



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 24-169

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

### **Appearances:**

Liz Vladeck, General Counsel, attorneys for respondent, by Cynthia Sheps, Esq.

## **DECISION**

### **I. Introduction**

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from a decision of an impartial hearing officer (IHO) which denied their request for reimbursement of the cost of their son's private program and paraprofessional services for the summer portions of the 12-month 2022-23 and 2023-24 school years. Respondent (the district) cross-appeals from the portion of the IHO's decision that awarded a prospective program for the student. The appeal must be dismissed. The cross-appeal must be sustained.

### **II. Overview—Administrative Procedures**

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; *see* 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). 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). If disputes

occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]; see Educ. Law § 3602-c[2][b][1]).

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

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

### **III. Facts and Procedural History**

The parties' familiarity with this matter is presumed and, therefore, the facts and procedural history of the case and the IHO's decision will not be fully recited.

Briefly, the student has received diagnoses of autism disorder, attention deficit disorder (ADD) combined type, expressive language disorder, and exhibited sensory processing concerns (Parent Exs. B at pp. 9, 17, 22; D at p. 5; Y at p. 18).

A CSE convened on June 3, 2022, to conduct an annual review and develop an IEP for the student for July and August 2022 and an IESP for the student for the 2022-23 10-month school year (1st grade) (see generally Parent Exs. D-E). Having found the student eligible for special education as a student with an other health impairment (OHI), the CSE recommended that for summer 2022 the student receive two periods per week of individual special education teacher support services (SETSS) for math, three periods per week of individual SETSS for English language arts (ELA), three 30-minute sessions per week of individual occupational therapy (OT), two 30-minute sessions per week of individual physical therapy (PT), three 30-minute sessions per week of individual speech-language therapy, and a daily full-time individual paraprofessional for behavioral support (Parent Ex. D at pp. 15-16).<sup>1</sup> According to the IEP, the SETSS and related services were to be delivered in a "[s]eparate location" with the respective "provider[s]" (*id.*). The IEP reflected that the student was recommended to attend a district non-specialized school during the summer (*id.* at p. 19).

As for the IESP, the June 2022 CSE recommended that, for the 10-month portion of the 2022-23 school year, the student receive five periods per week of group SETSS, three 30-minute sessions per week of individual OT, two 30-minute sessions per week of individual PT, three 30-minute sessions per week of individual speech-language therapy, one 30-minute session per week of counseling services, and the support of daily full-time individual paraprofessional services for behavioral support (Parent Ex. E at pp. 14-15).

According to the parents, the student attended a private "summer camp social program" for summer 2022 (see Parent Ex. A at pp. 13, 22). During the 2022-23 school year, the student was parentally placed in a religious nonpublic school in a 10:1+1 classroom setting, where he was supported by a paraprofessional (Parent Exs. E at p. 17; Y at p. 2).

On March 14, 2023, the parents signed a registration form for the student to attend a 5-week religious "summer camp" program during summer 2023 (Parent Ex. DD).

A CSE convened on June 16, 2023, to conduct an annual review and develop an IEP for the student for July and August 2023 and an IESP for the 10-month 2023-24 school year (2nd grade) (see generally Parent Exs. B; C). According to both the IEP and IESP, the parent and advocate requested to obtain more information and the CSE reconvened on June 27, 2023 (Parent Exs. B at p. 3; C at p. 3). Having found the student eligible for special education as a student with autism, the CSE recommended that for summer 2023 the student receive three periods per week of group SETSS for ELA and math, one 30-minute session per week of individual counseling services, three 30-minute sessions per week of individual OT, two 30-minute sessions per week of individual PT, and three 30-minute sessions per week of group speech-language therapy (Parent

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<sup>1</sup> The student's eligibility for special education and related services as a student with an other health-impairment for the 2022-23 school year is not in dispute (see 34 CFR 300.8[a][9]; 8 NYCRR 200.1[zz][10]).

Ex. B at p. 41).<sup>2</sup> The services were to be provided in a separate location at the therapist's option (id.). According to the IEP the student was recommended to attend a district non-specialized school during the summer (id. at p. 45).

In an IESP, the June 2023 CSE recommended that, for the 10-month 2023-24 school year, the student receive three periods per week of direct group SETSS to be provided in a separate location, three periods per week of direct group SETSS to be provided in the general education classroom, three 30-minute sessions per week of group speech-language therapy, two 30-minute sessions per week of individual PT, two 30-minute sessions per week of individual OT to be provided in a separate location, one 30-minute session per week of individual OT to be provided in the general education classroom, one 30-minute session per week of individual counseling services, and one 30-minute session per week of group counseling services, and further recommended that the student's parents be provided with parent counseling and training twice a year for 45-minutes (Parent Ex. C at pp. 39-40). The CSE also recommended that the student receive the support of full-time individual paraprofessional services (id. at p. 40).

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

In a due process complaint notice dated October 9, 2023, the parents alleged that the district denied the student a free appropriate public education (FAPE) for the 2021-22, 2022-23, and 2023-24 12-month school years (see generally Parent Ex. A).

For relief, the parents summarized their requests for the following remedies: reimbursement for paraprofessional services that were provided to the student during summer 2023; reimbursement for the summer programs the student attended during summer 2022 and summer 2023; compensatory education for the services that the CSE did not provide the student during the summer 2022, services that were "late in starting for the 2021-2022 and 2022-2023 school years," for the CSE's failure to develop an IESP for the 2021-2022 and 2022-2023 school years, and for regression and lack of progress the student experienced from remote and hybrid learning from March 2020 through June 2021; an increase in SETSS as recommended in the December 2022 private psychological evaluation; funding for independent educational evaluations (IEEs) consisting of all the evaluations recommended in the December 2022 private psychological evaluation, including an assistive technology evaluation, an OT evaluation, and a PRAXIS (sensory integration and processing) evaluation, a speech-language evaluation, and a functional behavioral assessment (FBA); for the student's IEP to contain all the testing accommodations recommended in the December 2022 private psychological evaluation; an increase in speech-language therapy services and OT; and for SETSS to be awarded at an enhanced rate from \$175 to \$275 per hour in order for the student to receive such service from a provider trained in applied behavioral analysis (ABA) or a licensed behavior analyst (LBA) (Parent Ex. A at pp. 4-5, 23-24).

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<sup>2</sup> The student's eligibility for special education as a student with autism for the 2023-24 school year is not in dispute (see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

## B. Impartial Hearing Officer Decision

The parties convened for three status conferences between January 24, 2024 and February 28, 2024 (Jan. 24, 2024 Tr. pp. 1-31; Tr. pp. 1-44).<sup>3</sup> The matter was originally assigned to an IHO (IHO I) who conducted the first status conference held on January 24, 2024 (see Jan. 24, 2024 Tr. pp. 1-31). On January 25, 2024, an IHO with the Office of Administrative Trials and Hearings (OATH) (hereinafter referred to as "the IHO") was appointed to this matter and the IHO conducted and presided over two status conferences held on February 5, 2024 and February 28, 2024 and the impartial hearing was held on March 13, 2024 (see Tr. pp. 1-328; IHO Ex. I). The IHO issued a Prehearing Conference Summary and Order dated February 28, 2024, summarizing the parents' requested relief and the process for the hearing (see IHO Ex. I). A representative from the district did not appear at the status conferences on February 5, 2024, or the impartial hearing on March 13, 2024 (see Tr. pp. 1-21; 45-328).

In a decision dated April 9, 2024, the IHO found that the district denied the student a FAPE for the 2022-23 and 2023-24 school years (IHO Decision at p. 3).<sup>4</sup>

The IHO first addressed the parents' request for IEEs at a public expense and determined that the district did not meet its burden to defend its evaluations and, thus, awarded district funding for all the parents' requested IEEs, including an assistive technology evaluation, an OT evaluation, a PRAXIS evaluation, a speech-language evaluation, and an FBA (IHO Decision at pp. 3, 7-8, 15).

Next, the IHO addressed the parents' request for an increase in SETSS services, specifically that the student should receive 10 hours of SETSS in the classroom and 6 hours in a separate location for a total of 16 hours of SETSS per week (IHO Decision at pp. 8-9). The IHO determined that, based on the testimony of the psychologist who conducted the December 2022 private psychological evaluation, 16 hours per week of SETSS, including 10 of the 16 being provided by a licensed LBA, was necessary for the student to make educational progress (id. at p. 9). Accordingly, the IHO ordered the CSE to convene within 30 days of the completion of the ordered IEEs to develop an IESP for the student that contained at a minimum 16 hours per week of SETSS (id. at p. 15).<sup>5</sup>

Then, the IHO addressed the parents' request for reimbursement for the 2022 and 2023 summer programs, including their request for reimbursement for the costs of a paraprofessional for summer 2023 (IHO Decision at p. 10). The IHO determined that students must attend a school

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<sup>3</sup> The January 24, 2024 hearing transcript was paginated separately from the other hearing dates. Therefore, for purposes of this decision, the transcript for the January 24, 2024 hearing date will be preceded by the hearing date and the remaining transcripts will not be (e.g., Jan. 24, 2024 Tr. pp. 1-31; Tr. pp. 1-328).

<sup>4</sup> Although the IHO did not specifically indicate that the district denied the student a FAPE for the 2021-22 school year, she awarded compensatory education for the 2021-22 through the 2023-24 school years (see IHO Decision at pp. 12-14).

<sup>5</sup> The IHO also briefly addressed the other related services recommended in the student's IESP stating "[t]he IESP provides for [s]peech [l]anguage [t]herapy, [OT], counseling services, parent counseling and training, and a paraprofessional. There was no disagreement about the necessity of those services. Therefore, this program and services should remain in place" (IHO Decision at p. 10).

program in order to receive an extended school year program (*id.*). The IHO then noted that the student attended a "camp" both summers, which was not a school program, and therefore the district was not required to provide paraprofessional services during the summer (*id.*). The IHO denied the parents' request for reimbursement for the 2022 and 2023 summer programs and for reimbursement for paraprofessional services for the summer 2023 program (*id.* at pp. 3-4, 10).

Lastly, the IHO determined that to remedy the district's failures to provide appropriate equitable services, compensatory education should be awarded (IHO Decision at pp. 10-14). The IHO indicated that she used a "qualitative approach" and determined that 2,160 hours of compensatory SETSS would place the student in a position he would have been in had the district not denied him a FAPE (*id.* at pp. 12-13). The IHO noted that the psychologist testified that the student required 2,160 hours of SETSS, which included the hours the student missed during the 2021-22 school year (kindergarten) through the 2023-24 school year (2nd grade) and included 1,560 hours that would "definitely help [the student] be in a much better place" (*id.* at p. 13). Additionally, the IHO determined that the awarded "compensatory SETSS shall be performed by a [LBA]" and shall have a "five-year expiration period" (*id.* at pp. 13-14). The IHO directed the district to pay "the [p]arent's privately obtained providers for the SETSS" at specified maximum hourly rate (*id.* at p. 15).

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

The parents appeal, pro se, alleging that the IHO erred in denying their request for reimbursement for the 2022 and 2023 summer programs, including reimbursement for a paraprofessional for summer 2023. The parents also disagree "with the IHO[s] written decision to not compensate the parents for a privately paid evaluation and the expert that testified to her report due to the [district] not providing the student with an updated evaluation." As relief, the parents request reimbursement for the total sum of the summer programs plus the costs of the paraprofessional services for summer 2023, an order directing the district to provide a paraprofessional during the entire 12-month school years moving forward, reimbursement for expert testimony, and "clarification" on the IHO's order for the CSE to recommend sixteen hours of SETSS so that ten of the sixteen hours of SETSS are provided by an LBA at an enhanced rate and the other six may be provided by a curriculum specialist at a standard rate.

In an answer with cross-appeal, the district claims the IHO properly denied the parents' requested relief for both summer 2022 and summer 2023. The district also alleges that the parents' request for reimbursement for the expert testimony is additional relief being sought on appeal that was not alleged in the parents' due process complaint notice and this should not be considered.<sup>6</sup>

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<sup>6</sup> The district submits with its answer with cross-appeal a document that is described as a complaint dated April 11, 2024, that was submitted by the parents when they personally served the district with their request for review (Answer with Cross-Appeal ¶ 2). The parents did not file the complaint with the Office of State Review. The district did not request for the complaint to be considered on appeal and generally, documentary evidence not presented at an impartial hearing is considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]). Here, after a review of the complaint, it appears that the parents alleged

Additionally, the district argues the parents' request for clarification and ongoing remedy related to SETSS services should be denied because the IHO awarded SETSS consistent with the parents' requested relief in her due process complaint notice. In its cross-appeal, the district argues the IHO erred in awarding prospective relief in the form of IEP amendments and asserts that the prospective award should be vacated as it has the effect of circumventing the statutory process with which the CSE is tasked.<sup>7</sup>

## V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. 386, 399 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the

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similar, if not the same, claims as raised in the request for review. Accordingly, I decline to accept and consider the complaint as additional evidence because it is not necessary to render a decision in this case. I would like to note the parent could have submitted a memorandum of law of up to 30 pages and used it to further argue the relevant facts in the hearing record and cite legal authority to support the contentions raised in the request for review, but elected not to do so (see 8 NYCRR 279.4[g]; 279.8[b], [d]).

<sup>7</sup> The district affirmatively asserts that it is not appealing the IHO's finding that the district failed to offer the student a FAPE for the 2022-23 and 2023-24 school years, the IHO's determination to award compensatory education services consisting of 2,160 hours of SETSS, or the IHO's award of IEEs (Answer with Cross-Appeal ¶ 16). As such, the IHO's determinations on these issues have become final and binding on the parties and will not be reviewed on appeal (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]).

Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Andrew F., 580 U.S. at 404). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Andrew F., 580 U.S. at 403 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).<sup>8</sup>

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<sup>8</sup> The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the



Although 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]), the IDEA confers no individual entitlement to special education or related services upon students who are enrolled by their parents in nonpublic schools (see 34 CFR 300.137[a]). Although districts are required by the IDEA to participate in a consultation process for making special education services available to students who are enrolled privately by their parents in nonpublic schools, such students are not individually entitled under the IDEA to receive some or all of the special education and related services they would receive if enrolled in a public school (see 34 CFR 300.134, 300.137[a], [c], 300.138[b]). However, under State law, parents of a student with a disability who have privately enrolled their child in a nonpublic school may seek to obtain educational "services" for their child by filing a request for such services in the public school district of location where the nonpublic school is located on or before the first day of June preceding the school year for which the request for services is made (Educ. Law § 3602-c[2]).<sup>9</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>10</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.

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chance to meet challenging objectives" (*Endrew F.*, 580 U.S. at 402).

<sup>9</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>10</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.

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85).

## **VI. Discussion**

### **A. Unilateral Placement**

Prior to addressing the parents' claims relating to 12-month services for the 2022-23 and 2023-24 school years, I will address the parents' claims that the district failure to develop a "summer IESP" deprived the parents of the opportunity to enroll the student in a district summer program. State guidance has indicated that Education Law § 3602-c does not require school districts to provide dual enrollment services to students with disabilities during the summer, unlike a district's obligation during the course of the regular school year, within an IESP (see "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 3206-c," at p. 14, VESID Mem. [Sept. 2007], available at <https://www.nysed.gov/sites/default/files/special-education/memo/chapter-378-laws-2007-guidance-on-nonpublic-placements-memo-september-2007.pdf>). However, State guidance also directs that for such dually enrolled (that is parentally placed) nonpublic school students who qualify for 12-month services (also known as extended school year services [ESY]) there is a need for an IESP for the regular school year and an IEP for 12-month services programming, resulting in a 10-month IESP and a 6-week IEP ("Questions and Answers on Individualized Education Program (IEP) Development, The State's Model IEP Form and Related Documents," at pp. 38-39, Office of Special Ed. [updated Oct. 2023], available at [https://www.nysed.gov/sites/default/files/programs/special-education/questions-answers-iep-development\\_0.pdf](https://www.nysed.gov/sites/default/files/programs/special-education/questions-answers-iep-development_0.pdf)). The district properly created a 10-month IESP and a 6-week IEP for the 2022-23 and 2023-24 school years (see Parent Exs. B-E) and the parents' claim is unfounded to the extent that they assert the district should have created a summer IESP. Further, as indicated above, an IESP is developed for a student dually enrolled in a private school and thus would not be the correct document to secure enrollment for the student in a district program as the parents allege.

Here, neither party disputes that the student required a 12-month school year program to prevent substantial regression. As noted, consistent with this need, the CSEs created IEPs for

summer 2022 and summer 2023 (see Parent Exs. B, D); however, the parents claimed that the district did not thereafter assign the student to attend a particular public summer school program for summer 2022 or summer 2023, that the June 2023 CSE failed to recommend paraprofessional services for summer 2023, and that the summer programs the parents unilaterally obtained for the student for summer 2022 and summer 2023, including the services of a private paraprofessional during summer 2023, were appropriate for the student. As the district did not cross-appeal the IHO's finding that it denied the student a FAPE for the 2022-23 and 2023-24 school years, including the summer portions of each school year, it is unnecessary to address the parents' claims relating to the IEP program recommendations and whether the district assigned the student to attend a particular public summer school program. As such, I now turn to the parents' request for reimbursement for the unilateral placement.

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129). 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 Rowley, 458 U.S. at 203-04). 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).

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

Although the student's needs are not in dispute, a description thereof provides context to determine whether the parents' selected summer program was appropriate.

#### **a. June 2022 IEP**

The student's June 2022 IEP identified the student's disability classification as OHI and included the results of previous testing that indicated the student's general ability index (GAI) was in the low average range and that he met the criteria for a social pragmatic communication disorder (Parent Ex. D at p. 1). The IEP further indicated that the student's overall behavioral presentation, performance on tests and information from his parents and teacher supported a diagnosis of attention deficit hyperactivity disorder (ADHD), combined presentation (id.). With respect to reading, the June 2022 IEP stated that the student recognized and printed lower case letters, spelled one syllable words, identified frequently used sight words, and answered simple questions with one word responses; however, he had difficulty decoding, tracking one to two sentences on a page, was unable to produce rhyming words, and required cues and prompts from his paraprofessional to remain on task (id. at pp. 1-2). As related to math, the June 2022 IEP stated the student counted and identified numbers to 20, and identified simple shapes; however, he needed visuals to print numbers to 100 and had difficulty counting from any given number to 20 and above (id. at p. 2). In terms of writing, the student composed sentences from frequently used sight words and provided details when prompted; however, he had difficulty using proper spacing when copying sentences and often needed words printed in highlighter to trace (id.).

In the area of speech and language, the June 2022 IEP noted that the student presented with delayed receptive and expressive language skills (Parent Ex. D at p. 2). According to the IEP, the student understood simple two-step directions, and simple "wh" questions, but had difficulty identifying categories and understanding associations (id. at pp. 2-3). In addition, he could initiate a conversation, but had trouble with topic maintenance and was self-directed and distracted by visual stimuli (id. at p. 3). The IEP stated that the student used three-to-four-word utterances to express his wants and needs, answered questions with one-to-two-word answers when provided with visual prompts, although he had difficulty with "why" and "who" questions (id.). The IEP

reported that the student exhibited scripted language and repeated phrases previously said to him and sounds from preferred videos or television shows; he frequently perseverated on these phrases (id.). In the area of pragmatics, the student greeted others with minimal prompts and demonstrated increased participation in structured language activities; however, he engaged in outbursts during these activities when his preferred toys were not presented and had difficulty with turn-taking and problem solving (id.). The IEP reported that the student was a risk to himself and others during transitions as he leaned his body weight on others for support and could knock them down, and he attempted to run off; therefore, the student required maximal verbal prompts to walk and hold hands during transitions (id.).

The June 2022 IEP included a report from the student's paraprofessional, which indicated the student had difficulty coping with frustrations, and "when frustrated he thr[ew] items, flip[ped] desks, bang[ed] desk, yell[ed], [and] trie[d] to run" (Parent Ex. D at p. 3). The paraprofessional stated that the student "exhibit[ed] aggressive behaviors" when suggestions were given to him (id.). The IEP included, per the paraprofessional report, that the student used a visual schedule, a token system, and visual reminders (id.). According to the IEP, with regard to speech and language, the student needed self-regulation strategies, feedback with positive reinforcement to attend and complete assignments, visual aids, scheduled reinforcement, modeling social stories, self-management tools, systemic movement breaks, and color coded, nonverbal communication cards with incentive charts and checklists (id. at p. 4).

Next, the June 2022 IEP included teacher, SETSS, and counseling reports that provided information on the student's social behaviors and needs (Parent Ex. D at p. 4). Per teacher report, the IEP noted the student demonstrated disruptive behaviors, struggled to remain in his seat, consistently called out, and demonstrated frustration easily when not provided with something he wanted, or asked to do something he "might not feel like doing" (id.). The IEP, per the SETSS report, stated the student responded well to positive feedback and rewards such as stickers when completing a task (id.). Per a counseling report, the IEP stated the student's emotional reactivity appeared rapidly, and during behavioral outbursts the student threw toys, office supplies, and attempted to elope from the therapy room; in some instances the student called out "stay away" even when the therapist was not in close proximity (id.). According to the IEP, the student took a long time to "relax and compose himself to re-engage in the [therapy] session" (id.). As reflected in the IEP, the counseling report indicated that the student was able to express himself about various topics and restated behavioral strategies; although, he could acknowledge that his choices were wrong in a counseling session, the student might still have difficulty deciding on the correct behavior (id.). The IEP stated that, during moments of frustration, the student tended to try and remove himself from the situation and, when overwhelmed, did not appropriately use calming techniques (id.). The student did not work well under pressure and preferred playing games in which there was no clear winner (id.). According to the IEP, the student's teacher reported that the student engaged in parallel play, but not in conversations with classmates, and enjoyed participating in class; however, he called out responses and never raised his hand (id. at p. 5).

In the area of physical development, the June 2022 IEP noted that the student had been diagnosed as having ADHD, and demonstrated sensory processing concerns (Parent Ex. D at p. 5). As related to OT, the student had delays in visual motor skills, fine motor skills, sensory processing, and attention, as well as in grasping skills, hand strength, dexterity, and coordination (id.). The IEP reported the student displayed decreased motor coordination skills with writing,

used an immature grasp pattern when writing, recognized all letters, wrote the alphabet from memory, and needed continued work on sizing, letter formation, and placement (*id.*). According to the IEP, the student's skill level was hindered by sensory processing input, attention, frustration, tolerance, and impulsivity (*id.*). He was easily frustrated, had difficulty controlling impulses, and displayed differences in sensory processing skills, in that he was hypo-responsive to sensory input (*id.*). The IEP noted the student demonstrated positive responses to sensory input such as weighted vests, exercise, swinging, sliding, and rocking, and displayed increased participation and attention following sensory input activities (*id.* at pp. 5-6). With regard to PT, the IEP stated the student had low muscle tone, delayed balance and protective responses, decreased endurance and strength, and demonstrated impulsive behavior and decreased body awareness with sensory seeking behavior, which presented a safety concern in the school setting (*id.* at p. 6). The IEP indicated the student showed variable performance depending on his behavior and interest in an activity (*id.*).

### **b. June 2023 IEP**

For the June 2023 IEP, the student's disability classification was changed from OHI to autism (compare Parent Ex. B at p. 1, with Parent Ex. D at pp. 1, 3). The June 2023 IEP reflected the results of a December 2022 administration of the WISC-V and WIAT- (Parent Ex. B at p. 1). As measured by the WISC-V, the student attained a full-scale IQ of 104, which fell in the average range; notably he attained a visual spatial index score of 119 in the above average range, and a working memory index score of 85 in the low average range (*id.* at pp. 1, 3-6). The student's academic testing scores on the (WIAT-4) placed his performance in word reading in the average range with a standard score of 103, his reading comprehension in the very low range with a standard score of 78, his spelling performance in the high average range with a standard score of 115, his alphabet writing fluency in the extremely high range with a standard score of 137, and his math problem solving in the average range with a standard score of 109 (*id.* at pp. 1-2). The IEP indicated that the student's reading skills were variable in that he could recognize all of the letters of the alphabet and some words but his pseudo decoding skills were very poor and he was unable to sound out any words (*id.* at p. 7).<sup>11</sup> The student also had difficulty with reading comprehension due to his inability to read many words (*id.*). In terms of written expression, the June 2023 IEP indicated the student did well with spelling and alphabet fluency, but his sentence writing skills and capitalization skills were poor, he did not use punctuation (*id.*). The IEP stated that the student performed best with regard to math (*id.*). He "did relatively well" on problem solving skills but his math fluency skills were variable, with the student performing "outstandingly well" on addition problems but he was unable to complete subtraction problems (*id.*). The June 2023 IEP also reflected the results of the Autism Diagnostic Observation Schedule , Second Edition (ADOS-2), which indicated that the student met the criteria for an autism spectrum disorder (ASD) diagnosis and the results of the Test of Pragmatic Language – Second Edition (TOPL-2), which yielded a standard score of 55 (very poor) (*id.* at p. 2).

As noted in the June 2023 IEP, the student did well on weekly spelling tests; however, he struggled to retain this information for use in his writing (Parent Ex. B at p. 3). The IEP reported

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<sup>11</sup> A June 2023 speech-language progress report, memorialized later in the IEP, indicated that the student had made continual progress in his decoding skills (Parent Ex. B at p. 9).

that when prompted by his providers to locate words in the classroom to support his writing, the student became defiant and did not accept assistance for errors made (id.). With respect to math, the IEP stated the student had a "very good understanding of the math concepts being taught" and his providers helped support the student to stay on task and focused during lessons (id.). In the area of reading, the IEP indicated the student demonstrated improvement in comprehension skills; however, he became distracted when reading aloud, and needed constant validation from the teacher (id.). According to the IEP, the student's providers worked to help support the student's "focus on reading" and "provide[d] support so he gain[ed] confidence" (id.).

The June 2023 IEP reported that, during the student's first grade school year, he attended a nonpublic religious school, and he would continue at the same school for the 2023-24 school year (second grade) (Parent Ex. B at p. 3). The parents reported "they [we]re not considering a public school (or a special program, such as NEST)" and would like an IESP created for the student (id.).<sup>12</sup>

In the area of speech-language development, the IEP included a June 16, 2023 speech and language progress report, which stated the student presented with delayed pragmatic skills as he had difficulty maintaining and expanding conversations and benefited from "maximal verbal and visual cues" to support him in this area (Parent Ex. B at p. 9). The IEP indicated that the student had difficulty regulating emotions even with a slight change in routine and displayed frustration such as slamming his fist or making an angry face (id.). According to the IEP, the student's auditory comprehension skills were delayed, and he required "greater levels of support" to follow verbal directives and recall specific details (id.). The IEP stated that the student's responses to questions were correct but limited to one to three words rather than full sentences (id.). The IEP included a May 2023 speech and language regression statement that reported regression as related to pragmatic language, frustration when a change in routine occurred, and delayed receptive and expressive language (id. at pp. 10-11).

The June 2023 IEP included information from a June 2023 teacher progress report that stated the student performed at the first grade level in math and reading (Parent Ex. B at p 11). As indicated in the IEP, the teacher report identified the student's math strengths as his addition skills and ability to count to 100 by 1s, 2s, 5s, and 10s (id.). The teacher report identified the student's math weakness as computing subtraction (id.). Based on the teacher report, the IEP identified additional student weaknesses related to letter sounds, digraphs, decoding, comprehension, and remaining focused (id.). Per teacher report, as included within the IEP, "[w]hile once always eager to participate, [the student] now d[id] not. When called on he look[ed] to his providers or teacher to provide him with information" (id.). The IEP stated the student struggled with sentence structure and with retaining learned information in his writing (id.). The classroom teacher provided a June 2023 regression statement that indicated it was typical that, following a one-week break, the student exhibited increased lethargic behavior, maladaptive behavior, and escape behaviors upon return; additionally, he lost up to two weeks of classroom and academic foundation skills (id.). At the June 16, 2023 CSE meeting, the student's classroom teacher noted his regression over extended

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<sup>12</sup>The June 2023 IEP indicated that all reports and evaluations were reviewed during the IESP conference, with the student's classroom teacher present at the June 16, 2023 CSE meeting, and the student's SETSS provider and speech-language therapist present at the June 27, 2023 CSE reconvene (Parent Ex. B at p. 3).

breaks from school (id. at p. 13). The IEP further noted that the student's attendance was inconsistent due to medical conditions or the absence of his paraprofessional (id. at p. 14).

Similarly, the IEP included information from a June 2023 SETSS progress report stating that the student had delays in subtraction of numbers and noting difficulties with word problems, regrouping, time, and money (Parent Ex. B at p. 12). The SETSS provider reported the student would seek help from an adult, needed prompting and cuing to solve word problems, and would shut down when feeling overwhelmed and frustrated with a problem he did not understand (id. at pp. 12-13). The SETSS provider also reported the student tended to mildly tantrum and shut down when he struggled to decode grade level vocabulary, his lack of focus hindered his ability to read fluently which delayed comprehension, and he used a "barely audible" voice when reading and would get angry when an adult working with him corrected him (id. at p. 13). As related to writing, the SETSS provider reported the student struggled writing orally dictated sentences, and further stated the student did not retain instruction to start a sentence with a capital letter or end it with the correct punctuation (id.).<sup>13</sup> The IEP included additional information gleaned from the SETSS provider at the IESP reconvene meeting, specifically that the student's teachers "rel[ie]d on related services" and, therefore, the student required increased SETSS for the next school year (id. at p. 14). The parent advocate clarified at the meeting that the SETSS provider meant that teachers relied on the providers to give strategies, as the private school teachers did not have a special education background (id.). At the June 27, 2023 CSE meeting, the CSE determined that the student would be provided with three periods of SETSS over summer months, as "[the student's] challenges appeared to be more behavioral in nature" (id.).

Turning to the student's social development, the June 2023 IEP included information from the psychological evaluation indicating that the student had difficulty transitioning to a non-preferred activity and had tantrums in school and at home (Parent Ex. B at p. 16). However, the IEP also stated that the student initiated play with other children and had friends at school (id.). The June 2023 IEP included information from a June 2023 counseling progress report, which stated the student attended counseling weekly and transitioned easily; however, he demonstrated inconsistent progress (id. at pp. 17-18). The IEP reported that, during counseling sessions, the student needed constant redirection to look at the provider when he was talking to her, presented with difficulty communicating and answering questions about himself, and was unable to describe his thoughts or feelings, although he was also described as enjoying talking about his family and outside activities (id.). In addition, the IEP stated the student preferred to play alone, could easily be distracted, and struggled to complete non preferred tasks (id. at p. 18). The June 2023 IEP reflected a June 2023 paraprofessional progress report, which indicated the paraprofessional provided redirection of behavior, reminders to perform personal hygiene routines, use of a progress chart to address the student's behavior, and encouragement to improve the student's feelings about

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<sup>13</sup> The IEP did not include information as related to regression from the student's SETSS provider (see generally Parent Ex. B at p. 13-15). The IEP reported that the SETSS provider, per a previous phone call with CSE, did not recommend ESY services; both the parent and parent advocate requested increased SETSS services in the classroom and a separate location as they stated the student "ha[dn't] made progress" (id. at pp. 15). The SETSS provider reported, at the June 27, 2023 CSE reconvene meeting, that the student easily became frustrated and "shut[] down" and needed prompting to support these times (id. at p. 14).



himself (*id.* at pp. 18-19). The June 2023 IEP described the student's coping skills, with both the classroom teacher and SETSS provider progress reports indicating the student, when frustrated, would tantrum or shut down (*id.* at pp. 19-20). The IEP indicated that the student stomped his feet, growled, grunted, and had bathroom accidents in order to get sent home (*id.*). As related to interpersonal relationships, the IEP reported the student had friends in class; however, he would get in trouble for rough play and, at times, he demonstrated disrespectful behaviors with adults (*id.* at p. 20).

In the physical development section, the June 2023 IEP reported, per the psychological evaluation, diagnoses of ADD combined type, ASD, and expressive language disorder (Parent Ex. B at p. 22). The IEP further reported sensory issues that included sensory seeking behavior, picky eating, and aversion to noises such as a fire drill (*id.* at pp. 22-23). As related to PT, the June 2023 IEP included a June 2023 PT report that stated the student presented with decreased muscle tone, delayed balance, decreased endurance, decreased strength and ball skills, as well as decreased functional mobility and stability (*id.* at p. 23). The IEP indicated the student had "significant safety concerns including risk of elopement, impulsivity, and poor safety awareness" (*id.*). The IEP included a June 2023 PT regression statement, which reported that, following breaks in service, the student demonstrated regression in "behavior, balance reactions, functional mobility, stair training, object manipulation, attention, motor planning, and following directions" (*id.* at pp. 23-24).

The June 2023 IEP reflected an OT progress report, dated June 6, 2023, that indicated the student received OT to address delays in visual motor skills, fine motor skills, sensory processing skills, and attention (Parent Ex. B at p. 24). The IEP stated that the student required sensory input to increase participation and attention and although progress was inconsistent, the student required visual, verbal, and tactile cues to assist in making progress toward goals (*id.* at p. 25). The IEP reported that, as observed during OT, the student made choices that were a risk to safety; the student ran down ramps, away from providers, and downstairs; slammed doors; rolled on the floor; or bumped others (*id.*). The IEP included an April 2023 OT regression statement, reporting that the student displayed regression in using movement breaks and sensory strategies to focus and attend to a group or individual task in the classroom setting (*id.* at p. 26).

## **2. Unilaterally-Obtained Summer Programs**

As set forth in more detail above, a unilateral placement must provide educational 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). Accordingly, review of the program provided to the student for the summer 2022 and summer 2023 school years is necessary to determine if the summer program provided specially designed instruction to meet the student's needs.

First, the hearing record does not include any information regarding the student's attendance or a description of the summer program the student attended during summer 2022. According to the parent's testimony, she had to find a program for the student to attend for the summer and he received the support of a paraprofessional and related services, including speech-language therapy, PT, and OT from the district, but he did not receive SETSS (Tr. pp. 193-95).

Turning to summer 2023, the hearing record includes a March 13, 2023 letter from the director of the summer program that indicated that the program was a "camp" that would run from July 5 to August 18, 2023 (Parent Ex. Z). The letter further indicated that, at the camp, the student would work on "appropriate social and play skills" and that daily activities would include "theme days, reading circles, science experiments, arts and crafts, basic math and math games, visits from the NY [p]ublic library and more" (*id.*). The student's teacher, at his nonpublic school for the 2023-24 10-month school year, testified that she believed the student needed to be in a structured program over the summer and when she reviewed the description of the private program for summer 2023, she remarked that it "sound[ed] wonderful" and she loved that there would be some academics and structured learning and that the student also needed things like arts and crafts and going on trips (Tr. pp. 95-97).

The student's SETSS provider testified that she provided the student SETSS three hours per week for summer 2023 at the summer camp but also reported that she did not provide the student SETSS for summer 2022 (Tr. pp. 171, 179-180). During the hearing, the SETSS provider testified "the camp program . . . could have helped socially but [the student] withdr[ew] himself" (Tr. p. 179). The SETSS provider described the student as a loner and testified that she observed that the camp provided arts, crafts, and swimming; however, her time to observe was limited to the three hours per week and she could not report on what happened at camp the entirety of the day (*id.*). The SETSS provider opined that the student "definitely need[ed] a full-time para[professional] there with him" although, other than noting the student withdrew himself from social situations, she did not report observations related to the student's participation or behaviors during summer camp (Tr. pp. 179-80).

The parent provided testimony regarding the 2023 CSE meeting, explaining that the parents "wanted [the student] to continue his related services in the summer" in addition to his paraprofessional services but that the CSE's position was that the student was not entitled to a paraprofessional as "they felt that the program was a camp . . . [i]t wasn't . . . academic in nature" (Tr. pp. 197-98). The parent testified that she provided the program description, as described above, and further reported that the camp included social/emotional learning, provided reading circles, and leisure activities (Tr. pp. 198-99). The parent further testified that, when the district members of the CSE advised the parents that it was too late to place the student in a summer program in a public school and recommended only three hours of SETSS per week and no paraprofessional services, the parents decided that they would privately pay for the student's attendance at the camp in addition to finding and paying for a paraprofessional to support the student's social/emotional and academic learning in the camp environment (Tr. pp. 202-203). The parent testified that, without paraprofessional services, the student would not be able to participate in camp in a meaningful manner (Tr. p. 203). She indicated that at camp the student had an issue with elopement, trouble actively participating with peers in parallel play, and needed someone to help calm him when overwhelmed or overstimulated, and take him out of the classroom to get recentered and then integrated back into the current activity (Tr. p. 204). The hearing record does not contain any evidence that the camp had a general education or a special education teacher on

staff, or that the privately obtained paraprofessional, over summer 2023, provided services under the general supervision of a teacher.<sup>14</sup>

The hearing record, aside from the general description of the 2023 summer camp, did not include any information related to programming or specialized instruction provided for the student during the summer 2022 or summer 2023 camps. Here, the hearing record included an invoice for the summer 2023 program and invoices for the summer 2023 paraprofessional services, including dates/hours for the delivery of services, as well as a brief description of what activities might occur at the camp (Parent Exs. Z; CC). Although both the June 2022 and June 2023 IEPs specified the student's eligibility for 12-month services and the hearing record identified the student's needs as described above (see Parent Exs. B, D), the hearing record did not provide any information on how the private summer camp program the student attended during summer 2022 and summer 2023 provided specialized instruction to support the student's identified needs or how they may have been designed to prevent the student from regressing over the summer months.<sup>15</sup> Further, the parents did not provide any records of the student's attendance at camp, reports or notes regarding the student's participation in activities, or any information related to the supports provided by the paraprofessional (Tr. pp. 198-99, 204; see Parent Exs. CC).

As such, the hearing record does not support a finding that the parents met their burden to prove that the 2022 and 2023 private summer camp programs, including the private paraprofessional services delivered during summer 2023, provided specialized instruction to support the student's identified needs. Therefore, I find that the evidence in the hearing record supports the IHO's findings that the district is not required to reimburse the parents for the student's 2022 and 2023 private summer camp programs, or the privately obtained paraprofessional services for summer 2023.

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<sup>14</sup> With respect to paraprofessional services, State regulations no longer define the term "paraprofessional," as the term "paraprofessional" was replaced with the term "supplementary school personnel" (see NY Reg, June 25, 2014 at 85-86). Supplementary school personnel "means a teacher aide or a teaching assistant" (8 NYCRR 200.1[hh]). In June 2023, the Office of Special Education updated a guidance document entitled "Extended School Year Special Education Programs," which sets forth direction on the role of supplementary school personnel in an ESY program such that teaching assistants may only provide services under the general supervision of a licensed or certified teacher, and teacher aides may perform only non-instructional duties under the general supervision of the special education teacher and listed that these non-instructional duties could include assisting students with physical care tasks, health-related activities, behavior management needs, in addition to supporting teachers in managing records, materials, and equipment. (see "Extended School Year Special Education Programs" at p. 8, Office of Special Ed. [June 2023], available at <https://www.nysed.gov/sites/default/files/programs/special-education/extended-school-year-questions-and-answers-2023.pdf>).

<sup>15</sup> State regulations provide that, students "shall be considered for 12-month special services and/or programs in accordance with their need to prevent substantial regression" (8 NYCRR 200.6[k][1]). "Substantial regression" is defined as "student's inability to maintain developmental levels due to a loss of skill or knowledge during the months of July and August of such severity as to require an inordinate period of review at the beginning of the school year to reestablish and maintain IEP goals and objectives mastered at the end of the previous school year" (8 NYCRR 200.1[aaa], [eee]). State guidance indicates that "an inordinate period of review" is considered to be a period of eight weeks or more (see "Extended School Year Programs and Services Questions and Answers," at p. 3, Office of Special Educ. [Updated June 2023], available at <https://www.nysed.gov/sites/default/files/programs/special-education/extended-school-year-questions-and-answers-2023.pdf>).

## B. Independent Educational Evaluations

Next, the parents' request for reimbursement in the amount of \$500 for expert testimony and a private evaluation must be considered.

During the impartial hearing, the psychologist who conducted the December 2022 private psychological evaluation testified (Tr. pp. 231-302). During her closing statement, the parents' lay advocate indicated, for the first time, that the parents were seeking reimbursement of \$500 for the cost of the private psychologist's "updated testing and providing her expert witness testimony in this proceeding[]" (Tr. p. 319). Here, it is unclear from the lay advocate's statement and the parents' request for review whether the requested \$500 was for the testimony of the psychologist, for testing conducted by the psychologist, or for something else entirely. The parents, in their request for review, state that they "disagree with the IHO[s] written decision to not compensate the parents for a privately paid evaluation and the expert that testified to her report due to the [district] not providing the student with an updated evaluation," but in their request for relief, the parents state "[we] want the district to reimburse the parents for the sum total of \$500.00 for the expert testimony needed to discuss the private evaluation that was used to develop the IESP due to the [district] failing to provide the student with an evaluation" (Req. for Rev. at pp. 7-8, 10). To the extent that the parents are requesting relief for a failure to evaluate the student, the IHO addressed this issue and awarded an IEE at public expense in all of the areas the parents requested during the hearing (see IHO Decision at pp. 14-15; Parent Ex. A at pp. 23-24). Moreover, as indicated by the district, the parents did not request reimbursement for money paid to the private psychologist in their due process complaint notice and only requested reimbursement during the impartial hearing in the lay advocate's closing statement.

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]). Here, the district did not appear at the impartial hearing and thus could not have opened the door to this issue and the evidence shows it was the lay advocate who mentioned, for the first time during her closing statement, that the parents wanted to be reimbursed for the psychologist's expert testimony. Additionally, although the parents may not have known of potential reimbursement for the cost of the expert's testimony at the time of the filing of the due process complaint notice, the December 2022 private psychological evaluation was conducted almost a full year prior to the filing of the parents' due process complaint notice in

October 2023 (see Parent Exs. A; Y). Additionally, the hearing record does not include an invoice for the requested \$500, or any indication that such a sum was due or paid. Accordingly, it cannot be determined when the parents were aware that it would be an issue in this proceeding.

Based on the foregoing there is not enough evidence in the hearing record to support the parents' argument that the IHO erred by not awarding the \$500 reimbursement requested during the lay advocate's closing statement.

### **C. Prospective Placement**

The IHO ordered the CSE to convene a review meeting within 30 days of the completion of the ordered IEE and for the CSE to develop an updated IESP that included at least 16 hours a week of SETSS (IHO Decision at p. 15). The parents ask in their request for review for "more clarification" regarding the "ongoing remedy" of SETSS services and request 10 of the ordered hours be provided by an LBA at the enhanced rate, and six hours be provided by a "curriculum specialist" at the standard rate (Req. for Rev. at p. 10). The district cross-appeals the IHO's order of prospective relief and requests that it be annulled.

Generally, as the district points out, an award of prospective relief in the form of IEP amendments can, under certain circumstances, have the effect of circumventing the statutory process, pursuant to which the CSE is tasked with reviewing information about the student's progress under current educational programming and periodically assessing the student's needs (see Adams v. Dist. of Columbia, 285 F. Supp. 3d 381, 393, 396-97 [D.D.C. 2018] [noting with approval the hearing officer's finding "that the directives of IDEA would be best effectuated by ordering an IEP review and revision, rather than prospective placement in a private school"]; see also Student X v. New York City Dep't of Educ., 2008 WL 4890440, at \*16 [E.D.N.Y. Oct. 30, 2008] [noting that "services found to be appropriate for a student during one school year are not necessarily appropriate for the student during a subsequent school year"]). This is particularly so when the school year at issue is over and, in accordance with its obligation to review a student's IEP at least annually, a CSE should have already produced an IEP for the following school year, which has not been the subject of a due process proceeding (see also Eley v. Dist. of Columbia, 2012 WL 3656471, at \*11 [D.D.C. Aug. 24, 2012] [noting that prospective placement is not an appropriate remedy until the IEP for the current school year has been completed and the parent challenges the IEP for the current year]).

Additionally, while prospective placement might be appropriate in rare cases (see Connors v. Mills, 34 F.Supp.2d 795, 799, 804-06 [N.D.N.Y. Sept. 24, 1998] [noting a prospective placement would be appropriate where "both the school and the parent agree[d] that the child's unique needs require[d] placement in a private non-approved school and that there [we]re no approved schools that would be appropriate"]), the pitfalls of awarding a prospective placement have been noted in multiple State-level administrative review decisions, including that where a prospective placement is obtained by the parents through the impartial hearing, such relief could be treated as an election of remedies subject only to further judicial review, where the parents assume the risk that future unforeseen events could cause the relief to be undesirable (see, e.g., Application of a Student with a Disability, Appeal No. 19-018; see also Tobuck v. Banks, 2024 WL 1349693, at \*5 [S.D.N.Y. Mar. 29, 2024]).

Here, I find the district is correct that the IHO erred in ordering the district to create an IESP with a minimum number of SETSS hours and this is not one of those rare instances where prospective relief would be appropriate. The hearing record includes testimony from the student's classroom teacher, SETSS provider, and the psychologist who conducted the December 2022 psychological evaluation that was unclear and contradictory regarding the recommendations and designation of SETSS hours. For example, the student's classroom teacher testified that the student could benefit from more SETSS hours; however, she stated that "[w]e can't have him having more hours if he's not going to have success" as the student might think that he had to work with the SETSS provider "again" instead of going outside or doing something else with his classmates (Tr. p. 80). The student's SETSS provider testified that an appropriate mandate on the student's IESP would be an increase in SETSS hours and a recommendation for services from a behavior analyst as the student had many behaviors (Tr. pp. 142-144). Further, the SETSS provider testified that the student had regressed academically and socially, and the "behaviors [we]re getting worse" (Tr. p. 149). On the other hand, the private psychologist testified that, aside from needing refocusing, the student did not display any behaviors during testing, and specified he was not defiant, not oppositional, and did not display any negative behaviors during the private neuropsychological evaluation (Tr. p. 241). The private evaluator found the description of the student's in-class behaviors, such as shutting down, surprising, as the student did not shut down during the evaluation and rather "he was very well behaved" and "he tried his best" during testing (Tr. pp. 244, 254-55). Moreover, the private evaluator opined that the student's biggest needs were academic, not behavioral, and that the student's behaviors were due to his academic needs, and he needed an ABA/SETSS provider that could support both areas (Tr. pp. 290-291).

Further, although the classroom teacher, SETSS provider, and private psychologist generally agreed that the student required an increase in SETSS, they also agreed that an integrated co-teaching (ICT) class with a full-time special education teacher would be appropriate for the student (Tr. pp. 85-86, 134, 274-275; Parent Ex. Y at p. 18). Moreover, the IHO has ordered the student to undergo an IEE which will yield more data to be considered by the CSE which could contradict the IHO's order for the CSE to recommend at least 16 hours of SETSS per week. Therefore, the IHO's order for the CSE to recommended 16 hours of SETSS must be vacated and, instead, completion of evaluations, the CSE must reconvene and discuss all the available options to address the student's needs whether it be increased SETSS to address the student's need areas related to behavior and academics, the amount of SETSS, whether SETSS should be provided by an LBA or whether the student needs a more supportive program such as an ICT classroom.

## **VII. Conclusion**

Based on the foregoing, the IHO was correct in denying the parents' request for reimbursement for the student's 2022 and 2023 private summer camp programs and the privately obtained paraprofessional for summer 2023 but erred in ordering that the CSE reconvene and recommend at least 16 sessions of SETSS per week for the student in his next IEP. Accordingly, the IHO's decision is modified to the extent indicated above for the CSE to reconvene after the completion of the ordered IEE and recommend an appropriate program and placement.

**THE APPEAL IS DISMISSED.**

**THE CROSS-APPEAL IS SUSTAINED.**

**IT IS ORDERED** that the IHO's decision, dated April 9, 2024, is modified by reversing that portion which ordered the CSE to recommend at least 16 sessions per week of SETSS on the student's IEP; and

**IT IS FURTHER ORDERED** that the district shall reconvene the CSE within 30 days of completion of the awarded IEE and recommend an appropriate program and placement for the student.

**Dated:**            **Albany, New York**  
                         **June 27, 2024**

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**SARAH L. HARRINGTON**  
**STATE REVIEW OFFICER**