



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 24-196

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

### **Appearances:**

Liz Vladeck, General Counsel, attorneys for respondent, by Sarah M. Pourhosseini, 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 awarded partial funding for the cost of the special education services and speech-language therapy delivered to her son by Upgrade Resources (Upgrade) at specified rates for the 2023-24 school year. Respondent (the district) cross-appeals from the IHO's determination that the parent's unilaterally-obtained services were appropriate and from the IHO's findings related to equitable considerations. 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]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

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

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

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

A Committee on Preschool Special Education (CPSE) convened on March 24, 2014, determined the student was eligible for special education as a preschool student with a disability, and recommended services for summer 2014 (Parent Ex. B at p. 1).<sup>1</sup> The March 2014 CPSE recommended for "July/August 2014 Only" a bilingual program in Yiddish consisting of 15 hours per week of special education itinerant teacher (SEIT) services, three 30-minute sessions per week of individual speech-language therapy, two 45-minute sessions per week of individual

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<sup>1</sup> During the 2014-15 school year the student turned five years old (see Parent Ex. B at p. 1).

occupational therapy (OT), and two 45-minute sessions per week of individual physical therapy (PT) (id.).

The hearing record is not fully developed regarding the student's educational history after the March 2014 CPSE IEP and through the 2022-23 school year. Briefly, the hearing record shows that the district conducted a social history on January 10, 2020 (Dist. Ex. 3). A private neuropsychological evaluation of the student was conducted on January 19, 2022, January 26, 2022, and April 29, 2022, which was shared with the district on September 2, 2022 (Parent Ex. G; Dist. Ex. 4 at p. 1).

A CSE convened on February 23, 2023 and developed an IEP with an implementation date of March 7, 2023 (Dist. Ex. 1 at pp. 1, 19). The February 2023 CSE found the student eligible for special education and related services as a student with an other health-impairment (id. at pp. 1, 20).<sup>2</sup> At the time the IEP was developed, the student was 13 years old, attending a nonpublic school (NPS), and exhibited delays in reading, writing, mathematics, language, and social/emotional skills (id. at p. 1). The February 2023 CSE recommended 10-month bilingual integrated co-teaching (ICT) and related services in a non-specialized district school (id. at pp. 14, 15, 19, 20). Specifically, the February 2023 CSE recommended 10 periods per week of ICT services in math delivered in Yiddish, ten periods per week of ICT services in English language arts (ELA) delivered in English, and five periods per week each of ICT services in social studies and science delivered in Yiddish (id. at pp. 14, 20). The February 2023 CSE also recommended one 30-minute session per week of individual counseling services delivered in Yiddish, three 30-minute sessions per week individual OT delivered in English, two 30-minute sessions per week individual PT delivered in English, and two 30-minute sessions per week of individual speech-language therapy delivered in Yiddish (id.).

By email dated July 31, 2023, the district provided the parent with a copy of the student's February 2023 IEP along with a July 31, 2023 prior written notice and a school location letter, which identified the school site to which the student had been assigned to attend for the 2023-24 school year (Dist. Ex. 2).

On October 31, 2023, the parent entered into an agreement with Upgrade to provide the student's special education and/or related services for the 2023-24 school year and agreed to all of the rates listed for each of the services offered by Upgrade (Parent Ex. H).

In a ten-day written notice letter (ten-day notice) dated December 27, 2023, the parent wrote to the district to express "great concern" with the student's recommended placement and program for the 2023-24 school year (Dist. Ex. 5 at p. 1). The parent further stated that she had "not been able to locate a bilingual Yiddish ICT program within the public school system" and that she was concerned about the CSE's failure to recommend 12-month services (id.). For those reasons, the parent "reject[ed] th[o]se recommendations and the school placement" and stated she had "no choice but to place [the student] in" an NPS, "and provide his special education program and services" at the NPS (id. at p. 2). The parent also notified the district that she would "be

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<sup>2</sup> The student's eligibility for special education as a student with an other health-impairment is not in dispute (see 34 CFR 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

seeking reimbursement or direct payment from the [district] for this special education program and related services" (id.).

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

By due process complaint notice dated December 27, 2023, the parent alleged that the district denied the student a free appropriate public education (FAPE) for the 2023-24 school year (Parent Ex. A at p. 3). The parent claimed that the student was entitled to pendency based on a March 24, 2014 CPSE IEP, which constituted the "last agreed upon program" (id.). The parent contended that the student's pendency services consisted of 15 hours per week of SEIT services delivered in Yiddish, three 30-minute sessions per week of individual speech-language therapy delivered in Yiddish, two 45-minute sessions per week of individual OT delivered in Yiddish, and two 45-minute sessions per week of individual PT delivered in Yiddish (id.). The parent also asserted that "[a]ll services were recommended on a 12-month basis" (id.).<sup>3</sup>

The parent next asserted that the February 2023 CSE did not offer the student an appropriate placement for the 2023-24 school year, did not consider the student's need for 12-month services, and the recommended program could not be implemented (Parent Ex. A at pp. 2-3). The parent also alleged that she did not receive a "suitable school location letter" and "could not locate" the district's recommended program "within the public school system" on her own (id. at p. 2). The parent argued that the district had not recommended a proper placement and that the parent was "left with no choice but to implement the SEIT program independently and seek reimbursement" from the district (id. at p. 3). As relief, the parent "reserved the right to ask for compensatory services to which [the student] was entitled to under pendency and not provided during the 2023-24 school year" and requested a finding that the district failed to offer a FAPE for the 2023-24 school year because it failed to convene a timely CSE, failed to "recommend the continuation of the 12-month SEIT program" and failed to recommend an appropriate placement (id.). The parent also requested that the district fund the recommendations on the March 24, 2014 CPSE IEP for the "complete 2023-24 school year at the provider's contracted rate," and that the district "fund a bank of compensatory education for the entire 2023-24 school year - or the parts of which were not serviced" (id. at p. 4).

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

The matter was assigned to an IHO with the Office of Administrative Trials and Hearings (OATH). The parties convened on February 26, 2024 for an impartial hearing, which concluded on March 4, 2024, after two days of proceedings (Tr. pp. 1-184). By decision dated April 10, 2024, the IHO determined that the district failed to provide the student a FAPE for the 2023-24

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<sup>3</sup> This statement is not an accurate representation of the IEP. The March 24, 2014 CPSE IEP was for summer services only in July and August 2014, which was the summer prior to the school year in which the student turned five years old (Parent Ex. B at p. 1). State law defines a preschool student with a disability as a student who is eligible to receive preschool programs and services and "who will not have become five years of age on or before December first of the school year, or a later date if a board established such later date for eligibility to attend school" (Educ. Law § 4410[1][i]). State regulation further describes a preschool student with a disability as a student who "is not entitled to attend the public schools of the school district of residence" due to being under the age of five (8 NYCRR 200.1[mm]; see Educ. Law § 3202[1]).

school year, and that the parent's unilaterally-obtained services were appropriate (IHO Decision at pp. 3, 6, 8-9). With regard to equitable considerations, the IHO determined that the parent's ten-day notice was untimely, that the parent did not cooperate with the CSE, and that the parent had no intention of enrolling the student in a public school (*id.* at pp. 10-11). As relief, the IHO awarded funding for the services delivered by Upgrade but, based on evidence of the student's schedule, limited funding to 10 sessions (instead of 15 sessions) per week of special education services in Yiddish and three 30-minute sessions per week of speech-language therapy in Yiddish at specified rates (*id.* at p. 11). Further, on equitable grounds, the IHO limited the award to services delivered from January 1, 2024 through June 30, 2024 (*id.*). The IHO required the district to directly pay Upgrade or reimburse the parent upon proof of costs and attendance (*id.*). The IHO also directed the district to convene the CSE to develop an individualized education services program (IESP) for the student for the 2024-25 school year within 45 days of her decision (*id.* at p. 12).

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

The parent appeals and argues that the IHO erred in failing to award funding for 15 hours per week of special education services. The parent also alleges that the IHO erred in finding that her ten-day notice was untimely. Further, the parent asserts that she cooperated with the district and that she was open to enrolling the student in a public school. The parent also argues that the district has not complied with the IHO's order to convene the CSE. As relief, the parent requests funding for 15 hours per week of special education services to be delivered by Upgrade at the specified rate.

In an answer and cross-appeal, the district denies the parent's allegations and asserts that the IHO erred in finding the parent's unilateral placement appropriate. The district further argues that, if the parent's unilateral placement is found to be appropriate, the parent's requested relief should be denied in its entirety based on equitable considerations.

#### **V. Applicable Standards**

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in

an IEP" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. 386, 399 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

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

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR

300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).<sup>4</sup>

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**

At the outset, the parent has not appealed from the IHO's finding that she did not request 12-month services in her ten-day notice, or from the IHO's term of funding set from January 1, 2024 through June 30, 2024 or from the IHO's refusal to consider her request for compensatory education. In addition, the district has not cross-appealed from the IHO's finding that it failed to offer the student a FAPE for the 2023-24 school year. Therefore, those determinations 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]).

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

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

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<sup>4</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 chance to meet challenging objectives" (Endrew F., 580 U.S. at 402).

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. 510 U.S. at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether a unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether the placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] ["evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

The Second Circuit has set forth the standard for determining whether parents have carried their burden of demonstrating the appropriateness of their unilateral placement.

No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

(Gagliardo, 489 F.3d at 112, quoting Frank G., 459 F.3d at 364-65).

A parent may obtain outside services for a student in addition to a private school placement as part of a unilateral placement (see C.L., 744 F.3d at 838-39 [finding the unilateral placement appropriate because, among other reasons, parents need not show that a "private placement



furnishes every special service necessary" and the parents had privately secured the required related services that the unilateral placement did not provide], quoting Frank G., 459 F.3d at 365).

Here, the phrasing of the parent's ten-day notice indicated that she intended to provide the student with unilateral services at the NPS and seek funding for those services (Dist. Ex. 5 at p. 2). The parent has not sought reimbursement or direct funding for the cost of the student's attendance at the NPS (Parent Ex. A at pp. 3-4; Dist. Ex. 5 at p. 2). The hearing record includes evidence of the special education services and speech-language therapy delivered to the student by Upgrade; however, there is no evidence in the hearing record about the program the student received at the NPS.

In order to determine whether the parent's unilaterally-obtained special education teacher services and speech-language therapy were appropriate, a discussion of the student's needs is necessary to determine whether the student was provided specially designed instruction to meet those needs. Based on the hearing record, the student's needs at the time of the 2023-24 school year can best be gleaned from the student's April 2022 neuropsychological evaluation and the February 2023 IEP (Dist. Exs. 1 at p. 19; 4 at p. 1).

According to an April 2022 neuropsychological evaluation, administration of the Wechsler Intelligence Scale for Children – Fifth Edition (WISC-V) to the student yielded a full scale IQ of 80 (low average range) (Dist. Ex. 4 at p. 2).<sup>5</sup> The student's general abilities index score, and verbal comprehension, visual spatial, and fluid reasoning scale scores were also in the low average range (id.). His working memory scale score was in the "bright normal" range (id.). Finally, the student's score on the processing speed scale was within the mildly impaired range (id.). Because the student exhibited variability on the visual spatial scale, he was given an additional measure of spatial visualization (independently of the WISC-V) and his score was within the average range (id. at p. 3). When the student was given a nonverbal task that required planning and organizational skills, he was only able to complete six out of nine problems, which the neuropsychologist opined was "unusual" for his age (id.). The neuropsychologist further reported that the student worked quite slowly and was unable to arrive at solutions for the more demanding problems and noted that the student had difficulty maintaining his "cognitive set and frequently lost track of the rules and the basic premises of the task" (id.).

The neuropsychologist indicated that the student had a "moderate [s]peech [a]rticulation [d]isorder" which impacted his intelligibility, as well as difficulty with expressive language production related to word retrieval and morpho-syntactic structure (Dist. Ex. 4 at p. 3). According to the neuropsychologist, the student "demonstrate[d] some physical awkwardness, some of which was associated with postural control" and noted that "he scored quite poorly" on a "test of motor planning ability that had him imitate hand and finger postures and positions" (id.). The neuropsychologist further indicated that the student had motor-related difficulties including poor postural tone and motor planning problems, as well as "particularly problematic" fine motor and

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<sup>5</sup> The evaluator reported that as the student's primary language was Yiddish, "some adjustments" to the test protocol were made and therefore the WISC-V was not administered in the "standard manner" (Dist. Ex. 4 at p. 2). According to the evaluator, the student's cognitive assessment scores were "variable enough so that one summary score [ould not] capture [the student's] abilities" (id. at p. 5).

graphomotor skills (id. at p. 5). Additionally, the neuropsychologist reported that the student was "highly distractible and fairly restless," "poorly organized," and demonstrated "a low frustration tolerance when he encounter[ed] difficulty" (id.).

The February 2023 IEP indicated that, at that time, the student was in seventh grade at the NPS and presented with delays in reading, writing, mathematics, language and social/emotional skills (Dist. Ex. 1 at p 1). In addition to reporting the results from the April 2022 neuropsychological evaluation, the IEP reflected information from one of the student's then-current special education teacher support services (SETSS) providers (Dist. Exs. 1 at pp. 1-2; 2 at p. 23). According to the IEP, the student had shown progress; however, he continued to present with significant delays in reading, reading comprehension, math, writing, language, and focusing skills, and opined that he continued to require specialized instruction and support (Dist. Ex. 1 at p. 1). Additionally, the IEP indicated that the student exhibited receptive and expressive language and conversational skill deficits, and that speech-language therapy would help him "develop the foundational language skills needed to make academic gains in all content areas" (id. at p. 4).

In reading, the February 2023 IEP indicated that the student was performing significantly below grade level (Dist. Ex. 1 at pp. 2, 19). The IEP indicated that the student struggled to decode words that were three or more syllables, stumbled on unfamiliar words, and became frustrated when he could not read those words (id. at p. 2). Furthermore, the student was not reading with the fluency necessary to support comprehension, he did not use proper expression, and did not use context "to confirm or self-correct word recognition and understanding" (id.). The student had made progress in his reading comprehension skills but struggled with longer texts in that he could become overwhelmed and have difficulty processing the information in an organized manner (id.). According to the IEP the student could miss key components in a story, confused the order of events, and struggled to answer "WH" questions (id.). The IEP further indicated that the student would interpret text based on his opinions, assumptions, and experiences, and had difficulty differentiating between them and what the text implicitly stated or implied (id.). Finally, the student had difficulty with comparing and contrasting, synthesizing information, and summarizing content of a non-complex passage or story (id.).

With regard to writing, the February 2023 IEP indicated that the student struggled with basic skills (Dist. Ex. 1 at p. 2). Additionally, the IEP reflected that the student presented with difficulty writing complete sentences with correct tense and singular/plural usage (id.). The IEP indicated that the student could write short sentences and very basic paragraphs, but had difficulty writing a full descriptive paragraph, an opinion piece, and an organized narrative (id. at pp. 2-3).

In the area of math, the February 2023 IEP indicated that the student had shown moderate progress; however, he continued to struggle significantly, and had limited understanding of multiplication and division and a "very basic perception of fractions" (Dist. Ex. 1 at pp. 1-2). According to the IEP, the student's performance was inconsistent and he presented with difficulty maintaining previously acquired skills (id. at p. 2).

With regard to the student's social development, the February 2023 IEP indicated that the student often reacted negatively to frustration and failure, became anxious, and gave up easily (Dist. Ex. 1 at p. 3). The IEP indicated that the student used a pictorial schedule to help him stay focused on one task instead of becoming overwhelmed by the many steps and tasks he needed to

complete in class (id.). According to the IEP, because the student "lack[ed] [b]asic English language, it [wa]s difficult for him to interact successfully with peers" (id.). The IEP reported that the parents felt the student was immature, tended to be impulsive, seemed disorganized, and was physically awkward (id.). Furthermore, the parent reported that the student was friendly, but had been bullied due to his speech problems; therefore, he attended counseling for support (id.). Counseling sessions would also address the student's social/emotional needs of "poor self-regulation and compliance" (id. at p. 4).

Regarding physical development, the IEP indicated that the student had received a diagnosis of attention deficit hyperactivity disorder, and the parents felt OT should be continued due to delayed fine motor skills (id. at pp. 3, 4). The IEP also indicated that the student's focusing and writing difficulties would be addressed by OT (id. at p. 4). Additionally, the IEP indicated that "reportedly" the student had "gross motor deficits" that would be "remediated with physical therapy" (id.).

The February 2023 IEP indicated that the student's management needs consisted of: a multisensory approach to learning; scaffolding; repetition and rephrasing of directions as needed; periodic checks for understanding; review of previously learned material; instruction broken down into small, manageable units; previewing and modeling of content; visual aids and cues (i.e., graphic organizers and checklists); refocusing prompts and redirection as needed; preferential seating near the teacher; positive reinforcements and praise; peer models; and testing accommodations consisting of extended time and testing in a separate room or location (Dist. Ex. 1 at p. 4).

Turning to the unilaterally-obtained services, the hearing record contains a February 2024 special education progress report prepared by the Upgrade special education teacher (teacher), which indicated that the student demonstrated "severe delays in all areas of his academics, including language, focusing, processing and comprehension" (Parent Ex. J at p. 1). The teacher further indicated that the student struggled with communication skills, had difficulty expressing himself verbally, used very slow and deliberate speech, did not maintain eye contact when engaged in a conversation, had difficulty with peer interactions due to limited understanding of social cues and exhibited anxious tendencies, was easily frustrated, and was quick to give up (id.).

The teacher reported the results of the Scholastic Three Minute Reading Assessment that indicated the student read 42 words correct per minute in a sixth-grade passage, which according to the Hasbrouck and Tindal Words Correct Per Minute "[p]ercentile chart" fell below the 10th percentile for a sixth grade reader in the winter semester (Parent Ex. J at p. 1). Additionally, the student achieved a score of 6 out of 16 on the reading fluency and expression rubric of the same assessment (id.). Listening comprehension was assessed using a third-grade passage, because reading text on his grade level was too difficult for the student to comprehend (id. at p. 2). The student was able to recall many details of the text; however, "he also included some random information" not included in the text (id.). The student was able to answer some "wh" questions, referred to the text to support his answer, and used logic to make a very basic comparison; however, he could not relate self to text and was unable to make inferences or predict the ending to a story (id.). The teacher indicated that the student struggled with decoding multi-syllabic words, words that contain silent letters such as "thought" or "campaign," and special prefixes or suffixes, and had difficulty reading words that had a soft "c" or "g" sound (id.).

The teacher reported that the student's writing was "severely underdeveloped," noting that his directionality, alignment, and spacing was very poor and he had difficulty with word formation (Parent Ex. J at p. 5). The teacher indicated that the student could not compose a sentence, and that the best he could do was a two-to-three-word phrase (id.). Finally, the teacher explained that the student did attempt to write words, but due to the severity of delays in his spelling and letter formation, it was impossible to comprehend what he had written (id.). The teacher opined that with continued direct support, the student would improve his writing skills (id.).

With regard to math, the teacher reported that, according to results of the Common Core Math Assessment, the student was performing at approximately a second-grade level (Parent Ex. J at p. 4). It was noted that the student struggled greatly with basic math skills and could only add and subtract multi-digit numbers that did not require any regrouping (id.). The teacher indicated that the student had difficulty solving basic or simple word problems, and he continuously made errors when computing (id.). The teacher opined that the student was "unable to keep up" with math class and was unable to solve fractions, ratios, exponents or algebraic equations, and inequalities (id.).

A February 2024 speech-language therapy progress report prepared by the Upgrade speech-language pathologist (provider) indicated that the student presented with severe deficits in receptive, expressive, and social pragmatic language skills (Parent Ex. M at p. 1). Additionally, the provider indicated that the student's speech intelligibility was "significantly decreased due to poor contact of articulators and misartic[ul]ations" (id.). The provider further explained that the student struggled with a "host of severe speech and language delays including social pragmatic, receptive and expressive skills which are delaying his social-emotional-well-being and academic progress" (id. at p. 3). Specifically, the provider indicated that the student presented with deficits in concept formation, understanding and following complex directives, task approach, problem-solving, critical thinking, and logical reasoning, and noted that his reading comprehension skills were also significantly delayed (id. at p. 1).

Review of the hearing record shows that the student was attending a general education classroom at an NPS and was "allotted" to receive the following related services through Upgrade: individual special education services 15 times per week for 60 minutes per session to address his academic delays as well as individual speech-language therapy three times per week for 30 minutes per session (Tr. pp. 54-55; Parent Exs. J at p. 1; K at ¶¶ 10-11; L at ¶ 14). However, the educational director of Upgrade (educational director) testified that due to the student's difficulty with focusing and attention he was only receiving approximately ten hours per week of individual special education services (Tr. pp. 54-55; Parent Ex. L ¶¶ 1, 4). The agency did not provide the special education services at the NPS, but instead the student was transported to the provider's office during the afternoon for the last two hours of the school day Monday through Friday (Tr. pp. 56, 118-21). According to the parent, the student missed math, reading, and English instruction at the NPS during this timeframe (Tr. pp. 118, 121). The student was also transported to and from the provider's office for speech-language therapy during the student's lunchtime on Thursdays and Fridays, and he received a third session on Sundays (Tr. pp. 71, 73, 118-19).

With regard to progress, the hearing record indicated that the student was "responding well to the modifications and interventions provided and [wa]s making progress" (Parent Ex. J at p. 1). The teacher noted that the student was making "slow incremental progress in his academics," and

that he also demonstrated "some improvements in his social-emotional well-being" (*id.*). In speech-language therapy, the student had made progress in his comprehension and session participation, as well as his receptive and expressive vocabulary (Parent Ex. M at p. 3). The provider noted "[s]ignificant improvement in sentence structure, syntax and grammar" (*id.*).

The foregoing evidence in the hearing record does not demonstrate that the unilateral services obtained by the parent were specially designed to address the student's needs. As noted above, the parent indicated in her ten-day notice that the student would receive the unilaterally-obtained services at the NPS. However, the hearing record reflects that all of the student's special education instruction and speech-language therapy was provided on a pull-out basis at an off-site location.<sup>6</sup> While the parent does not seek district funding for the costs of the NPS and, perhaps, was not required to present evidence of the non-specially designed instruction provided at the NPS in the general education class the student attended, I find that, under the totality of the circumstances, evidence of the off-site instruction by the special education teacher and related services provided is insufficient to demonstrate that the unilateral placement as a whole was appropriate. In particular, the evidence in the hearing record does not demonstrate how the private services enabled the student to access the general education curriculum at the NPS. The purpose of providing special education services to a student attending a nonpublic school is to support his or her meaningful access to the general education curriculum and classroom setting in a way that is reasonable under the circumstances. I am not convinced that removal of the student from the general education NPS during core instruction to receive special education services off-site was appropriate for the student under the totality of the circumstances. Furthermore, the hearing record shows that the student had identified fine and gross motor needs, yet the hearing record is devoid of any provision of OT or PT, or any other support that would appropriately address those needs.

## **B. Other Relief**

The district also cross-appeals the IHO's directive for the CSE to reconvene to develop an IESP for the student for the 2024-25 school year.

An IHO generally has broad authority to fashion appropriate equitable relief (*see, e.g., Mr. and Mrs. A v. New York City Dep't of Educ.*, 769 F. Supp. 2d 403, 422-23, 427-30 [S.D.N.Y. 2011]; *see Forest Grove v. T.A.*, 129 S.Ct. 2484 [2009]); however, an IHO may not use this authority to order relief to remedy an issue that was not raised. 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

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<sup>6</sup> To the extent the parent does not seek district funding of the student's tuition at the NPS, the unilateral placement arranged for by the parent does tend to resemble the situation where a student who attends a nonpublic school in the State at the parent's expense is also eligible for special education services under an IESP pursuant to the State's so-called "dual enrollment" statute (*see* Educ. Law §3602-c).

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 an 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., 502 F.3d 708 [7th Cir. 2007]).

Review of the parent's December 27, 2023 due process complaint notice reflects that the parent challenged a February 2023 IEP and did not set forth any facts or circumstances that would indicate the student was dually enrolled pursuant to Education Law §3602-c nor did the parent request any relief related to equitable services and/or the development of an IESP (see generally Parent Ex. A). Review of the hearing record indicates that the parent was not seeking funding or reimbursement for the cost of the student's attendance at the NPS, and, for that reason, the unilateral placement arranged for by the parent does tend to resemble the situation where a student attends a nonpublic school in the State at the parent's expenses and receives special education services under an IESP pursuant to the State's so-called "dual enrollment" statute (see Educ. Law §3602-c). Here, however, there were no facts or circumstances raised during the impartial hearing that would indicate the parent sought for the district to provide the student's special education services pursuant to the dual enrollment statute, or that the parent sought relief addressing those issues (see Tr. pp. 1-184; Parent Exs. A-B, G-M; Dist. Exs. 1-7). If the parent wishes for the district to provide special education services to the student at the NPS pursuant to the dual enrollment statute, the parent should, pursuant to New York State law, file a request for such services with the district 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]).

While IHOs and SROs have some latitude in fashioning appropriate relief, to survive a challenge there should be some specific request for the relief in the due process complaint notice or discussion at the impartial hearing so that a record may be developed. There being no evidence in the hearing record that the IHO's directive addressed issues raised in the present matter and that the parent did not request the specific relief, the IHO erred in ordering the district to convene to develop an IESP for the 2024-25 school year.

## **VII. Conclusion**

In summary, the IHO erred in finding that the parent demonstrated the appropriateness of her unilaterally-obtained services and further erred in ordering the district to convene a CSE to develop an IESP for the 2024-25 school year. In light of these determinations, I need not address the parties' remaining contentions, including the district's cross-appeal that equitable considerations do not favor the parent.

**THE APPEAL IS DISMISSED.**

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

**IT IS ORDERED** that the IHO's decision dated April 10, 2024, is modified by reversing those portions which found that the parent's unilaterally-obtained services were appropriate and awarded partial funding thereof for the 2023-24 school year; and

**IT IS FURTHER ORDERED** that the IHO's decision dated April 10, 2024, is modified by reversing that portion which ordered the district to convene the CSE to develop an IESP for the 2024-25 school year.

**Dated:**           **Albany, New York**  
                      **June 20, 2024**

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**CAROL H. HAUGE**  
**STATE REVIEW OFFICER**