The University of the State of New York

The State Education Department
State Review Officer
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No. 24-266

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:
Gulkowitz Berger LLP, attorneys for petitioner, by Shaya M. Berger, Esq.

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 a decision of an impartial hearing officer (IHO) which denied her request that respondent (the district) fund the costs of her daughter's private services delivered by Always a Step Ahead, Inc. (Step Ahead) for the 2023-24 school year. The district cross-appeals from the IHO's award of relief to the parent. The appeal must be dismissed. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

When a student who resides in New York is eligible for special education services and attends a nonpublic school, Article 73 of the New York State Education Law allows for the creation of an individualized education services program (IESP) under the State's so-called "dual enrollment" statute (see Educ. Law § 3602-c). The task of creating an IESP is assigned to the same committee that designs educational programing for students with disabilities under the IDEA (20 U.S.C. §§ 1400-1482), namely a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3,

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

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

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

III. Facts and Procedural History

The parties' familiarity with this matter is presumed and, therefore, the facts and procedural history of the case and the IHO's decision will not be recited in detail. The CSE convened on February 5, 2021, found that the student was eligible for special education as a student with a learning disability, and formulated the student's IESP to be implemented beginning February 18, 2021 (see generally Parent Ex. B).[1] The February 2021 CSE recommended that the student receive five periods per week of direct, group special education teacher support services (SETSS) (id. at p. 9).[2] The hearing record does not contain any subsequent IESP or IEP (see Parent Exs. A-G; I).[3] The student attended a nonpublic school during the 2023-24 school year and the student received SETSS from Step Ahead beginning on September 11, 2023 (see Parent Exs. G; I at p. 1).

A. Due Process Complaint Notice

In a due process complaint notice dated January 29, 2024, the parent alleged that the district denied the student a free appropriate public education (FAPE) for the 2023-24 school year (see Parent Ex. A at p. 1). According to the parent, the student's February 5, 2021 IESP was the last program the district developed for the student, which included a recommendation for five sessions per week of SETSS, as well as "certain related services" (id.).[4] The parent further indicated that she "dispute[d] any subsequent program the [district] developed that removed and/or reduced services on the IESP, and also dispute[d] any act the [district] may have taken to deactivate or declassify the student from being eligible to receive services" (id.). The parent asserted that the student continued to require the "same special education services and the same related services each week as set forth on the IESP" (id.).

Next, the parent indicated that she could not locate providers to work at the district's "standard rates," and the district had not provided any for the student for the 2023-24 school year (Parent Ex. A at p. 1). The parent further indicated that she had located providers to deliver "all required services" to the student for the 2023-24 school year, but at "rates higher than standard [district] rate[s]" (id.).

As relief, the parent sought an order directing the district to continue the student's special education and related services under pendency, to fund five sessions per week of SETSS at an enhanced rate for the 2023-24 school year, and to issue related services authorizations (RSAs) for the parent to obtain the student's related services through parent-selected providers or to directly

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[1] 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]).

[2] SETSS is not defined in the State continuum of special education services (see 8 NYCRR 200.6). As has been laid out in prior administrative proceedings, the term is not used anywhere other than within this school district and a static and reliable definition of "SETSS" does not exist within the district.

[3] The district's response to the due process complaint notice indicates that a CSE convened on March 28, 2023 to review the student's educational program and recommended that the student receive SETSS; however, no documentation from that meeting was included in the hearing record (Parent Ex. F).

[4] The February 2021 IESP did not include any recommendations for related services (see Parent Ex. B at p. 9).

fund the costs of the student's related services delivered by parent-selected providers at the providers' rates "even if higher than the standard [district] rate" (Parent Ex. A at p. 2).

B. Facts Post-Dating the Due Process Complaint Notice

On March 26, 2024, the parent electronically signed a document on Step Ahead's letterhead indicating that she was "aware that the services being provided to [the student] [we]re consistent with those listed" in the student's February 2021 IESP, and that she was aware SETSS were provided to the student at a rate of $200.00 per hour (Parent Ex. C at p. 1).[5, 6] According to the evidence, the SETSS provider held a students with disabilities, birth – grade 2 initial certificate, and that the certificate was effective June 11, 2021 through August 31, 2026 (Parent Ex. E).

C. Impartial Hearing Officer Decision

An impartial hearing convened before the Office of Administrative Trials and Hearings (OATH) on April 3, 2024 and concluded the same day (Tr. pp. 1-24). In a decision dated May 13, 2024, the IHO found that the Burlington-Carter analysis applied to the facts of the case, that the district's failure to implement the student's February 2021 IESP was a denial of a FAPE for the 2023-24 school year, and that the parent failed to meet her burden to establish that the unilaterally-obtained services were appropriate for the student (IHO Decision at pp. 4-5). Having determined that the parent failed to prove the appropriateness of the SETSS delivered by Step Ahead, the IHO declined to address equitable considerations (id. at p. 5). The IHO ordered the district to conduct new evaluations of the student in all areas of suspected disability, noting that the IHO's order constituted parental consent to the evaluations unless the parent objected in writing, and further ordered a reconvene of the CSE to develop a new IESP or IEP for the student (id.).

IV. Appeal for State-Level Review

The parent appeals, alleging that this matter is "an equitable services case" and, as such, the burden of proof and persuasion lies entirely with the district, rather than with the parent as the IHO found in her application of the Burlington-Carter analysis. The parent asserts that even under that standard, she met her burden of establishing that the SETSS delivered by Step Ahead were appropriate, as they were provided by an appropriately credentialed/licensed Step Ahead employee and based on an IESP that the district recommended. According to the parent, the session notes and progress report detailed how the student's needs were addressed, and progress was not a "defining factor of appropriateness." Regarding equitable considerations, the parent next alleges that she was not required to provide the district with notice of the student's removal from public school as this is not a tuition reimbursement matter, there was no removal as the student was never offered a public placement, and there was no evidence the district provided the parent with a procedural safeguards notice. Additionally, the parent contends that equitable considerations should not result in a denial or reduction of relief as the parent's failure to submit a 10-day notice

[5] Step Ahead is a private corporation and has not been approved by the Commissioner of Education as a school or provider with which districts may contract to instruct students with disabilities (see Educ. Law § 4410[9]; 8 NYCRR 200.1 [nn]).

[6] The director of Step Ahead appears to have signed the letter as well (see Parent Ex. C at pp. 2, 3; see also Tr. pp. 24-27).

must be weighed against the district's inequitable conduct. Further, the parent contends she was not required to have a contract in writing. As relief, the parent requests that the undersigned reverse the IHO's determination regarding the appropriateness of the SETSS provided by Step Ahead, and award direct funding to Step Ahead at the rate of $200 per hour for the SETSS Step Ahead delivered to the student during the 2023-24 school year.

In an answer with cross-appeal, the district argues that the IHO's determination that the parent failed to meet her burden of proof under the Burlington-Carter analysis be affirmed. The district asserts that equitable considerations do not favor the parent and alleges that the parent did not provide evidence of a 10-day notice to the district that she was unilaterally obtaining services, and that the rate sought for the SETSS was excessive. The district cross-appeals from the IHO's order directing the district to reevaluate the student and develop a new IEP or IESP, asserting that specific relief was not requested in the due process complaint notice and the order would "impact a subsequent school year not at issue in this case."

V. Applicable Standards

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

However, under State law, parents of a student with a disability who have privately enrolled their child in a nonpublic school may seek to obtain educational "services" for their child by filing a request for such services in the public school district of location where the nonpublic school is located on or before the first day of June preceding the school year for which the request for services is made (Educ. Law § 3602-c[2]).[7] "Boards of education of all school districts of the state shall furnish services to students who are residents of this state and who attend nonpublic schools located in such school districts, upon the written request of the parent" (Educ. Law § 3602-c[2][a]). In such circumstances, the district of location's CSE must review the request for services and "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an [IEP]" (Educ. Law § 3602-c[2][b][1]). The CSE must "assure that special education programs and services are made available to students with disabilities attending nonpublic schools located within the school district on an equitable basis, as compared to special education programs and services provided to other students with disabilities attending public or

[7] 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]).

nonpublic schools located within the school district (id.).[8] Thus, under State law an eligible New York State resident student may be voluntarily enrolled by a parent in a nonpublic school, but at the same time the student is also enrolled in the public school district, that is dually enrolled, for the purpose of receiving special education programming under Education Law § 3602-c, dual enrollment services for which a public school district may be held accountable through an impartial hearing. The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E. v. New York City Dep't of Educ., 694 F.3d 167, 184-85 [2d Cir. 2012]).

VI. Discussion

Initially, the district has not appealed from the IHO's determination that it failed to offer the student a FAPE for the 2023-24 school year, as such, that determination has become final and binding on the parties and will not be further discussed (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-7, *10 [S.D.N.Y. Mar. 21, 2013]).

A. Legal Standard

The parent challenges the IHO's reliance on the Burlington/Carter model of analysis for resolving the parties' dispute. Accordingly, the first issue to be addressed is the appropriate legal standard to be applied. In this matter, the student has been parentally placed in a nonpublic school and the parent does not seek tuition reimbursement 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 Step Ahead 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

[8] State guidance explains that providing services on an "equitable basis" means that "special education services are provided to parentally placed nonpublic school students with disabilities in the same manner as compared to other students with disabilities attending public or nonpublic schools located within the school district" ("Chapter 378 of the Laws of 2007–Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the Individuals with Disabilities Education Act (IDEA) 2004 and New York State (NYS) Education Law Section 3602-c," Attachment 1 (Questions and Answers), VESID Mem. [Sept. 2007], available at https://www.nysed.gov/special-education/guidance-parentally-placed-nonpublic-elementary-and-secondary-school-students). The guidance document further provides that "parentally placed nonpublic students must be provided services based on need and the same range of services provided by the district of location to its public school students must be made available to nonpublic students, taking into account the student's placement in the nonpublic school program" (id.). The guidance has recently been reorganized on the State's web site and the paginated pdf versions of the documents previously available do not currently appear there, having been updated with web based versions.

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]).[9] 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 Step Ahead. 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.

B. 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 Step Ahead were appropriate, because the SETSS provider was "credentialed," the session notes and progress report showed the "work" being done to "address the issues each service was required to address," and the provider delivered SETSS pursuant to the student's February 2021 IESP.

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

[9] 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 Step Ahead (Educ. Law § 4404[1][c]).

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

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

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

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

1. The Student's Needs

Although not in dispute on appeal, a brief discussion of the student's needs is necessary to resolve the issue of whether the SETSS delivered by Step Ahead were appropriate for the student for the 2023-24 school year.

The evidence in the hearing record concerning the student's educational history is sparse. According to the student's February 2021 IESP, results of a non-standardized "Student Pre-Assessment" (assessment) completed by her teachers in January 2021 indicated that the student presented with cognitive delays across all domains (Parent Ex. B at p. 2). Specifically, the student's oral language, visual spatial, and fluid reasoning skills ranged from "below her peers to significantly below her peers" (id.). The student's processing speed and working memory skills were considered to be relative weaknesses and "significantly below her peers" (id.). Additionally, the student reportedly struggled with executive functioning skills and exhibited "extreme difficulty focusing, concentrating, and shifting from one idea/topic to another" (id.).

The student, who was in fifth grade at the time of the 2021 assessment, demonstrated reading skills estimated to be at a fourth grade level for decoding and a third grade level for reading comprehension (Parent Ex. B at pp. 2, 3). According to the IESP, the student exhibited a relative strength in sight word recognition, and difficulty reading fluently and decoding multisyllabic words (id. at p. 3). The student also struggled with comprehending new vocabulary words and understanding written text (id.).

According to the February 2021 IESP, the student's written language skills were on a third grade level and below her peers, although her graphomotor skills were age appropriate (Parent Ex. B at p. 3). Specifically, the student struggled with writing fluency/stamina, using proper syntax/grammar, developing ideas, composing complex sentences, and using proper mechanics of writing and spelling (id.). The student could compose simple sentences but did not connect sentences in writing (id.).

In math, the February 2021 IESP indicated that the student's skills were delayed and her math calculation and applied math skills were on a fourth grade level (Parent Ex. B at pp. 2, 3). The student did not use effective strategies that had been taught or display her work when solving problems, and she often refused to engage in and complete work without adult support (id. at p. 3).

The February 2021 IESP reflected results from a pre-assessment form, which indicated that the student's oral language skills were delayed, although she exhibited social pragmatic skills that were a relative strength (Parent Ex. B at pp. 2, 3-4). In the receptive language domain, the student's ability to understand directions and instructional materials was below her peers (id. at p. 4). The student's ability to understand content area vocabulary was also significantly lower and noted as a relative weakness (id. at p. 4). The IESP documented that the student "require[d] simplified language and rephrasing as well as repetition" (id.). Regarding expressive language, the student had difficulty engaging in reciprocal conversation, using vocabulary appropriately when speaking, asking questions in a logical manner, and expressing ideas completely, fluently, and in a concise manner when speaking (id.). Additionally, the IESP documented the student's weakness in maintaining appropriate eye contact in conversation and mirroring speech in response to another speaker (id.).

The February 2021 CSE identified that the student's management needs included: graphic organizers to aide with reading and writing tasks, multimodal/multi-sensory approach to teaching, provide sentence repetition, combining and completion activities to help build fluency, visual cues and scaffolding, simplification of direction, teacher modeling, directions repeated/reworded in

simple language, use of manipulatives, teacher check ins, positive reinforcement and encouragement, preferential seating, and testing accommodations (Parent Ex. B at p. 6).

2. Services from Step Ahead

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]).

In the decision, the IHO expressed concern that the session notes and progress report the parent provided lacked clarity about what services were provided to the student, what strategies or methodologies were employed to address the student's needs, and whether the student made progress because of the SETSS providers' efforts (IHO Decision at p. 4). On appeal, the parent argues that the session notes and the progress report "provide[d] detailed work being done to the [s]tudent and all that work [went] to address the issues each service was required to address" (Req. For Rev. ¶ 18)[10]

Regarding the documentary evidence about the student's SETSS, the hearing record includes what appears to be a fillable document, which the parent submitted into evidence and identified as "Session Notes"; however, the document, itself, does not bear any title or reflect the origin of the document (Parent Ex. G). The session notes reflect the student's name; the SETSS providers' names; the dates of sessions, as well as the "time in" and "time out" for each date; the location of the service (i.e., "school"); areas to describe goals (all left blank); and areas for notes (id.). According to the session notes, during the 2023-24 school year the student's SETSS were delivered by two providers: provider 1 held a students with disabilities birth – grade 2 initial certificate, and provider 2 held a students with disabilities grades 1-6 initial certificate (Parent Exs. E; G). Provider 1 began delivering SETSS to the student on September 11, 2023, and was the sole provider of services through December 4, 2023 (Parent Ex. G at pp. 1-5). Provider 2 began delivering the student's SETSS on December 5, 2023 and, along with provider 1, continued delivering services until the last session recorded on March 19, 2024 (id. at pp. 5-11). According

[10] The parent also alleges that the "IHO, who is not an [sic] a licensed provider of any of the services, replace[d] the credentialed providers' decision-making process as to what work should have been done to [s]tudent for the program to be implemented appropriately" (Req. for Rev. ¶18). However, the parent cites no authority for this argument, and the unreasonable criticism of the IHO appears to be an after the fact attempt to excuse the parent's failure to present evidence to prove that the services delivered to the student by Step Ahead were appropriate to meet the student's special education needs. If the parent wanted to present an expert witness to provide evidence of the student's needs and the services being delivered to the student, the parent could have introduced such evidence during the hearing; however, the parent cannot wait until an appeal to attempt to qualify session notes and a progress report as expert testimony without having the provider who allegedly produced those documents testify.

to the session notes, the sessions encompassed anywhere from approximately 20 minutes per day to 2 hours and 25 minutes per day (id. at pp. 1-11).[11]

The IHO's concerns with the session notes included that all of the goal fields were left blank, and most of the note fields were also blank (IHO Decision at p. 4). She determined that the completed session notes were "vague" and did not "provide detailed information on the methodologies and strategies being used to address [the s]tudent's needs" (id.). Review of the providers' session notes shows that for approximately 72 out of 101 sessions, the SETSS providers filled in their names, the date, time in and out, and location, while the goal and note sections were blank (see Parent Ex. G). The session notes that were filled in showed that the SETSS providers worked on reading or writing (during 18 of the sessions) or math (for six of the sessions) (id.). Skills focused on during sessions included proportions and ratios, graphing, weather, short story elements, decoding, independent reading, chapter themes, writing book reports, reading comprehension and fluency, and completing missed assignments (id.).

Additionally, the IHO relayed that the Step Ahead secretary testified that the providers entered the information into the session notes; however, as several of the session notes referred to the special education teacher in the third person, the IHO did "not find it credible that the [p]rovider would refer to themselves" in that way, and therefore, she was "unconvinced that the [p]rovider entered these notes" (IHO Decision at pp. 4-5; see Tr. pp. 11, 14-15). Generally, an SRO gives due deference to the credibility findings of an IHO, unless non-testimonial evidence in the hearing record justifies a contrary conclusion or the hearing record, read in its entirety, compels a contrary conclusion (see Carlisle Area Sch. v. Scott P., 62 F.3d 520, 524, 528-29 [3d Cir. 1995]; P.G. v. City Sch. Dist. of New York, 2015 WL 787008, at *16 [S.D.N.Y. Feb. 25, 2015]; M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 330 [E.D.N.Y. 2012], aff'd F.3d 131 [2d Cir. 2013]; Bd. of Educ. of Hicksville Union Free Sch. Dist. v. Schaefer, [24-295]84 A.D.3d 795, 796 [2d Dep't 2011]; Application of a Student with a Disability, Appeal No. 12-076). However, despite use of the word "credible," here the IHO appeared to be discussing the weight she gave to the session notes. In any event, the IHO concluded that, "even if [she] did find the notes credible, and that the [p]rovider entered them," she did not find that the notes were specific enough regarding the strategies the providers used or what student deficit the provider addressed in each session (IHO Decision at p. 5). The IHO is correct that aside from brief statements about the skill the student worked on during the session, review of the session notes shows that they generally did not include information about the specially designed instruction the provider delivered to the student (compare IHO Decision at p. 4, with Parent Ex. G). Accordingly, as determined by the IHO, the session notes are of little value in assessing the appropriateness of the services delivered to the student and are only useful for showing when the student was provided with SETSS at school.

Turning to the student's December 2023 SETSS progress report prepared by provider 1, the IHO acknowledged that the report "outline[d] [the s]tudent's deficits, goals, and a recommendation for continuation of special education services" (IHO Decision at p. 5; Parent Ex. I at p. 1). The IHO continued that although "the progress report addresse[d] [the s]tudent's

[11] For example, on October 11, 2023, one session was documented as lasting from 11:40 a.m. to 12:00 p.m., and on October 16, 2023, two sessions were documented from 10:10 a.m. to 10:20 a.m., and from 12:30 p.m. to 2:45 p.m. (Parent Ex. G at p. 2).

weaknesses and provide[d] limited goals, similar to the session notes, it provide[d] no information on what strategies or methodologies the SETSS [p]rovider [wa]s utilizing to address [the s]tudent's weaknesses and reach goals and conclude[d] with a generic recommendation for services" (IHO Decision at p. 5).

In the December 2023 progress report, SETSS provider 1 reported that the student "[wa]s approaching at grade 7 in math, reading, and writing" (Parent Ex. I at p. 1). Regarding the student's reading comprehension, the progress report stated that the student tried to engage in collaborative discussions and presented claims confidently by emphasizing important points and using valid reasoning (id.). The SETSS provider noted that the student struggled with determining the purpose of information being presented, evaluating motives, and evaluating the quality of supports used for a claim (id.). The SETSS provider suggested three goals the student needed to work on in the area of reading comprehension: accurately determining the purpose of information presented, critically evaluating motives, and effectively evaluating the quality of supports used for a claim (id. at pp. 1-2).

In writing, the progress report stated that the student demonstrated skills in writing arguments to support claims, informative/explanatory texts, narratives, and creating artistic responses to text with help from the provider (Parent Ex. I at p. 1). The SETSS provider also stated that the student was able to convey ideas clearly, introduce topics effectively, develop narratives, and use evidence from texts for research and analysis (id.). According to the progress report, the student needed to improve using relevant evidence in arguments, organizing ideas through different structures in informative/explanatory text, and incorporating descriptive details in narratives (id.).

Regarding math, the progress report stated that the student struggled with identifying rational and irrational numbers, generating equivalent numerical expressions, solving multiplication and division problems with scientific notation, using square and cube root symbols, and graphing proportional relationships (Parent Ex. I at p. 1). The SETSS provider identified three goals for the student to work on: using square root and cube root symbols effectively, graphing proportional relationships accurately, and solving linear equations in one variable (id.).

The SETSS provider concluded that, "[b]ased on [the student's] current academic performance and areas of improvement" she "recommend[ed] continuing services to provide her with the necessary support to reach grade level expectations" (Parent Ex. I at p. 2).

Further, the IHO found that "the progress report d[id] not list any progress experienced by [the s]tudent in reading, writing or math but generally state[d] that [the s]tudent '[w]ith continued guidance and instruction [] has potential to improve in math, reading comprehension and writing skills'" (IHO Decision at p. 5). While the IHO is correct that the progress report does not indicate that the student had made progress, it is well settled that, while progress is a relevant factor to be considered (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]), a finding of progress is not required for a determination that a student's unilateral placement is adequate (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). Accordingly, the lack of identified progress is not dispositive.

The hearing record does not include any other documentary evidence about the instruction the SETSS providers delivered to the student during the 2023-24 school year (see Parent Exs. A-G; I). The parent called one witness, the secretary from Step Ahead, who testified that she had no contact with the student, either of the student's SETSS providers, or Step Ahead's provider supervisors (Tr. p. 16; see Tr. pp. 1-24). The secretary confirmed that her role at Step Ahead was to gather documents, not to contact the student or service providers (Tr. p. 17).

Therefore, although there is some limited information as to the SETSS provided to the student during the 2023-24 school year, namely the inclusion of several general goals in the SETSS progress report, the limited hearing record does not include sufficient evidence of the specially designed instruction provided to the student. The SETSS progress report does not include any detail with respect to specific strategies or supports utilized by the SETSS providers to address the student's unique needs. Accordingly, the evidence in the hearing record is insufficient to support a reversal of the IHO's finding that the parent failed to meet her burden to show that Step Ahead provided specially designed instruction to address the student's unique special education needs or that the SETSS provided were reasonably calculated for the student to receive an educational benefit.

VII. Conclusion

Having determined that the parent failed to meet her burden to show that the SETSS Step Ahead delivered to the student were appropriate, the necessary inquiry is at an end.[12]

[12] The district's request to reverse the IHO's order for it to conduct an evaluation of the student and develop an IEP or an IESP is without merit. The district does not dispute that the student is entitled to special education services in this case. Based on the evidence in the hearing record, the district last developed an IESP for the student in February 2021, and the district has not submitted any evidence showing that it has since evaluated the student. Although this is a dual enrollment case, the failure of the parent to request dual enrollment services does not, by itself, eliminate the district's obligation to evaluate the student and to develop appropriate public school programming. The district and the CSE may not simply treat the student as if she had been declassified when she has not. Mere inaction by the parent does not establish that the parent has made clear her intention to keep the student enrolled in the nonpublic school at her own expense despite the student's need for special education services and would thus not support finding the district was not required to make a FAPE available to the student in the public school ("Questions and Answers on Serving Children with Disabilities Placed by Their Parents in Private Schools" 80 IDELR 197 [OSERS 2022]; see also "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. 12, 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). Therefore, given the potential length of time since the student's last evaluation and development of an educational program for the student, the IHO did not abuse her discretion by ordering the district to reevaluate the student and develop a new educational program. Further, the district is able to inquire whether the parent would like an IEP or IESP upon the completion of the reevaluation. Accordingly, I decline to reverse the IHO's order.

I have considered the parties' remaining contentions and find it is unnecessary to address them in light of my determinations above.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

Dated: **Albany, New York**
August 22, 2024

CAROL H. HAUGE
STATE REVIEW OFFICER