the IHO's determination that it failed to meet its burden to prove that it offered or provided the student appropriate services for the 2023-24 school year (IHO Decision at p. 8). Accordingly, the IHO's determination has become final and binding upon the parties (see 34 CFR 300.514[a]; 8 NYCRR200.5[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]).

Prior to reaching the substance of the parties' arguments, some consideration must be given to the appropriate legal standard to be applied. In this matter, the student has been parentally placed in a nonpublic school and the parent does not seek tuition reimbursement for the cost of the student's attendance there. Instead, the parent alleged that the district did not convene to develop an IESP for the student for the 2023-24 school year or deliver previously agreed-upon services and as a self-help remedy she unilaterally obtained private SETSS from Limud for the student without the consent of the school district officials, and then commenced due process to obtain remuneration for the costs thereof (Parent Ex. A at pp. 2-3). Generally, districts who fail to comply with their

² 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.*).

statutory mandates to offer or 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 parent is entitled to public funding of the costs of the private SETSS. "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"]).

As the IHO found, the parent's request for privately obtained SETSS 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]). 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]). 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 Rowley, 458 U.S. at 207). Parents

need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether a unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether the placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] ["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).

The parent argues that the IHO erred by finding she did not meet her burden of proving that the unilaterally-obtained SETSS constituted specially designed instruction which addressed the student's unique needs and provided her with educational benefit because, as opposed to the IHO's determinations based on the lack of program specificity and evidence of the student's progress, "the [hearing] record is replete with references to the tools, strategies, accommodations, and methodologies used by the SETSS providers" with the student."

While the IHO found that the Limud supervisor's testimony was vague as to the details of the program, on my independent review of the hearing record, I find that the totality of the evidence and, in particular the February 2024 progress report, which the IHO acknowledged was "thorough," supports a finding that the parent met her burden to demonstrate the unilaterally-obtained SETSS provided to the student through Limud were appropriate under the Burlington/Carter standard applied by the IHO.

At the outset, a consideration of the student's needs frames the issue to be resolved; to wit, whether the parent's unilaterally-obtained services constituted specially designed instruction and enabled the student to receive the requisite educational benefit. The IHO found that "there [wa]s a significant discrepancy between the testimony of the Parent's witnesses regarding the Student's level of functioning and the present levels of performance . . . in the Student's last IESP dated 2/15/2022" but did not explicitly make a determination resolving the discrepancy (IHO Decision at p. 7). I note, however, that the district did not offer the February 2022 IESP as evidence of the student's needs (Tr. pp. 48-49). Instead, the IHO requested that the most recent IESP be produced "to complete the record" and it was entered into evidence as an IHO exhibit (Tr. p. 48; see IHO Ex. I). Further, there is no indication that the district evaluated the student or engaged in educational planning leading up to the 2023-24 school year at issue. To the extent the description of the student's needs by the parent's witnesses or as set forth in the February 2024 progress report might be questioned, it was the district's responsibility to identify the student's needs through the evaluation process and its burden to present evidence regarding the student's needs during the impartial hearing, particularly in light of the parent's allegations that the district did not sufficiently evaluate the student (see Parent Ex. A at pp. 1, 3; see also A.D. v. Bd. of Educ. of City Sch. Dist. of City of New York, 690 F. Supp. 2d 193, 208 [S.D.N.Y. 2010] [finding that a unilateral placement was appropriate even where the private school reports were alleged by the district to be incomplete or inaccurate and finding that the fault for such inaccuracy or incomplete assessment of the student's needs lies with the district]). Taking this into account, I turn now to reviewing the most recent evidence regarding the student's strengths and deficits, beginning with the February 2022 IESP but also including the February 2024 SETSS progress report completed by the student's two special education teachers from Limud (see Parent Ex. G; IHO Ex. I).³

Overall, the evidence in the hearing record shows that the student presented with average intellectual functioning with delays in language, articulation, pragmatics, behavior, academics, and social/emotional development with a history of attending, fine motor and motor planning deficits (see Parent Ex. G; IHO Ex. I at pp. 1-6). She had received diagnoses of autism, attention deficit hyperactivity disorder, and social pragmatic communication disorder (see Parent Ex. G at p. 1; IHO Ex. I at p. 6).

The February 2022 IESP contained information from a December 2021 neuropsychological evaluation that reflected that administration to the student of the Wechsler Intelligence Scale for Children, Fifth Edition (WISC-V) yielded a full-scale intelligence quotient (IQ) of 100; however, the evaluator noted there was variability in the five index scores and indicated that the scores should be considered individually (IHO Ex. I at p. 1).⁴ The IESP reported that the student scored in the high average range on the visual spatial index with a score of 117 (87th percentile), in the average range on the verbal comprehension index with a score of 106 (66th

³ The February 2024 SETSS progress report was completed by two special education teachers who were both providing the service to the student (Tr. p. 75; Parent Ex. G at p. 1).

⁴ The hearing record also includes a June 2021 IESP, which reported the results from a January 2019 administration of the Wechsler Preschool & Primary Scale of Intelligence – Fifth Edition (WPPSI-IV) that placed the student's intellectual functioning within the superior to very superior range (Parent Ex. B at p. 1). The hearing record does include information regarding the discrepancy between the cognitive assessments reported in the January 2019 psychoeducational evaluation and the December 2021 neuropsychological evaluation.

percentile) and the fluid reasoning index with a score of 100 (50th percentile), and in the low average range on the working memory index with a score of 91 (27th percentile) and the processing speed index range with a score of 83 (13th percentile) (*id.*). The evaluator indicated that the student's visual spatial skills were an area of strength, whereas her working memory and processing speed were areas of relative weakness and specifically noted that her processing skills were considered weaker than her other skills (*id.* at pp. 1, 2).

With regard to academic skills, the March 2022 IESP reported information from the neuropsychological evaluation that the student performed in the average range in reading and writing but that her math skills were "highly variable" (IHO Ex. I at p. 2). According to the IESP, the evaluator indicated that the student performed in the average range in basic computation and math problem solving skills, in the very low range when asked to solve simple addition and subtraction problems under time constraints, and within the low range for multiplication fluency (*id.*).

The February 2022 IESP also reflected the results from a 2021 psychoeducational evaluation, which indicated the student performed in the average to above average range on the Wechsler Individual Achievement Test, Third Edition (WIAT-III), with the exception of numerical operations subtest which was not completed (IHO Ex, at p. 2). The IESP further reported information from the evaluation that the student's reading skills were above average (standard score 124, 95 percentile) and her reading comprehension skills were "at the upper reaches of the average range" and noted that the student easily understood and recalled details of the passages read but had difficulty making inferences (*id.* at p. 3).

The February 2022 IESP also included results from an August 2021 speech-language evaluation, which indicated that the student performed in the low average to average range on the Clinical Evaluation of Language Fundamentals – Fifth Edition (CELF-5) (IHO Ex. at p. 3). The IESP reflected that the student performed in the low average range on formulating sentences and understanding spoken paragraphs (*id.*). Additionally, the student demonstrated many errors in both words and sentences on the Goldman Fristoe Test of Articulation 3, and the evaluator noted that her intelligibility was considered fair (*id.* at pp. 3-4). The February 2022 IESP further reported that the student struggled with ritual and conversational skills, verbally making or responding to greetings to or from others, beginning and ending conversations, observing turn-taking rules in the classroom or in social interactions, introducing appropriate topics of conversation, making relevant contributions to a topic during conversations or discussions, avoiding use of redundant or repetitive information, and asking for or responding to requests for clarification during conversations (*id.* at p. 4).

According to the February 2024 SETSS progress report, the student presented with deficits in cognition, communication, and social/emotional and behavioral skills (Parent Ex. G at p. 1). The special education teachers reported that the student struggled with focusing, was "highly emotional," which affected her friendships, and noted that her academic functioning was below grade level (*id.*). Additionally, the student had a low frustration tolerance, which affected the quality of her classwork and her social interactions (*id.*).

With regard to math, the special education teachers reported that the student had difficulty with many sixth grade skills including: computing ratios and proportional relationships;

interpreting and computing quotients of fractions; solving word problems involving division of fractions by fractions; finding the greatest common factor of two whole numbers less than or equal to 100; using the distributive property to express a sum of two whole numbers; finding the least common multiple of two whole numbers less than or equal to 12; identifying parts of an expression using mathematical terms; and applying properties of operations to generate equivalent expressions (Parent Ex. G at p. 1). The special education teachers indicated that the student was making consistent progress in fourth grade math skills (id. at pp. 1-2).

In reading, the student scored below the 40th percentile on the DIBELS 8th Edition reading assessment, and her teachers indicated that she was reading at a beginning of fifth grade level (Parent Ex. G. at p. 2). The teachers reported that the student struggled with specific diagraphs, confused hard and soft 'c' and 'g,' and omitted suffixes in words (id.). In reading comprehension, the student scored below the 20th percentile on the DIBELS 8th Edition Maze reading comprehension assessment (id.). The teachers indicated that the student struggled with reading comprehension unless the story was to her liking, otherwise she read on "autopilot" to get through the work, but then could not answer any questions on what she just read (id.). Additionally, the teachers indicated that the student struggled with perspective taking questions and noted that this was a struggle for her in general (id.). Finally, they noted that the student was able to answer basic reading comprehension questions but struggled with higher level thinking questions, as well as with fact versus opinion and making inferences (id.).

In writing, the teachers reported that the student loved to write on topics of interest to her but that she struggled "and need[ed] lots of assistance putting the information down on paper in an organized and comprehensive fashion" (Parent Ex. G at p. 2). They indicated that she used basic grammar skills appropriately, but her sentences were "often rigid and fragmented" and noted that she had a hard time organizing her thoughts in order to put them down on paper (id.). Finally, they indicated that, even if the topic was of interest, the student could go off on tangents and miss the main idea of the essay, used run on sentences and repeated herself numerous times (id.).

The teachers indicated that the student learned best in a small group environment, because outside stimuli was distracting to her, and noted that different supplies and hands-on modalities when learning new skills were helpful (Parent Ex. G at p. 2). They further indicated that the student was "very emotional and highly charged, so she need[ed] a lot of emotional support throughout the day" (id.). Additionally, the student required a lot of outside motivation to learn new concepts, to complete her work, and she required many prompts to help her focus of what was being taught in class (id. at p. 3). The teachers indicated that the student struggled with two or three step directions and could become very overwhelmed when expected to "follow listening directions" (id.). Once overwhelmed, the student would either shut down and be completely non-responsive or put her head down and cry (id.).

The teachers reported that the student was really struggling socially, noting that as she got older the gap between her and her classmates' emotional and social intelligence grew bigger (Parent Ex. G at p. 3). They indicated that the student had difficulty with conversational skills, listening skills, and seeing others' perspectives (id.). The teachers further indicated that the student struggled with flexibility, impulse control, and coping strategies and noted that when frustrated in class it often took the full lesson for her to regulate (id. at pp. 3-4). Furthermore, the student then needed the lesson to be retaught in a 1:1 setting (id.). Additionally, task completion was

challenging and redirections from her teachers often triggered negative behaviors (id. at p. 4). Finally, with regard to executive functioning skills, the teachers reported that the student scored significantly below level on the Life Skills Advocate assessment (id.).

In the February 2024 SETSS progress report, the teachers indicated that that the student's educational program consisted of a mainstream classroom setting, 1:1 intervention and small group setting, all of which were facilitated by a provider (Tr. p. 75; Parent Ex. G at p. 1). Additionally, the teachers reported that they addressed some of the student's deficits using applied behavior analysis (ABA) methodology (Parent Ex G at p. 1). They further indicated that, with the 1:1 assistance, the student was making "slow and steady progress in all areas" (id.). The teachers indicated that, while the student was able to stay in the mainstream classroom for most of the day, she continued to need frequent breaks and 1:1 support outside of the classroom a few times a day to help her focus with less distractions (id.). The student required constant guidance and motivational charts to keep her on task with the classroom teacher (id.). The teachers indicated that they were working with the school team and parent to expand the student's community of reinforcement, flexibility, and coping strategies (id. at pp. 3-4). The teachers recommended that the student continue to receive 13 hours of SETSS weekly and opined that the "1:1 learning [wa]s extremely important for [the student], mainly to address her inability to focus and stay on tasks especially in large groups" (id. at p. 5). The teachers indicated that the student was able to focus and grasp information when taught in a 1:1 setting and provided with "a lot" of visual stimuli and information presented in a multisensory and hands-on manner (id.). Additionally, they indicated that the student did well: using a written and pictorial schedule for organization and to minimize frustrations; when taught new information with visual and/or hands on material; and with constant review and maintenance to help her retain information being taught (id.). Furthermore, the teachers addressed coping strategies and appropriate replacement behaviors for the student, provided a high level of repetition and modification in a 1:1 setting, and supported the transfer of that information into the classroom (id.). The progress report set forth 45 goals targeted to address the student's needs in math, social strategies, reading, and writing (id. at pp. 5-9).

In her affidavit testimony, the educational supervisor from Limud indicated that the student received the 13 hours per week of "direct 1:1" SETSS from two teachers who were certified by the State to teacher students with disabilities and who were "trained and experienced in teaching literacy and comprehension to school-aged children and adolescents" (Parent Ex. I ¶¶ 20-21). The supervisor indicated that the student received the services in her nonpublic school and "at home when needed" and that the services were "typically provided as push-in and pull-out services" (id. ¶ 22; see Tr. p. 72). The supervisor indicated the providers addressed the student's needs related to writing, reading comprehension, problem solving math, and math computation, as well as executive functioning and social skills (Tr. p. 76). The supervisor described that the student "ha[d] a difficult time learning," so at times the "SETSS provider ha[d] to reteach the information, pre-teach the information, work on skills with [the student], [and] prepare her for what's happening . . . so that she's able to function well in the classroom" (Tr. p. 76). One of the providers was trained in ABA and used "behavior intervention techniques with the student" (Tr. p. 80). With respect to the number of hours, the supervisor opined that, with fewer than 13 hours of SETSS, the student would not be able to function in the "mainstream environment" as the student's needs related to her diagnosis of autism spectrum disorder "impede[d] every subject of the day" (Tr. pp. 77-78).

Consistent with the supervisor's testimony, the parent testified that the 13 hours of SETSS were delivered to the student Monday through Thursday during the afternoon when the student's secular classes took place and were provided as individual services, both as a "push-in" service to help the student "function in the classroom" and "at times" as a pull-out service for those times when the student became "dysregulated" (Tr. pp. 58-59). The parent testified that the student could not "function .in the classroom without . . . the support she g[ot] from her SETSS provider" (Tr. pp. 53-54). She indicated that, if a provider was not available, the student would "fall[] apart" in that she would "shut[] down" and wouldn't participate, listen to the teacher, or take out her book and would get upset if her teacher directed her to do her work (Tr. pp. 54, 59). The parent further shared that, if the student knew the provider would not be there on a given day, she would refuse to go to school (Tr. p. 59). The parent indicated that there were "some things that [the student was] catching up on, but some things that she[was] failing," noting that the student still struggled "even with the support" (Tr. pp. 54-55). However, the parent also indicated that, when the student received SETSS, her "motivation level" improved and she was better able to participate in her work (Tr. pp. 56-57). The parent testified that the student "ha[d] made some progress with her reading comprehension[and] a little bit with math" (Tr. p. 57).

Based on the foregoing, I find that the totality of the evidence in the hearing record demonstrates that the unilaterally-obtained SETSS provided to the student through Limud during the 2023-24 school year constituted specially-designed instruction which addressed the student's unique needs and provided her with educational benefit. While the Limud supervisor's testimony might have been more useful with respect to proving that the SETSS were provided by Limud at the frequency and duration claimed by the parent, the February 2024 progress report, prepared by the student's SETSS providers, evidences the requisite specially designed instruction and educational benefit to support an award to the parent of funding or reimbursement of the SETSS. Moreover, while the parent's view of the student's progress may have differed in some respects from the slow and steady progress reflected in the February 2024 progress report, progress is merely one relevant, but nondispositive, factor to be considered when evaluating the appropriateness of unilaterally-obtained services, and such discrepancies in viewpoint as to progress do not undercut the overall evidence in the hearing record that the unilaterally-obtained SETSS were appropriate (see Scarsdale Union Free Sch. Dist. v. R.C., 2013 WL 563377, at *9-*10 [S.D.N.Y. Feb. 4, 2013] [noting that evidence of academic progress is not dispositive in determining whether a unilateral placement is appropriate]; see also M.B. v. Minisink Valley Cent. Sch. Dist., 523 Fed. App'x 76, 78 [2d Cir. Mar. 29, 2013]; D.D-S. v. Southold Union Free Sch. Dist., 506 Fed. App'x 80, 81 [2d Cir. Dec. 26, 2012]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 486-87 [S.D.N.Y. 2013]; C.L. v. Scarsdale Union Free Sch. Dist., 913 F. Supp. 2d 26, 34, 39 [S.D.N.Y. 2012]; G.R. v. New York City Dep't of Educ., 2009 WL 2432369, at *3 [S.D.N.Y. Aug. 7, 2009]; Omidian v. Bd. of Educ. of New Hartford Cent. Sch. Dist., 2009 WL 904077, at *22-*23 [N.D.N.Y. Mar. 31, 2009]; Frank G., 459 F.3d at 364). Accordingly, the IHO's finding that the parent was not entitled to funding or reimbursement from the district for the unilaterally-obtained SETSS must be reversed.

B. Equitable Considerations

The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ.,

226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]; L.K. v. New York City Dep't of Educ., 674 Fed. App'x 100, 101 [2d Cir. Jan. 19, 2017]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014] [identifying factors relevant to equitable considerations, including whether the withdrawal of the student from public school was justified, whether the parent provided adequate notice, whether the amount of the private school tuition was reasonable, possible scholarships or other financial aid from the private school, and any fraud or collusion on the part of the parent or private school]; C.L., 744 F.3d at 840 [noting that "[i]mportant to the equitable consideration is whether the parents obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA"]).

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

Here, there is no dispute that the parent did not provide the district with 10-days' notice of her intent to unilaterally obtain SETSS from Limud. On the other hand, the district failed to conduct an annual review in February 2023 and did not respond to the May 2023 letter from the parent's attorney requesting that the district provided equitable services to the student at the student's nonpublic school for the 2023-24 school year (Parent Ex. D; IHO Ex. I at p. 1). Thus, as the district offered no program for the parent to reject, I decline to exercise my discretion and reduce or deny the parent's request for district funding for the costs of SETSS delivered by Limud for the 2023-24 school year based on the lack of a 10-day notice.

C. Compensatory Education

The district cross-appeals from the IHO's award of compensatory education in the form of a bank of related services to the student, primarily arguing that the parent did not request compensatory education in the due process complaint notice.

Generally, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). Under the IDEA and its implementing regulations, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[i][7][i][a]; [j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]). Moreover, it is essential that the IHO disclose his or her intention to reach an issue which the parties have not raised as a matter of basic fairness and due process of law (Application of a Child with a Handicapping Condition, Appeal No. 91-40; see John M. v. Bd. of Educ. of Evanston Tp. High Sch. Dist. 202, 502 F.3d 708 [7th Cir. 2007]). With respect to relief, State and federal regulations require the due process complaint notice state a "proposed resolution of the problem to the extent known and available to the party at the time" (8 NYCRR 200.5[i][1] [emphasis added]; see 20 U.S.C. §1415[b][7][A][ii]; 34 CFR 300.508[b]).

As noted above, in the October 2023 due process complaint notice, the parent sought 13 hours per week of SETSS, two 30-minute sessions per week of individual OT, two 30-minute sessions per week of counseling (one individual and one group) and two 45-minute sessions per week of speech-language therapy (one individual, one group) (Parent Ex. A at p. 3). The parent requested "[c]ontinuation/recommendation," as well as "funding/reimbursement," for the services (id.). While the due process complaint notice is not explicit in requesting compensatory education; on the other hand, the complaint also did not state that the parent engaged in self-help and obtained private services for which she sought district funding (id.). During her opening statement, the parent's attorney clarified that the relief sought was two-fold (Tr. pp. 45-47). The parents' attorney indicated that the parent had arranged for SETSS from Limud and requested district funding for the costs of those services at the contract rate (Tr. pp. 45-47). With respect to the related services, the parent sought "a bank of hours for the related services to compensate for the hours missed to date due to the District's failure to arrange for services and offer any viable providers" (Tr. p. 47). The parent sought the compensatory related services to "be ordered at a reasonable market rate" (Tr. p. 46). The parent's attorney explained that, as of that date, the district had not identified providers to deliver the student's related services and the parent had tried but had, thus far, been unsuccessful in finding providers (Tr. pp. 46-47).

Consistent with the assertions made during opening statement, the parent testified that the district had not reached out to her with providers to deliver the student's related services (Tr. p. 57). In addition, in her affidavit testimony, the parent indicated that she had been "unable to secure providers" to deliver the student's related services and so the student had not received speech-language therapy, OT, or counseling during the 2023-24 school year (Parent Ex. J ¶ 12). The parent also stated she continued to seek providers (id.). During cross-examination, the district's representative inquired of the parent regarding her efforts in locating providers (Tr. pp. 52-53). The parent testified that she contacted "the agency that work[ed] with" the student's private school "countless times" and that she "contacted many, many agencies," as well as individual therapists and providers, but "couldn't find anybody" willing to work with a related services authorization (RSA) through the district (Tr. pp. 52-53).

In her closing statement, the parent's attorney reiterated the request for compensatory education consisting of a bank of hours for related services at a reasonable market rate (Tr. pp. 88-92). The parent's attorney specifically stated the parent was not seeking RSAs to obtain the related services (Tr. p. 92).

During the impartial hearing, the district did not respond to the parent's attorney's statements that the parent sought compensatory related services, either by arguing that the request was improperly raised or by proposing what remedy might serve to place the student in the position she would have been had the district not denied the student a FAPE or equitable services. Moreover, there is no dispute that the district has not delivered or facilitated the delivery of related services during the 2023-24 school year, either pursuant to its obligation to provide equitable services or pursuant to its obligation to provide the student's pendency related services, to which the student was entitled for a large part of the school year (see Pendency Implementation Form). Under the circumstances, I do not find that the IHO erred in awarding compensatory education for services not delivered and not unilaterally obtained by the parent during the 2023-24 school year.

Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). The purpose of an award of compensatory education is to provide an appropriate remedy for a denial of a FAPE (see E.M. v. New York City Dep't of Educ., 758 F.3d 442, 451 [2d Cir. 2014]; Newington, 546 F.3d at 123; Newington, 546 F.3d at 123 [holding that compensatory education is a remedy designed to "make up for" a denial of a FAPE]; see also Doe v. E. Lyme, 790 F.3d 440, 456 [2d Cir. 2015]; Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005] [holding that, in fashioning an appropriate compensatory education remedy, "the inquiry must be fact-specific, and to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"]; Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1497 [9th Cir. 1994]). Accordingly, an award of compensatory education should aim to place the student in the position he or she would have been in had the district complied with its obligations under the IDEA (see Newington, 546 F.3d at 123 [holding that compensatory education awards should be designed so as to "appropriately address[] the problems with the IEP"]; see also Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1289 [11th Cir. 2008] [holding that "[c]ompensatory awards should place children in the position they would have been in but for the violation of the Act"]; Bd. of Educ. of Fayette County v. L.M., 478 F.3d 307, 316 [6th Cir. 2007] [holding that "a flexible approach, rather than a rote hour-by-hour compensation award, is more likely to address [the student's] educational problems successfully"]; Reid, 401 F.3d at 518 [holding that compensatory education is a "replacement of educational services the child should have received in the first place" and that compensatory education awards "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA"]).

In its cross-appeal, the district explicitly states that it does not appeal the type and amount of compensatory education ordered by the IHO but requests that the services be provided by the district through issuance of RSAs rather than by providers of the parent's choosing at reasonable market rates. Yet, the district has not offered any evidence to rebut the parent's testimony that she tried but was unsuccessful in finding providers who would take RSAs from the district (Tr. pp. 52-53). Further, as noted above, the district made no argument during the impartial hearing regarding

an appropriate compensatory award. Thus, there is insufficient basis to disturb the IHO's award of compensatory speech-language therapy, OT, and counseling.

VII. Conclusion

In summary, the parent met her burden to prove the appropriateness of the unilaterally-obtained SETSS delivered by Limud during the 2023-24 school year and equitable considerations support an award of district funding of the costs of the services. Further, there is insufficient basis to disturb the IHO's award of compensatory speech-language therapy, OT, and counseling.

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's decision, dated March 7, 2024, is modified by reversing that portion which found that the parent did not meet her burden to prove the appropriateness of the unilaterally-obtained SETSS delivered by Limud during the 2023-24 school year and denied her request for district funding of the costs of the private services; and

IT IS FURTHER ORDERED that, upon proof of delivery, the district shall reimburse the parent for or directly fund the costs of up to 13 hours per week of SETSS delivered to the student by Limud during the 2023-24 school year.

Dated: **Albany, New York**
 June 5, 2024

SARAH L. HARRINGTON
STATE REVIEW OFFICER