



The University of the State of New York

The State Education Department

State Review Officer

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No. 24-209

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

Appearances:

Liz Vladeck, General Counsel, attorneys for respondent, by Lindsay R. VanFleet, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request for respondent (the district) to directly fund the costs of her daughter's unilaterally-obtained special education teacher support services (SETSS) delivered by Achieve It, LLC (Achieve It) for the 2023-24 school year. The appeal must be sustained.

II. Overview—Administrative Procedures

When a student who resides in New York is eligible for special education services and attends a nonpublic school, Article 73 of the New York State Education Law allows for the creation of an individualized education services program (IESP) under the State's so-called "dual enrollment" statute (see Educ. Law §3602-c). The task of creating an IESP is assigned to the same committee that designs educational programming for students with disabilities under the IDEA (20 U.S.C. §§ 1400-1482), namely a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law §§ 3602-c; 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts related to IESPs, State law provides that "[r]eview of the recommendation of the committee on special education may be obtained by the parent or person in parental relation of the pupil pursuant to the provisions of

[Education Law § 4404]," which effectuates the due process provisions called for by the IDEA (Educ. Law § 3602-c[2][b][1]). Incorporated among the procedural protections of the IDEA and the analogous State law provisions is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

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

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4[a]). 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

In this case, the evidence in the hearing record concerning the student's educational history is sparse. Based on the limited evidence, it appears that the student has been parentally placed at a religious, nonpublic school since at least the 2020-21 school year (see Parent Ex. B at p. 1).

The limited evidence further reflects that, on November 4, 2020, a CSE convened and developed an IESP for the student that would be implemented from November 19, 2020 through the projected annual review date of November 4, 2021 (see Parent Ex. B at p. 1).¹ At that time, the student was in seventh grade (id.). According to the IESP, a "reevaluation team met to review updated progress report from the special education (sic) as part of the special education eligibility process" and had "collaborated to provide further insight to [the student's] current level of functioning" (id.). Finding that the student remained eligible to receive special education as a student with a learning disability, the November 2020 CSE recommended nine periods per week of individual SETSS (Yiddish language) in a separate location to address the student's needs (id. at pp. 1, 8).² However, the November 2020 CSE noted in the IESP that the student was then-currently "sitting in a [seventh] grade mainstream classroom" and "function[ed] way below her grade level" at an estimated third or fourth grade level (id. at pp. 2-3). At that time, the CSE "was asked to brainstorm possible improvements in the [student's] special education services that could better facilitate [her] transition from [j]unior [h]igh school requirements to [h]igh [s]chool academics" (id.). According to the IESP, the CSE broached the subject of a 12:1 special class placement for the student, but "that was not acceptable to the parent" and therefore, an increase in SETSS was recommended (id.).

On or about May 16, 2023, the parent executed a notice to the district, indicating that the student was parentally placed at her own expense at a nonpublic school and that she wished for the district to provide special education services to the student for the 2023-24 school year (see Dist. Ex. 3).³

Evidence in the hearing record includes an Achieve It "SETSS Contract 2023-2024," dated September 4, 2023 (Parent Ex. C).⁴ According to the contract, Achieve It would deliver nine 60-minute sessions per week of 1:1 SETSS to the student beginning on September 4, 2023 and continuing through June 30, 2024 for the 2023-24 school year, at a rate of \$195.00 per hour (id.). In addition, the contract indicated that the SETSS would be delivered to the student "in person, unless zoom [was] required," and that the parent was "responsible to pay the costs of the SETSS sessions should the [district] not fully reimburse the therapy cost" (id.).

¹ At the impartial hearing, the district's attorney confirmed that the November 2020 IESP was the last IESP the district developed for the student (see Tr. p. 7).

² The student's eligibility for special education as a student with a learning disability is not in dispute (see 34 CFR 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

³ At the time the parent executed this notice, she indicated that the student would be in 10th grade in September 2023 (see Parent Ex. G).

⁴ Achieve It has not been approved by the Commissioner of Education as a company with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

A. Due Process Complaint Notice

By due process complaint notice dated November 29, 2023, the parent alleged that she could not locate a SETSS provider at the "regular [district] rate" (Parent Ex. E at p. 3).⁵ As relief, the parent requested that the district "cover the cost" of the "SETSS provider [she had located] at an enhanced rate" (id.).

B. Impartial Hearing Officer Decision

On March 21, 2024, the parties proceeded to an impartial hearing before an IHO with the Office of Administrative Trials and Hearings (OATH), which concluded on April 3, 2024, after two total days of proceedings (see Tr. pp. 1-42).⁶ At the impartial hearing, the district's attorney admitted that the district failed to develop an IESP for the student for the 2023-24 school year and therefore, the district was conceding that it had failed to offer the student a free appropriate public education (FAPE) for the 2023-24 school year (see Tr. pp. 7-8). In addition, the district's attorney indicated that the district was not presenting any witnesses and only contested the hourly rate for the parent's unilaterally-obtained SETSS (i.e., equitable considerations); in response, the IHO explained her expectations with respect to evidence concerning the hourly rate (Tr. pp. 8-9).

When the impartial hearing resumed on April 3, 2024, the IHO confirmed with the parties that the Burlington/Carter legal standard applied to the analysis of this matter, and the IHO further confirmed that the district was only contesting the appropriateness of the unilaterally-obtained SETSS and the "rates" (Tr. pp. 20, 32-33, 37-38). The parent's advocate entered two affidavits in lieu of direct testimony into the hearing record as evidence: one attested to by the parent and one attested to by the SETSS provider (see generally Parent Exs. F-G).⁷ The IHO asked the district's attorney whether she had submitted a request to cross-examine the parent's witnesses, the district's attorney believed that she had; however, after a brief search, neither the IHO nor the district's attorney could locate any emails or other correspondence indicating the district's intention to cross-examine the parent's witnesses (see Tr. pp. 33-35). At that point, the IHO noted that, based on the prehearing conference, "the party who want[ed] to cross-examine the witness must let the offering party, . . . , know two business days in advance" (Tr. p. 35; see IHO Ex. I ¶ 9). Therefore, absent a request, the IHO stated that there would be no district cross-examination of the parent's witnesses (see Tr. pp. 35-36).

In a decision dated April 22, 2024, the IHO found that the district had conceded that it failed to implement the student's services in the November 2020 IESP (see IHO Decision at pp. 6-

⁵ It appears that the parent did not submit the November 2023 due process complaint notice to the district until February 13, 2024 (see Parent Ex. E at p. 1).

⁶ The student's older sibling acted as the parent's educational advocate (see Tr. pp. 1-4). At the impartial hearing, the IHO questioned the parent's advocate and specifically advised her that "if [she was] an educational advocate, [she was] going to be held to the standard of all educational advocates in terms of her knowledge" (Tr. pp. 3-4).

⁷ Within the SETSS provider's affidavit, she indicated that she did "business as Achieve It, LLC" (Parent Ex. G ¶ 7).

8, 11). As a result, the IHO concluded that the district's failure to implement equitable services constituted a failure to offer the student a FAPE (id. at p. 8).

Turning to the appropriateness of the unilaterally-obtained SETSS, the IHO initially noted that the November 2020 IESP, as the student's "operative IESP," was "problematic" because the student had not been evaluated in over three years (IHO Decision at p. 8). According to the IHO, the student needed to be evaluated in order to discern the "breadth of [her] challenges and how to best address them" (id.). Even though the hearing record included a progress report, the IHO indicated that it did not "provide updated informal assessments in lieu of evaluations to demonstrate the student's current needs and the appropriateness of the services" (id.). Next, the IHO found that the SETSS provider was "certified to teach in a public school for students from birth to grade two," and the SETSS provider's testimony did not "explain how the [s]tudent's individual special education needs were addressed by the services rendered, nor her qualifications or experience to provide services to the [10]th-grade [s]tudent, even one whose performance [wa]s below grade level" (id.). The IHO noted that the impartial hearing did not include any "live testimony, just testimonial affidavits, which were brief, and the two affidavits of the witnesses were copied almost verbatim from another case for SETSS," which had previously been before the IHO (id. at pp. 8-9, citing to Parent Exs. F-G and IHO Ex. IV). The IHO found that "in both affidavits the [p]arents contacted the same number of potential providers, without success" and that "[n]o details [we]re provided as to those attempts" (id. at p. 9).

Next, the IHO found that it was "unclear if the [s]tudent made progress" (IHO Decision at p. 9). Based on a comparison of the November 2020 IESP with the information in the February 2024 progress report in the hearing record, the IHO found that the student appeared, in 2024, "either behind or at the same level she was in 2020" in reading; in mathematics, the IHO found that the student may have improved her performance from a third-grade level in 2020 to a fourth-grade level in 2024 (id.).

Finally, the IHO noted that the parent's advocate at the impartial hearing was the "older sister" of the student in this matter (IHO Decision at p. 9). The IHO also noted that the parent did not appear at the impartial hearing (id.). With respect to the SETSS provider in this matter, the IHO noted that she, herself, had acted as an "advocate in a prior matter assigned to [the IHO]" (id.). The IHO reiterated that the hearing record lacked any evidence to explain how the SETSS provider, who was "certified to teach students from birth through second grade, [wa]s appropriate to teach the [10]th grader at issue here" (id.). Additionally, the IHO faulted the parent for "[p]roviding virtually the same affidavits in this case as those that were submitted in [a previous] case [] (where the two providers [we]re different)," and that such actions "fully diminishe[d] the credibility of the witnesses" (id., citing to IHO Ex. IV). According to the IHO, "a [s]tudent's educational needs require[d] individual analysis, and proof of such should not be a one-size-fits-all approach" (id.).

In light of the foregoing evidence, the IHO concluded that the parent failed to sustain her burden to establish the appropriateness of the unilaterally-obtained SETSS from Achieve It for the student for the 2023-24 school year, and the IHO denied the parent's request for direct funding of the services (see IHO Decision at pp. 9-10). However, the IHO ordered the district to "conduct all necessary evaluations" of the student and convene a CSE meeting thereafter to develop a new IESP within 60 days from the date of the decision (id. at p. 10).

IV. Appeal for State-Level Review

The parent appeals, arguing initially that the IHO acted in a biased manner and lacked impartiality. The parent contends that the IHO improperly weighed the evidence and improperly relied on evidence from another case in reaching conclusions about the unilaterally-obtained SETSS in this case. The parent further contends that the IHO erred by finding that the parent failed to sustain her burden to demonstrate that the unilaterally-obtained SETSS was appropriate to meet the student's needs and to make progress. More specifically, the parent asserts that the IHO erred by finding that the SETSS provider was not qualified to deliver services to the student and that the hearing record lacked evidence demonstrating that the student made progress. As relief, the parent seeks to reverse the IHO's decision and requests an order directing the district to directly fund the costs of the unilaterally-obtained SETSS for the student for the 2023-24 school year.

In an answer, the district responds to the parent's allegations and generally argues to uphold the IHO's decision in its entirety.

V. Applicable Standards

A board of education must offer a FAPE to each student with a disability residing in the school district who requires special education services or programs (20 U.S.C. § 1412[a][1][A]; Educ. Law § 4402[2][a], [b][2]). However, the IDEA confers no individual entitlement to special education or related services upon students who are enrolled by their parents in nonpublic schools (see 34 CFR 300.137[a]). Although districts are required by the IDEA to participate in a consultation process for making special education services available to students who are enrolled privately by their parents in nonpublic schools, such students are not individually entitled under the IDEA to receive some or all of the special education and related services they would receive if enrolled in a public school (see 34 CFR 300.134, 300.137[a], [c], 300.138[b]).

However, under State law, parents of a student with a disability who have privately enrolled their child in a nonpublic school may seek to obtain educational "services" for their child by filing a request for such services in the district of location where the nonpublic school is located on or before the first day of June preceding the school year for which the request for services is made (Educ. Law § 3602-c[2]).⁸ "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

⁸ 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]).

education programs and services provided to other students with disabilities attending public or nonpublic schools located within the school district (*id.*).⁹

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. Preliminary Matters

1. Additional Documentary Evidence

The parent submits additional documentary evidence for consideration on appeal in support of her claim that the IHO was biased (*see* Req. for Rev. ¶ 1; Req. for Rev. Exs. 1-2). The district objects to the consideration of the parent's additional documentary evidence, arguing that both proposed exhibits were available at the time of the impartial hearing and are not now necessary to render a decision (*see* Answer ¶ 11).

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]). The factor specific to whether the additional evidence was available or could have been offered at the time of the impartial hearing serves to encourage full development of an adequate hearing record at the first tier to enable the IHO to make a correct and well supported determination and to prevent the party submitting the additional evidence from withholding relevant evidence during the impartial hearing, thereby shielding the additional evidence from cross-examination and later springing it on the opposing party, effectively distorting the State-level administrative review and transforming it into a trial de novo (*see M.B. v. New York City Dep't of Educ.*, 2015 WL 6472824, at *2-*3 [S.D.N.Y. Oct. 27, 2015]; *A.W. v. Bd. of Educ. of the Wallkill Cent. Sch. Dist.*, 2015 WL 1579186, at *2-*4 [N.D.N.Y. Apr. 9, 2015]). On the other hand, both federal and State regulations authorize SROs to seek additional evidence if necessary, and SROs have accepted evidence available at the time of the impartial hearing when necessary (34 CFR 300.514[b][2][iii]; 8 NYCRR 279.10[b];

⁹ State guidance explains that providing services on an "equitable basis" means that "special education services are provided to parentally placed nonpublic school students with disabilities in the same manner as compared to other students with disabilities attending public or nonpublic schools located within the school district" ("Chapter 378 of the Laws of 2007—Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the Individuals with Disabilities Education Act (IDEA) 2004 and New York State (NYS) Education Law Section 3602-c," Attachment 1 at p. 11, VESID Mem. [Sept. 2007], [available at https://www.nysed.gov/sites/default/files/special-education/memo/chapter-378-laws-2007-guidance-on-nonpublic-placements-memo-september-2007.pdf](https://www.nysed.gov/sites/default/files/special-education/memo/chapter-378-laws-2007-guidance-on-nonpublic-placements-memo-september-2007.pdf)). The guidance document further provides that "parentally placed nonpublic students must be provided services based on need and the same range of services provided by the district of location to its public school students must be made available to nonpublic students, taking into account the student's placement in the nonpublic school program" (*id.*).

Application of a Student with a Disability, Appeal No. 08-030; Application of a Child with a Disability, Appeal No. 00-019 [finding it necessary to accept evidence available at the time of the impartial hearing to determine the student's pendency placement]).

As the district contends, a brief review of the documents submitted by the parent with her request for review reveals that both were available at the time of the impartial hearing and are not now necessary to render a decision. Therefore, in an exercise my discretion, I decline to accept the parent's proffered evidence.

2. IHO Bias

As noted, the parent alleges that the IHO acted with bias and lacked impartiality in conducting the impartial hearing. The parent asserts that the IHO was harsh and intimidating, and interrupted her educational advocate, which prevented the advocate from appropriately representing the parent's case. The parent also alleges that the IHO unfairly required the educational advocate to have the same experience and knowledge as an attorney. In addition, the parent contends that the IHO "gave negative vibes and remarks," "hinted at her leanings," and acted inconsistently, which intimidated and confused her educational advocate. Finally, the parent asserts that the IHO improperly relied on evidence from another impartial hearing to draw conclusions about the credibility and veracity of the parent's direct testimony by affidavit and the SETSS provider's direct testimony by affidavit rather than cross-examining the witnesses herself, which unfairly weakened the parent's case. In contrast, the parent points to language in the district's closing brief that was "cut and paste[d] from another case," which the IHO seemingly ignored.

The district contends that, contrary to the parent's assertions, the IHO followed State regulations in conducting the impartial hearing by asking questions to clarify or complete the hearing record and by ensuring that both parties followed her directives. Additionally, the district contends that the parent misconstrued the IHO's statement, which indicated that the IHO would hold the self-identified educational advocate to the standard of all educational advocates. Thus, the district argues that, even if the IHO was stern in her rulings, the IHO's conduct was not biased against the parent.

It is well settled that an IHO must be fair and impartial and must avoid even the appearance of impropriety or prejudice (see, e.g., Application of a Student with a Disability, Appeal No. 12-066). Moreover, an IHO, like a judge, must be patient, dignified, and courteous in dealings with litigants and others with whom the IHO interacts in an official capacity and must perform all duties without bias or prejudice against or in favor of any person, according each party the right to be heard, and shall not, by words or conduct, manifest bias or prejudice (see, e.g., Application of a Student with a Disability, Appeal No. 12-064). An IHO may not be an employee of the district that is involved in the education or care of the child, may not have any personal or professional interest that conflicts with the IHO's objectivity, must be knowledgeable of the provisions of the IDEA and State and federal regulations and the legal interpretations of the IDEA and its implementing regulations, and must possess the knowledge and ability to conduct hearings and render and write decisions in accordance with appropriate, standard legal practice (20 U.S.C. § 1415[f][3][A]; 34 CFR 300.511[c][1]; 8 NYCRR 200.1[x]).

State and federal regulations, as well as legal interpretations of the IDEA and its implementing regulations, require that an IHO possess the knowledge and ability to conduct hearings and render and write decisions in accordance with appropriate, standard legal practice (20 U.S.C. § 1415[f][3][A]; 34 CFR 300.511[c][1]; 8 NYCRR 200.1[x]). An IHO must provide all parties with an opportunity to present evidence and testimony, including the opportunity to confront and cross-examine witnesses (34 CFR 300.512[a][2]; 8 NYCRR 200.5[j][3][xii]). While an IHO is required to exclude evidence and may limit the testimony of witnesses that he or she "determines to be irrelevant, immaterial, unreliable or unduly repetitious" (8 NYCRR 200.5[j][3][xii][c]-[e]), it is also an IHO's responsibility to ensure that there is an adequate and complete hearing record (see 8 NYCRR 200.5[j][3][vii]). Further, State regulation provides that nothing shall impair or limit the IHO in his or her ability to ask questions of counsel or witnesses for the purpose of clarifying or completing the hearing record (8 NYCRR 200.5[j][3][vii]).

Initially, to the extent that the parent disagrees with the conclusion reached by the IHO, such disagreement does not provide a basis for finding actual or apparent bias by the IHO (see Chen v. Chen Qualified Settlement Fund, 552 F.3d 218, 227 [2d Cir. 2009] [finding that "[g]enerally, claims of judicial bias must be based on extrajudicial matters, and adverse rulings, without more, will rarely suffice to provide a reasonable basis for questioning a judge's impartiality"]; see also Liteky v. United States, 510 U.S. 540, 555 [1994] [identifying that "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion"]; Application of a Student with a Disability, Appeal No. 13-083).

Generally, unless specifically prohibited by regulation, IHOs are provided with broad discretion, subject to administrative and judicial review procedures, in how they conduct an impartial hearing, so long as they "accord each party a meaningful opportunity" to exercise their rights during the impartial hearing (Letter to Anonymous, 23 IDELR 1073 [OSEP 1995]; see Impartial Due Process Hearing, 71 Fed. Reg. 46,704 [Aug. 14, 2006] [indicating that IHOs should be granted discretion to conduct hearings in accordance with standard legal practice, so long as they do not interfere with a party's right to a timely due process hearing]). At the same time, the IHO is expected to ensure that the impartial hearing operates as an effective method for resolving disputes between the parents and district (id.). State and federal regulations balance the interests of having a complete hearing record with the parties having sufficient opportunity to prepare their respective cases and review evidence. Also, as a general matter, the parties to an impartial hearing are obligated to comply with the reasonable directives of the IHO regarding the conduct of the impartial hearing (see Application of a Student with a Disability, Appeal No. 14-090; Application of a Student with a Disability, Appeal No. 09-073; Application of a Child with a Disability, Appeal No. 05-026; Application of a Child with a Disability, Appeal No. 04-103; Application of a Child with a Disability, Appeal No. 04-061).

Overall, a review of the hearing record does not support the parent's claims that the IHO was biased or that her decisions were arbitrary and capricious. Instead, the hearing record shows that the IHO guided the parties, and more specifically, the parent's educational advocate, in order to ensure a balancing of the interests and completing the hearing record as necessary to maintain an orderly proceeding.

However, the parent raises one point that bears more examination, as discussed below.

3. Evidentiary Matters—Judicial Notice

Although argued as part of the IHO bias claims, the parent's concern with the IHO's use of affidavits from a previous impartial hearing is more aptly discussed as a matter of judicial notice.

Generally, an adjudicative fact may be judicially noticed when that fact "is not subject to reasonable dispute because it" is either "generally known within the trial court's territorial jurisdiction" or "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned" (Fed. R. Evid. 201[a], [b][1]-[b][2]). While a court is empowered with the discretion to "take judicial notice on its own," a court "must take judicial notice if a party requests it and the court is supplied with the necessary information" (Fed. R. Evid. 201[c][1]-[2]). In addition, while a court "may take judicial notice at any stage of the proceeding," a party—upon request—must be provided with the opportunity to be heard "on the propriety of taking judicial notice and the nature of the fact to be noticed" (Fed. R. Evid. 201[d]-[e]). However, if a court "takes judicial notice before notifying a party, the party, on request, is still entitled to be heard" (Fed. R. Evid. 201[e]). The IHO's use of judicial notice in this case also offends State regulation, which requires, in part, that an IHO's decision "shall be based solely upon the record of the proceeding before the [IHO]" (8 NYCRR 200.5[j][5][v]).

Here, the IHO accessed two affidavits submitted as evidence in an impartial hearing that did not involve this parent and entered those documents into the hearing record as evidence after the parties had completed the impartial hearing in this matter (see generally Tr. pp. 1-42; IHO Ex. IV). The IHO then appeared to take judicial notice of the information within the affidavits—without having informed the parties of her intent to do so and without giving the parties an opportunity to be heard—to assess the credibility of the parent's affidavit and the SETSS provider's affidavit in the instant administrative proceeding and to conclude that the outside affidavits "fully diminish[ed] the credibility of the [parent's] witnesses" (see IHO Decision at p. 9).

In reviewing the evidence in the hearing record, the parent correctly points out that the IHO had the opportunity to cross-examine the parent's witnesses, but elected not to do so (see generally Tr. pp. 1-42). As a result, it was improper for the IHO to seek out and rely on evidence outside the hearing record to reach a decision in this matter and to take judicial notice of such information without providing the parties with an opportunity to be heard. If the IHO had concerns about the credibility of the parent or the SETSS provider, then the IHO's avenue of recourse was to address it within the impartial hearing under the guidance of State regulations. Consequently, the IHO's finding that the parent and the SETSS provider lacked credibility must be reversed.

B. Legal Standard

In this matter, the student has been parentally placed in a nonpublic school and the parent does not seek tuition reimbursement from the district for the cost of the parental placement. Instead, the parent alleged that the district failed to implement the student's mandated public special education services under the State's dual enrollment statute for the 2023-24 school year, as a self-help remedy, she unilaterally obtained private services from Achieve It for the student without the consent of the school district officials, and then commenced due process to obtain remuneration for the costs thereof. Generally, districts who fail to comply with their statutory mandates to provide special education can be made to pay for special education services privately

obtained for which a parent paid or became legally obligated to pay, a process that is essentially the same as the federal process under IDEA. Accordingly, the issue in this matter is whether the parent is entitled to public funding of the costs of the private services. "Parents who are dissatisfied with their child's education can unilaterally change their child's placement . . . and can, for example, pay for private services, including private schooling. They do so, however, at their own financial risk. They can obtain retroactive reimbursement from the school district after the [IESP] dispute is resolved, if they satisfy a three-part test that has come to be known as the Burlington-Carter test" (Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 526 [2d Cir. 2020] [internal quotations and citations omitted]; see Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 14 [1993] [finding that the "Parents' failure to select a program known to be approved by the State in favor of an unapproved option is not itself a bar to reimbursement."]).

The parent's request for district funding of privately obtained services must be assessed under this framework. Thus, a board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Carter, 510 U.S. 7; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 252 [2d Cir. 2009]).¹⁰ In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

The parent's claims involve a self-help remedy seeking public funding of the special education services that she privately obtained from Achieve It. That is the hallmark of a Burlington/Carter style of claim and analysis, and such relief is permissible if the parent meets the evidentiary burden of showing that the private services she obtained were appropriate under the totality of the circumstances. Based on the foregoing, the IHO in this case correctly relied on the Burlington/Carter analysis. However, as set forth below, the IHO improperly considered factors irrelevant to this analysis in reaching the conclusion that the parent failed to sustain her burden with regard to the unilaterally-obtained SETSS; as a result, the IHO's finding must be reversed.

C. Unilaterally-Obtained SETSS

On appeal, the parent argues that, contrary to the IHO's determination, she sustained her burden to establish that the unilaterally-obtained SETSS delivered by Achieve It was appropriate, because the SETSS provider was "qualified and experienced," she understood the student and her needs, and the progress report in the hearing record supports a finding that the student made progress.

¹⁰ State law provides that the parent has the obligation to establish that a unilateral placement is appropriate, which in this case is the special education services that the parent obtained from Achieve It (Educ. Law § 4404[1][c]).

Turning to a review of the appropriateness of the unilaterally obtained services, the federal standard for adjudicating these types of disputes is instructive. A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; ; Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998]). Citing the Rowley standard, the Supreme Court has explained that "when a public school system has defaulted on its obligations under the Act, a private school placement is 'proper under the Act' if the education provided by the private school is 'reasonably calculated to enable the child to receive educational benefits'" (Carter, 510 U.S. at 11; see Bd. Of Educ. Of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 203-04 [1982]; Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see also Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] ["evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (id. at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G., 459 F.3d at 364; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

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

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

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

1. The Student's Needs

While the student's needs are not in dispute, a brief discussion thereof provides context for the issue to be resolved on appeal, namely, whether the parent's unilaterally-obtained SETSS was appropriate to meet the student's needs.

Based on the limited evidence in the hearing record, the November 2020 IESP was the most recent IESP developed for the student (see Parent Ex. B at p. 1; Tr. p. 24). At that time, the student was attending seventh grade at a religious, nonpublic school (see Parent Ex. B at p. 1).¹¹ The November 2020 IESP indicated that although the student had made "considerable progress in the last year with her reading abilities," she continued to exhibit "significant delays in her overall reading skills" (id.). Notably, the CSE described the student's decoding accuracy as "not very consistent" and her reading fluency as "very poor and far from grade level" (id.). According to the IESP, the student's decoding abilities were at a third-grade level, while her reading fluency was at a second-grade level (id.). The IESP noted that the student's special education teacher suspected that she might have "an underlying visual deficit which [wa]s impacting her reading and preventing her progression" (id.). More specifically, the IESP indicated that the student's "poor visual focusing hinder[ed] [her] reading skills" and the student "ha[d] difficulty reading words in a paragraph and even individual words unless they [we]re enlarged" (id.). The IESP noted that the student also had a "hard time tracking, finding and keeping her place, and moving on to the next line in a paragraph" (id.). It further noted that the student wore "specially prescribed prism eyeglasses to aid with some of her visual weaknesses" (id.).

The November 2020 IESP described the methods and strategies used by the student's "provider" at that time to deliver an "all-inclusive instructional approach to fill in the skills she [wa]s lacking," which included a "systematic multi-sensory approach, rhythm and repetitions, visual aids (enlarging reading materials, sound board), tactile input (sand, clay, textured writing boards), kinesthetic input (walking the sound, motions), clapping out, [and] word building using sound cards" (Parent Ex. B at p. 1). The IESP indicated that other reading program materials were also being used to "provide [the] student with strong instructional input" (id.). With respect to the student's reading comprehension, the November 2020 IESP reflected that the student's "general comprehension and higher order thinking skills [we]re well developed," but that "her struggle with decoding prevent[ed] her from comprehending text above her [third grade] reading level" (id.). However, the student demonstrated "good comprehension when she [wa]s read to on age level or when reading [third] grade level books" (id.).

Turning to mathematics, the November 2020 IESP indicated that the student's skills were "significantly delayed and she [wa]s [then-]currently learning on a [thi]rd grade level" (Parent Ex. B at p. 2). According to the IESP, the student had a "weak foundation in math," "lagg[ed] far behind her peers," and could not "follow along with the math lessons in class at all (although she ha[d] improved enough that she would like to)" (id.). The IESP noted that the student's mathematics goals "currently focused largely on developing and reinforcing multiplication and division skills" (id.). At that time, the student had "mastered the 0, 1, 2, 3, [and] 5 multiplication

¹¹ According to the November 2020 IESP, the student was "held back a grade in Pre-Kindergarten" (Parent Ex. B at p. 1).

times tables," and although she understood the "concepts of long and short division," she, at times, "need[ed] prompting to initiate and complete both" tasks (id.). The IESP reflected that the student was also "working on simple computation with positive and negative integers" and she could "order integers 0, 1, 2, and 3" (id.). The IESP noted that "[d]irectionality [wa]s an area of concern likely due to conceptual deficits, which m[ight] have [had] to d[o] with [the student's] struggle navigating her environment" (id.).

In terms of writing, the November 2020 IESP reported that the student could "write sentences" and "write a paragraph syntactically and grammatically correct"; however, the student could not "write independently beyond the paragraph level" (Parent Ex. B at p. 2). In terms of language, the IESP indicated that the student "present[ed] with a poor range of vocabulary in addition to difficulty with word retrieval," which "negatively affect[ed] her expressive language skills" (id.). The student "often ha[d] difficulty expressing herself and w[ould] stammer and move her hands excessively when trying to express a thought" (id.). The IESP also noted that the student had difficulty "focusing," "often fidget[ed] in her seat and prefer[red] to stand," or when seated, she would "put her chair sideways" (id.). The student "play[ed] with a ball as she [wa]s learning when appropriate" (id.).

Turning to the student's social development, the November 2020 IESP indicated that the student's "poor academic capabilities ha[d] lead to a regression in her social/emotional skills," but, conversely, that her "recent academic progress [] had obvious positive impacts on [her] self esteem" (Parent Ex. B at p. 3). According to the IESP, the student's eye contact had improved, and her "squirming and fidgeting while interacting" had decreased (id.). In addition, the student's academic progress helped her to "feel more capable" and motivated her to "make attempts at studying for and taking tests in class" (id.). The student also showed an interest in participating in class lessons and in requesting academic assistance (id.). However, the IESP also noted that the student "d[id] not enjoy school and complain[ed] about her classmates," and she tended to "socialize with more confidence with her friends out[side] of school" (id.). The IESP further described the student as "charming, personable and well liked," and noted that she had been selected to "partake in leadership opportunities during social and extracurricular activities" (id.).

Next, the physical development section of the November 2020 IESP indicated that, according to her teacher, the student "engage[d] in a lot of unfocused behavior that m[ight] be due to sensory dysregulation" (Parent Ex. B at p 3).

To address the student's identified needs, the November 2020 CSE recommended nine periods per week of individual SETSS in a separate location (Yiddish language) (see Parent Ex. B at p. 8). In addition, the CSE developed annual goals targeting the student's needs in English language arts (reading and vocabulary), organizational skills, attention, writing and organization (using a graphic organizer and adding descriptive details), reading, and mathematics (id. at pp. 4-7). In addition, the CSE recommended testing accommodations and strategies to address her management needs, including multisensory instruction; small group instruction for reading, writing, and mathematics; prompting for redirection; and use of manipulatives for learning (id. at pp. 3, 9).

2. Services From Achieve It

In this case, the IHO noted several concerns in reaching the determination that the SETSS Achieve It provided were not appropriate. Initially, the IHO noted that the November 2020 IESP was outdated, and the student had not been evaluated in over three years, which made it difficult to discern the student's needs for the 2023-24 school year at issue. However, to the extent the IHO faulted the parent for not identifying the student's current needs, such a rationale has been found to improperly switch the responsibility for identifying the student's needs from the district to the parent (see A.D. v. Bd. of Educ. of City Sch. Dist. of City of New York, 690 F. Supp. 2d 193, 208 [S.D.N.Y. 2010] [finding that a unilateral placement was appropriate even where the private school reports were alleged by the district to be incomplete or inaccurate and finding that the fault for such inaccuracy or incomplete assessment of the student's needs lies with the district]). Therefore, the IHO should not have held the absence of any updated evaluative information about the student against the parent or as a factor in concluding that the SETSS from Achieve It were not appropriate.

Next, and contrary to the IHO's findings, it is well settled that a parent need not engage the services of a certified special education teacher—or, as here, a SETSS provider—in order to qualify for reimbursement or direct funding of those services (Carter, 510 U.S. 7, 14 [noting that unilateral placements need not meet state standards such as state certification for teachers]). Here, the student's SETSS provider held a teaching certificate for students with disabilities for birth through second grade, which became effective in September 2009 (see Parent Ex. A). In addition, the SETSS provider testified that she had "20 years of experience" in the field (Parent Ex. G ¶ 4). The parent testified that the SETSS provider was "licensed and certified" and "known in [the parent's] community to be an exceptionally qualified and experienced SETSS provider for students with learning disabilities" (Parent Ex. F ¶¶ 3, 5). While it is true that the student in this matter was a 10th grade student, it is also true that the student demonstrated academic skills far below her grade level. Therefore, whether the SETSS provider held a teaching certificate specific to the student's grade level would not, per se, be determinative of whether the SETSS delivered to the student was appropriate to meet her needs.

Finally, with respect to the IHO's concern that the hearing record lacked information regarding the student's progress, it is well settled that progress, while a relevant factor to be considered in determining whether a unilateral placement is appropriate (Gagliardo, 489 F.3d at 115, citing Berger, 348 F.3d at 522 and Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]), is not required for a determination that a unilateral placement is appropriate (Scarsdale Union Free Sch. Dist. v. R.C., 2013 WL 563377, at *9-*10 [S.D.N.Y. Feb. 4, 2013] [noting that evidence of academic progress is not dispositive in determining whether a unilateral placement is appropriate]; see M.B. v. Minisink Valley Cent. Sch. Dist., 523 Fed. App'x 76, 78 [2d Cir. Mar. 29, 2013]; D.D-S. v. Southold Union Free Sch. Dist., 506 Fed. App'x 80, 81 [2d Cir. Dec. 26, 2012]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 486-87 [S.D.N.Y. 2013]; C.L. v. Scarsdale Union Free Sch. Dist., 913 F. Supp. 2d 26, 34, 39 [S.D.N.Y. 2012]; G.R. v. New York City Dep't of Educ., 2009 WL 2432369, at *3 [S.D.N.Y. Aug. 7, 2009]; Omidian v. Bd. of Educ. of New Hartford Cent. Sch. Dist., 2009 WL 904077, at *22-*23 [N.D.N.Y. Mar. 31, 2009]; see also Frank G., 459 F.3d at 364). However, as discussed below, evidence in the hearing record demonstrates that the student made appropriate progress in light of her circumstances.

Turning, now, to a determination of whether the SETSS Achieve It provided to the student were appropriate, as noted above, to qualify for reimbursement under the IDEA, parents must demonstrate that the unilateral placement provided instruction specially designed to meet the student's unique needs, supported by services necessary to permit the student to benefit from instruction (Gagliardo, 489 F.3d at 112; see Frank G., 459 F.3d at 364-65). Regulations define specially designed instruction, in part, as "adapting, as appropriate to the needs of an eligible student under this Part, the content, methodology, or delivery of instruction to address the unique needs that result from the student's disability" (8 NYCRR 200.1[vv]; see 34 CFR 300.39[b][3]).

Evidence in the hearing record indicates that the student began receiving SETSS from the Achieve It provider on September 4, 2023, and the agency intended to continue to provide SETSS to the student until June 30, 2024 (see Parent Ex. G ¶ 2). The evidence also indicates that the SETSS provider delivered nine 60-minute sessions per week of individual SETSS to the student in the SETSS provider's home (id. ¶¶ 3, 5).

On or about February 1, 2024, the SETSS provider prepared a "SETSS Progress Report," (February 2024 progress report) (Parent Ex. D at p. 1). The SETSS provider described the student as having "creative abilities" and being "full of fun," but noted that she "often g[ot] tense and anxious," was "aware of her limitations" and "suffer[ed] from a very poor self-image" (id.). The SETSS provider reported that the student had "lost much of her desire to work hard academically after all her years of struggles and poor results" (id.). According to the SETSS provider, the student presented with "delays across all academic domains" and had "limited reasoning ability, slow processing, and poor comprehension of information and concepts" (id.). In addition, the student "lack[ed] the automaticity that c[ame] naturally to most children," which "impact[ed] her reading, math, and expressive language" (id.). The SETSS provider reported that the student "lack[ed] some executive functioning skills such as problem-solving, focusing, planning, and emotional control skills" (id.). The provider noted that the student "fidget[ed] and [became] uncomfortable in the same position for an extended period of time" (id.). According to the SETSS provider, the student's expressive and receptive language delays "impede[d] her advancement in all areas," and the student "d[id] not ask for clarification when necessary, and struggled to communicate her feelings and needs" (id.). The student also "d[id] not explain to adults what the problem [wa]s when something bother[ed] her, which often le[d] her to become withdrawn" (id.). In addition, the student did not understand instruction "at the level and pace of her peers," "often needed repetition and rephrasing, . . . due to her language delays," became overwhelmed when asked to complete a "complex multi-step task," and had "a hard time keeping up with the classroom instruction and following directions"(id.).

According to the February 2024 SETSS progress report, the student was then-currently performing at a fourth-grade level in mathematics, with the exception of her ability to perform basic math computation with automaticity, which fell below a "fourth-grade level" (Parent Ex. D at p. 1). The student could complete two-digit multiplication and division problems that included decimals and remainders (id.). She also could add and subtract fractions with common denominators (id.).

In terms of reading, the February 2024 SETSS progress report reflected that it was a "great struggle" for the student and noted that although she was "way behind her grade level," she was "making slow improvements" and had progressed from a second-grade sight word level at the start

of the school year to a third-grade sight word level at that time (Parent Ex. D at p. 1). The student "read very slowly" and "exert[ed] a lot of energy to decode the words," which impacted her comprehension because the student "l[ost] the flow of the text" (id.). The progress report indicated that the student's listening comprehension was "significantly better" (id.). The student's poor reading skills also impacted her daily functioning and "self-help skills"; for example, the student misread important information, which led to mistakes such as "walking down the wrong streets, going to the wrong stores or buying the wrong item" (id. at pp. 1-2). According to the progress report, the student's mistakes "significantly affect[ed] her self-esteem and success in daily living" (id. at p. 2). The student often relied on others "to tell her what [wa]s posted on bulletin boards" and she had "lost her desire to read" because "it [wa]s so difficult for her" (id.). The progress report noted that the student was "very self-conscious" about her reading and "w[ould] do anything to avoid reading in front of others" (id.).

With respect to writing, the February 2024 progress report described the student's handwriting as "generally neat," but that she "exert[ed] a lot of energy and concentration while writing" (Parent Ex. D at p. 2). The progress report noted that the student spelled "phonemically" and she could not spell "many basic sight words" (id.). The progress report characterized the student as a "creative writer with an expressive swirl" and indicated that while the student could transfer her thoughts to paper, her writing lacked in "its organization and flow" (id.). The progress report also described deficits in the student's grammar skills, which included a lack of proper punctuation, misuse of pronouns and prefixes, confusion between singular and plural, and inconsistent use of tense within a sentence (id.). In addition, the student could not identify sentence fragments or run on sentences in her own writing (id.).

Turning to language skills, the February 2024 progress report indicated that the student "struggle[d] greatly with both receptive and expressive language" (Parent Ex. D at p. 2). The progress report noted that the student's expressive language was "underdeveloped," and the student had a "limited vocabulary" (id.). In addition, the student "struggle[d] with word retrieval," she used "non-specific references," and she "avoid[ed] expressing herself as much as possible" (id.). According to the progress report, when the student expressed herself she, at times, came across as "abrupt and impolite to her teachers and peers" (id.). In terms of receptive language, the progress report noted that the student "struggle[d] to follow directions once they bec[a]me too complex," but she had shown progress in her ability to "follow simple [three] step direction[s] when faced with a new experience" (id.).

With respect to the student's social/emotional functioning, the February 2024 progress report indicated that the student could "often seem to be indifferent and unmotivated" due to past failures (Parent Ex. D at p. 2). In addition, the student could "get frustrated and overwhelmed when her teachers c[a]me down too hard on her" (id. at p. 3). The progress report explained that the student "learn[ed] well when material [wa]s broken down and scaffolded from her level" and when she was provided with "proper motivation and positive feedback" (id.). According to the progress report, the student "d[id not] express herself when something [wa]s bothering her," which led to her "bottling up her emotions and becoming withdrawn" and caused her to "suffer from fears and anxieties" (id.). The student was also affected by conversations about current events, war and tragedy, and frightening stories, which, in addition to making the student anxious, affected her sleep (id.). Although the student had shown progress in her ability to "identify an emotion on others, she still struggle[d] to see it in herself" (id.).

Finally, in terms of interpersonal relationships, the February 2024 progress report noted that the student was eager to "please her teachers and peers," she "enjoy[ed] fun and t[ook] part in it," and she "very much want[ed] to 'fit in'" (Parent Ex. D at p. 3). The student was noted to be "sensitive to being left out of a game or when someone ma[de] a nasty remark to her" (id.). The progress report described the student as "creative and artistic" and musical (id.).

In addition to describing the student's needs, the February 2024 progress report included evidence of the SETSS provider's efforts to deliver specially designed instruction to the student. For example, in mathematics, the progress report indicated that the student had difficulty applying her knowledge of multiplication and division to word problems, and to assist the student, the SETSS provider highlighted key words in the word problems and broke them down step-by-step as a means of helping the student solve the problems (see Parent Ex. D at p. 1). In reading, the SETSS provider worked with the student to develop a sight word bank "to ease [her] reading" (id.). The progress report indicated that the SETSS provider "g[ot] [the student] to read by finding reading materials that [we]re of high interest to her and by balancing the reading time by alternating reading and being read to" (id. at p. 2). The SETSS provider also created a program in which the student "practice[d] reading children's books during the session and then when the student [wa]s comfortable with the text, she read[] [the book] to her little sister" (id.). With respect to writing, the progress report indicated that the SETSS provider used sight word flash cards to build the student's fluency with spelling basic words and, in addition, she used grammar flash cards with the student when working on writing assignments (id.).

To address the student's language deficits, the SETSS provider had the student "pause before speaking to help clarify her thoughts" and "wr[ote] down some non-specific references that [the student] used as she was speaking" and had the student choose the appropriate noun or verb to complete her thought (Parent Ex. D at p. 2). According to the progress report, the SETSS provider also used "language cards, vocabulary activities, sentence starters, and visual and anchor charts" to address the student's language skills (id.).

With regard to the student's social/emotional functioning, the February 2024 progress report indicated that the SETSS provider addressed the student's lack of motivation by working with the student on "topics that interest[ed] her, such as music, sports or art activities to get her to continue trying academically" (Parent Ex. D at pp. 2-3). The SETSS provider supported the student in her attempts to generate solutions on how to deal with her anxiety and fearfulness when it arose (id. at p. 3). This included reading narratives and passages that addressed fears and anxiety as a launching pad for conversation and problem-solving (id.). In addition, the SETSS provider used emotion cards and social skill scenario cards to discuss various emotions with the student, as well as "to problem solve appropriate behaviors and reactions to challenging situations" (id.). The progress report further indicated that the SETSS provider employed "different modalities to target [the student's] deficits including visual aids, multi-sensory instruction, social/emotional skill building, and positive reinforcement and praise" (id. at p. 1).

The February 2020 progress report also included annual goals targeting the student's needs in the areas of mathematics, reading, writing, language, and social/emotional functioning (see Parent Ex. D at pp. 3-4). The mathematics annual goals targeted the student's ability to complete three-digit multiplication and division problems with decimals and remainders, subtract fractions with unlike denominators, and solve two-step word problems across all four operations (id. at p.

3). The reading annual goals targeted the student's ability to read with sufficient accuracy and fluency to support comprehension, determine the cause for a character's actions after reading/listening to a fourth grade reading selection, and formulate predictions using prior knowledge and ideas from illustrations, titles, topic sentences, key words, and clues in response to a fourth-grade reading passage (id. at pp. 3-4). The progress report included annual goals targeting the student's need to master previously misspelled sight words and write and introduce a topic, use facts and definitions to develop a point, and provide a concluding statement in an organized manner using proper English (id. at p. 4). Language annual goals targeted the student's ability to follow three-step directions presented orally and use specific nouns, verbs, and adjectives when describing things (id.). A social/emotional annual goal targeted the student's ability to express her emotions and discuss problems as they occurred (id.).

With the support of nine hours per week of individual SETSS, the February 2024 progress report described the student's progress to date, noting that the student had "made progress in all areas" in the SETSS setting where she received "individualized, simplified and targeted instruction on her level in an environment with minimal distraction" (Parent Ex. D at p. 1). In terms of more specific progress, the report indicated that the student had advanced in the area of multiplication and division, made progress related to adding and subtracting fractions with common denominators, moved from a "[second] grade sight word level to a [third] grade sight word level," learned the proper use of commas in long sentences and used them correctly, began to follow simple three-step directions when presented with a new experience, showed improvement in her ability to use specific words versus nonspecific references, and developed her ability to identify emotions in others (id. at pp. 1-3).

Based on the foregoing, the evidence in the hearing record supports a finding that the parent's unilaterally-obtained SETSS was appropriate to meet the student's needs and provided the student with specially designed instruction. As a result, the IHO's finding must be reversed.¹²

¹² The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]; L.K. v. New York City Dep't of Educ., 674 Fed. App'x 100, 101 [2d Cir. Jan. 19, 2017]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014] [identifying factors relevant to equitable considerations, including whether the withdrawal of the student from public school was justified, whether the parent provided adequate notice, whether the amount of the private school tuition was reasonable, possible scholarships or other financial aid from the private school, and any fraud or collusion on the part of the parent or private school]; C.L., 744 F.3d at 840 [noting that "[i]mportant to the equitable consideration is whether the parents obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA"]). Additionally, reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to their removal of the student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see

VII. Conclusion

Having determined that, contrary to the IHO's finding, the parent sustained her burden to establish that the unilaterally-obtained SETSS delivered by Achieve It to the student during the 2023-24 school year was appropriate, the necessary inquiry is at an end.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision, dated April 22, 2024, is modified by reversing that portion which found that the parent's unilaterally-obtained SETSS from Achieve It during the 2023-24 school year was not appropriate; and,

IT IS FURTHER ORDERED that the district shall reimburse, or directly fund, the costs of the unilaterally-obtained SETSS at a rate not to exceed \$195.00 per hour, for no more than nine 60-minute sessions per week for the 2023-24 school year, upon proof of attendance and delivery of SETSS to the student.

Dated: **Albany, New York**
 July 15, 2024

CAROL H. HAUGE
STATE REVIEW OFFICER

34 CFR 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger v. Medina City Sch. Dist., 348 F.3d 513, 523-24 [6th Cir. 2003]; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G., 459 F.3d at 376; Voluntown, 226 F.3d at 68).

While the IHO did not reach the issue of equitable considerations, and neither party has raised the issue on appeal, I note that, based on my independent review of the hearing record, no evidence contained therein supports a finding that equitable considerations would weigh against a full award of the relief requested by the parent on appeal.