



The University of the State of New York

The State Education Department

State Review Officer

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No. 24-276

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

Appearances:

The Law Office of Philippe Gerschel, attorneys for petitioner, by Philippe Gerschel, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Sarah M. Pourhosseini, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from a decision of an impartial hearing officer (IHO) which awarded partial funding for the cost of the special education and related services delivered to his son by Upgrade Resources (Upgrade) for the 2023-24 school year. The district cross-appeals from those portions of the IHO's decision which found that the privately obtained services were appropriate and that equitable considerations did not weigh in favor of denying all relief. The appeal must be sustained. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

When a student who resides in New York is eligible for special education services and attends a nonpublic school, Article 73 of the New York State Education Law allows for the creation of an individualized education services program (IESP) under the State's so-called "dual enrollment" statute (see Educ. Law § 3602-c). The task of creating an IESP is assigned to the same committee that designs educational programming for students with disabilities under the 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. Briefly, a CSE convened on December 15, 2022 and determined that the student was eligible for special education as a student with a learning disability (Parent Ex. B at p. 1).¹ The December 2022 CSE recommended that the student receive five periods per week of direct, group special education teacher support services (SETSS) in Yiddish, as well as one 30-minute session per week of group counseling in Yiddish, two 30-minute sessions per week of individual occupational therapy (OT), and two 30-minute sessions per week of individual speech-language therapy in Yiddish (*id.* at p. 12).² On September 11, 2023 the parent, through his attorney, notified the district that he agreed with the services recommended in the December 2022 IESP but had "no way of implementing these recommendations"; he further indicated he had no choice but to implement the IESP on his own and would seek reimbursement or direct payment from the district (Parent Ex. C).

For the 2023-24 school year, the parent executed an agreement with Upgrade on August 18, 2023, in which the parent agreed to a set fee structure for SETSS and related services (Parent Ex. F).

A. Due Process Complaint Notice, Impartial Hearing, and Subsequent Events

The parent, through his attorney, filed a due process complaint notice dated September 11, 2023, in which the parent asserted that the district had not implemented the student's December 2022 IESP for the 2023-24 school year (Parent Ex. A).

Following a prehearing conference, held on October 16, 2023, and a status conference, held on November 17, 2023, an impartial hearing convened and the IHO heard opening statements on January 24, 2024 (Tr. pp. 1-27). At the next scheduled hearing date, on March 8, 2024, the matter was adjourned by the IHO at the parties' request to attempt resolution in the matter (Tr. pp. 28-63). Subsequently, the CSE convened on February 14, 2024 for an annual review and finding the student continued to be eligible for special education as a student with a learning disability, developed an IESP with an implementation date of February 14, 2024 (Parent Ex. E at p. 1). The February 2024 IESP included recommendations for the student to receive six periods per week of

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 The term SETSS is not defined in the State continuum of special education services (see NYCRR 200.6), and the manner in which those services are treated in a particular case is often in the eye of the beholder. 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, and unless the parties and the hearing officer take the time to develop a record on the topic in each proceeding it becomes problematic (see Application of the Dep't of Educ., Appeal No. 20-125). For example, SETSS has been described in a prior proceeding as "a flexible hybrid service combining Consultant Teacher and Resource Room Service" that was instituted under a temporary innovative program waiver to support a student "in the general education classroom" (Application of a Student with a Disability, Appeal No. 16-056), and in another proceeding it was suggested that SETSS was more of an a la carte service that is completely disconnected from supporting the student in a general education classroom setting (Application of a Student with a Disability, Appeal No. 19-047).

direct, group SETSS in Yiddish, as well as one 30-minute session per week of group counseling in Yiddish, one 30-minute session per week of individual counseling in Yiddish, two 30-minute sessions per week of individual OT, and two 30-minute sessions per week of individual speech-language therapy in Yiddish (id. at pp. 8-9).

After the February 2024 CSE meeting, the parent submitted, and the district accepted, an amended due process complaint notice dated February 15, 2024 (Parent Ex. N; see Tr. pp. 28-63). In the amended due process complaint notice, the parent alleged that the district denied the student a free appropriate public education (FAPE) for the 2023-24 school year by failing to implement the December 2023 IESP and the February 2024 IESP (Parent Ex. N). As relief, the parent requested that the district fund the services delivered by providers located by the parent at a reasonable market rate and provide a bank of compensatory SETSS and related services for the entire 2023-24 school year "or the parts of which were not serviced," along with attorney's fees and expenses (id.).

Another conference was held on April 22, 2024, and the impartial hearing was reconvened on May 13, 2024, wherein the parties were given another opportunity to present opening statements (Tr. pp. 67-113). The district waived its opening and closing statements and did not present any evidence at the hearing (Tr. pp. 22, 69). The parent presented both opening and closing statements and the IHO admitted all of the parent's exhibits without objection (Tr. p 70-78, 104, 111).³

The hearing record shows that the student received privately obtained SETSS, speech-language therapy, OT, and counseling during the 2023-24 school year (see Parent Exs. H-K, L ¶ 8.).

B. Impartial Hearing Officer Decision

In a decision dated May 23, 2024, the IHO found that the district failed to meet its evidentiary burden as it did not present any testimonial or documentary evidence (IHO Decision p. 13). The IHO found that the parent notified the district on May 10, 2023 that the student would be privately placed and that the parent would be seeking continuation of the special education services at the private school (id. at p. 7). The IHO then found there was no dispute that the district did not make SETSS providers available to the student, but that the student received SETSS and counseling services beginning in September 2023 from Upgrade and at some point began receiving other related services as well (id. at pp. 7-8). The IHO held that the parent sufficiently demonstrated, by a preponderance of the evidence, that the SETSS and related services provided by Upgrade were appropriate and addressed the student's needs and that the student was making progress (id. at p. 14). Finally, the IHO held that the evidence in the hearing record indicated the parent cooperated with the CSE and provided the required notices to the district, the parent entered into a contract with Upgrade and had a legal obligation to pay for the services provided to the student, and the district did not present any evidence that the rate charged by Upgrade was excessive or unreasonable (id. at pp. 14-16). However, on the issue of the rate, the IHO noted her

³ The parent's opening statement focused largely on the district's alleged failure to respond to the due process complaint notice; however, this issue was not addressed in the IHO decision, nor has it been raised on appeal and, accordingly, it will not be addressed herein.

concern that the rate charged by the agency for SETSS was "more than twice the rate paid to the provider" (*id.* p. 16). The IHO then determined that the rate charged for the SETSS would be reduced by averaging the amount billed and the amount the agency paid to the provider, arriving at a rate of \$142.50 per hour for SETSS (*id.*). The IHO then directed the district to fund the SETSS, counseling, speech-language therapy, and OT services delivered to the student during the 2023-24 school year at specified rates (*id.* at p. 17).

IV. Appeal for State-Level Review

The parent appeals, alleging that the IHO erred in reducing the award of funding for SETSS services. The parent argues that the district did not present any evidence as to what a reasonable market rate was and there was no basis in the hearing record for the IHO to reduce the award.

In an answer and cross-appeal, the district seeks dismissal of the parent's appeal and argues that the hearing record supports the IHO's finding that the rate charged for SETSS was excessive. As part of its cross-appeal, the district argues that the hearing record did not support the IHO's findings that the services delivered to the student by Upgrade during the 2023-24 school year were appropriate and further argues that the IHO should have denied all relief based on equitable considerations.

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]).⁴ "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

⁴ 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 on an equitable basis, as compared to special education programs and services provided to other students with disabilities attending public or nonpublic schools located within the school district (*id.*).⁵ 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

At the outset, the district has not appealed from the IHO's finding that it failed to meet its evidentiary burden regarding the development or implementation of the student's IESP for the 2023-24 school year (IHO Decision at p. 13).⁶ Accordingly, this finding has become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

A. Unilaterally-Obtained Services

The district cross-appeals and argues that the parent did not provide sufficient, credible evidence that proved the unilaterally-obtained services from Upgrade were appropriate to address the student's needs.

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.

⁵ 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.

⁶ Although the IHO found that the district did not defend its actions in the development and implementation of the student's IESPs for the 2023-24 school year, the parent only raised issues regarding implementation (IHO Decision at p. 13; Parent Exs. A; N).

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 and, as a self-help remedy, he unilaterally obtained private services from Upgrade 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 that 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 they obtained for a student 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]).⁷ In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

Turning to a review of the appropriateness of the unilaterally-obtained services, the federal standard 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, 142 F.3d at 129). Citing the Rowley standard, the Supreme Court has explained that "when a public school system has defaulted on its obligations under the Act, a private school placement is 'proper under the Act' if the education provided by the private school is 'reasonably calculated to enable the child to receive educational benefits'" (Carter, 510 U.S. at 11; see Rowley, 458 U.S. at 203-04; 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.,

⁷ 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 that the parent obtained from Upgrade (Educ. Law § 4404[1][c]).

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 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). 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 upon appeal, a summary is required to determine the appropriateness of the unilaterally-obtained services. Here, the primary evidence of the student's needs is the description of the student in the December 2022 and February 2024 IESPs.

According to the December 2022 IESP, developed during third grade, the student was eligible for special education as a student with a learning disability, bilingual, and demonstrated difficulty with reading, math, speech-language skills, and his ability to focus (Parent Ex. B at pp. 1-2). Specifically, the December 2022 IESP indicated that in terms of reading skills, the student "struggle[d] with reading pace and keeping up with the class," although he demonstrated an ability to decode when he was provided with "check-ins and extra time" and outside of a large group (id. at p. 2). The December 2022 IESP reported the student "read[] for decoding and not for comprehension" (id.). Additionally, the student knew letters of the Yiddish alphabet, vowel sounds in Yiddish, and made appropriate letter-sound correspondence (id.).

In writing, the December 2022 IESP indicated the student was easily distracted "during writing tasks," demonstrated the ability "to independently write letters of the alphabet," and "wr[o]te his name and some basic CVC words in Yiddish" (Parent Ex. B at p. 2). The December 2022 IESP indicated the student was "unable to write a complete sentence" at that time (id.).

The December 2022 IESP reported the student's math abilities included an understanding "that numbers represent[ed] the amount of something" along with "the concept[s] of 'more' and 'less,'" and the student demonstrated the ability "to add and subtract" single- and double-digit numbers (Parent Ex. B at p. 2). However, the December 2022 IESP indicated the student was "unable to regroup" and did not "write[] out his problem[-]solving strategies" (id.). According to the December 2022 IESP, the student "need[ed] visuals and tactiles to solve computations and learn how to regroup" (id.).

In terms of speech-language skills, the December 2022 IESP indicated that the student demonstrated "[r]elative weaknesses" in oral language related to "diminished use of specific words" and "[h]is ability to comprehend sentences incorporating different parts of speech" (Parent Ex. B at p. 3). The December 2022 IESP further indicated the student "struggle[d] to recall and comprehend supporting details and sequences of narratives," demonstrated difficulty with "the ability to retell an oral narrative using age-appropriate story grammar elements," "exhibit[ed] a reduced ability to draw inferences and make predictions," and demonstrated "mildly reduced" speech intelligibility (id.).

Socially, the December 2022 IESP indicated the student demonstrated difficulty with focus and attention (Parent Ex. B at p. 3). According to the December 2022 IESP, the student required "frequent redirection and refocusing" to keep up with the class and he "disrupt[ed] others around him" (id.). The December 2022 IESP indicated the student's teachers were "unsure if [the student] [was] aware of right and wrong" given his inconsistent ability to "demonstrate respect to teachers" (id.).

According to the December 2022 IESP, the student demonstrated average gross motor skills but difficulty with fine motor skills (Parent Ex. B at p. 4). The December 2022 IESP indicated the student demonstrated "significant delays in visual motor integration, visual processing, planning, organization, sensory processing and pre[-]writing skills" (id.).

The December 2022 CSE recommended management strategies and interventions to address the student's needs, including positive reinforcement, repetition, checks for understanding, scaffolding, tactiles, prompting, extra time, sentence starters, redirection and refocusing,

preferential seating, visuals, and graphic organizers (Parent Ex. B at p. 5). The December 2022 IESP recommended that the student receive five sessions per week of group SETSS, one 30-minute session per week of group counseling, two 30-minute sessions per week of individual OT, and two 30-minute sessions per week of individual speech-language therapy (id. at p. 12).⁸

The CSE convened again on February 14, 2024, determined the student's continued eligibility for special education as a student with a learning disability, and developed an IESP based on a February 8, 2024 SETSS report (Parent Ex. E at p. 1; see Parent Ex. H).⁹ According to the February 2024 IESP, the student was in fourth grade at the "general education" nonpublic school, "tend[ed] to be anxious and uptight while at school," and was "sensitive to the way he [was] treated by peers and adults" (Parent Ex. E at p. 1). The February 2024 IESP further indicated the student was easily upset and "ha[d] difficulty dealing with his feelings" (id.). The February 2024 IESP reported that the student "ha[d] shown improvement" in his program but "require[d] continued support to meet his annual goals" (id.).

The February 2024 IESP included assessment information provided by the SETSS provider that indicated the student's reading was at "the 10th percentile for a fourth grade reader" (Parent Ex. E at p. 1). The February 2024 IESP indicated the student's reading fluency was "choppy" and that he "[r]ead[ed] words as if simply to get them out with little sense of trying to make text sound like natural language" (id. at pp. 1-2). Further, the February 2024 IESP reported following a listening comprehension task the student recalled few details, and had difficulty "properly summariz[ing]" the passage and with the accuracy of his inferences regarding a text (id. at p. 2). According to the February 2024 IESP, the SETSS provider offered the student support with decoding skills, as they were preventing him from understanding text independently (id. at p. 2).

As for writing skills, the February 2024 IESP indicated the student demonstrated skills at the "first grade level" including both "poor handwriting" and "very poor spelling" skills (Parent Ex. E at p. 2). Additionally, the IESP indicated that the student needed to improve his "writing structure" of paragraphs and ability to organize his written work (id. at p. 3). In math, the February 2024 IESP reported the student "perform[ed] at approximately [the] second grade level" and he demonstrated the ability to regroup (id. at p. 2). The February 2024 IESP indicated the student had difficulty with multiplication as well as word problems (id.).

Socially, the February 2024 IESP reported the student "recently" started OT and counseling to address his anxiety, sensitivity, and "difficulty dealing with his feelings" (Parent Ex. E at p. 3). The February 2024 IESP indicated although he "ha[d] some friends," the student "often hit[ed] or pushe[d] his peers if he d[id] not agree with them" and described that the student struggled to control "his negative emotions" (id.).

⁸ The December 2022 CSE recommended that all of the student's services be delivered in Yiddish, with the exception of OT, which was to be delivered in English (Parent Ex. B at p. 12).

⁹ According to the IESP, the CSE did not have any progress reports from related service providers available to consider (Parent Ex. E at p. 1).

The physical development section of the February 2024 IESP did not include specific information about the student's fine motor skills other than that the parent shared the student "receiv[ed] OT for strength and upper body" (Parent Ex. E at p. 4).

The February 2024 IESP included the same recommended management needs as outlined in the December 2022 IESP (compare Parent Ex. B at p. 5, with Parent Ex. E at p. 4). The February 2024 IESP recommended similar services for the student as in the December 2022 IESP, except that the CSE increased the group SETSS services from five to six sessions per week and added one 30-minute session per week of individual counseling to the already existing group session (compare Parent Ex. B at p. 12, with Parent Ex. E at pp. 8-9).

2. Services From Upgrade

In their affidavits, the parent and Upgrade educational director testified that the agency provided the student with six hours of SETSS per week, two 30-minute sessions per week of speech-language therapy, two 30-minute sessions per week of OT, and two 30-minute sessions per week of counseling (Parent Exs. L ¶ 8; M ¶¶ 4, 14).¹⁰ The educational director testified via affidavit that the SETSS provider for the student was a certified special education teacher, "trained and experienced to teach literacy and comprehension to school[-]aged children and adolescents" (Parent Ex. M ¶ 16). The evidence shows that the SETSS provider holds a current students with disabilities birth to grade 2 emergency COVID-19 certificate (Parent Ex. G at p. 1). The educational director further testified in her affidavit that the speech-language therapist, occupational therapist, and counselor for the student were also licensed (Parent Ex. M ¶¶ 17, 18, 19). The hearing record includes current licensure information for the student's speech-language pathologist and occupational therapist (Parent Ex. G at pp. 2, 4, 5). The educational director testified in her affidavit that the service providers created goals for the student that were "reviewed quarterly" and that they "wr[o]te progress reports[] and met with teachers and parents" (Parent Ex. M ¶¶ 20, 21).

In her affidavit, the educational director testified that the student received services "outside of the classroom" and that the sessions were "individualized" and "include[d] a great deal of specialized instruction" (Parent Ex. M ¶ 23). During her testimony, the IHO asked the educational director where the student received SETSS and related services, and she confirmed that the services were provided "in a separate room" at the school because the student "ha[d] difficulty focusing in the classroom, and he need[ed] direct support" (Tr. pp. 93-94). In addition, upon questioning from the IHO, the educational director testified that the student received individual SETSS support (Tr. p. 94).

a. SETSS

The February 2024 SETSS progress report indicated the student received five sessions per week of SETSS "to address reading, comprehension, math[,] and writing delays" and identified the student's needs in those areas that were reflected in the February 2024 IESP described above

¹⁰ The parent and educational director also testified via their affidavits that the student received five hours of SETSS per week and one 30-minute session per week of counseling until February 14, 2024 "based on the IESP dated" December 15, 2022 (Parent Exs. L ¶ 9; M ¶ 15).

(compare Parent Ex. H at pp. 1-4, with Parent Ex. E at pp. 1-3). According to the February 2024 SETSS progress report, a variety of strategies were used to support the student's needs (id. at pp. 2-4). For reading, the SETSS provider reported providing the student with direct instruction in decoding multisyllabic words, by teaching him the "syllable types in isolation," and using a white board to identify how to read each syllable (id. at p. 2). To improve reading expression and intonation, the SETSS provider reported that he modeled reading then had the student re-read the text, and to "organize the information in his mind," provided prompts with visualization, text discussion, and worked on "finding the main idea and supporting details in text" (id.). The SETSS provider reported that to improve the student's ability to read a math word problem, he used a "key word chart" for the student to look at to identify which operation to use (id. at p. 3). To further address the student's math needs, the SETSS provider used visual support, models, and "direct broken-down instruction" (id.). The SETSS provider indicated he used "direct instruction, review[,] [] repetition," drills, proofreading, worksheets, flashcards, and word games to address the student's spelling needs, along with tracing letters, and using pencil grips and graphic organizers to address the student's writing skills (id. at p. 4). Additionally, the SETSS provider developed annual and short-term objectives for the student to improve his reading, writing, and math skills (id. at pp. 1-4).

The educational director testified that the student "started this school year" and had "an inability to cooperate with teachers and peers," was "very argumentative and unwilling to listen," and demonstrated an inability "to focus and learn" (Tr. p. 95). The educational director testified that the student "present[ed] with strong comprehension issues" that made it "difficult for him to follow directions and understand lessons . . . taught orally" (id.). The educational director testified that the student's SETSS provider offered "reteaching and reviewing" information "learned in the classroom and closely communicat[ed] with the teacher to help integrate him in the classroom" (id.).

The parent testified that the student struggled with "math, reading, spelling," and demonstrated "social-emotional issues between friends and regulating himself" (Tr. p. 105). In response to a question from the IHO regarding how the SETSS provider addressed these needs, the parent testified that the SETSS provider worked with the student "on the subjects that [she] mentioned" as well as "his emotional needs" (id.).

b. Speech-Language Therapy

According to a February 2024 speech-language therapy progress report, the student received two 30-minute sessions per week (Parent Ex. I at p. 1). The February 2024 speech-language therapy progress report indicated that "skill-based assessments determined that [the student] ha[d] sever[e] delays in language processing, receptive and expressive language, and memory" (id.). Specifically, the report indicated the student had difficulty with logical thinking, problem-solving, making associations and categorizations, and that he demonstrated "poor verbal reasoning" (id.). The February 2024 speech-language therapy progress report indicated the student demonstrated anxiety and that he was "a shallow and non-flexible thinker" (id.). The speech-language pathologist indicated that he supported the student's needs through the use of "visual cues, verbal cues, modeling, role[-]playing, and/or trial and error and positive feedback," and developed annual goals and short-term objectives to improve the student's receptive and expressive language, and listening comprehension skills (id. at p. 2).

c. Occupational Therapy

A February 2024 OT progress report indicated that the student received two 30-minute sessions per week of OT "to address deficits in strength, endurance, focusing, sensory, fine motor, coordination, processing, regulation[,] and transitioning" (Parent Ex. J at p. 1). The February 2024 OT progress report described the student as "hyperactive," "oppositional," and "disruptive" due to difficulty with regulation and behavioral challenges (*id.*). The occupational therapist reported that the student did not "heed[] to the rules and norms of the class or groups" and he sought sensory input that "result[ed] in disruptions" and a lack of focus that prevented him from learning the "information taught in class" (*id.* at pp. 1-2). According to the February 2024 OT progress report, the student had "difficulties making friends" and he was socially isolated because of his disruptive behavior (*id.*). The February 2024 OT progress report also indicated the student had difficulty with "poor balance, agility, strength[,] and endurance" (*id.* at p. 2). The February 2024 OT progress report indicated the therapist addressed the student's needs through the use of proprioceptive movement therapy, games, theraputty, a wheel board, deep-breathing, positive reinforcement, visual and verbal cues, tactile assistance, the "DIR/Floortime" student-led therapy model, and chaining strategies (*id.* at p. 3). The occupational therapist developed annual goals and short-term objectives for the student to improve his sensory processing, sustained focus, strength and postural stability, balance, and motor planning skills, and "manuscript legibility" (*id.* at p. 2).

d. Counseling

According to a February 2024 counseling progress report, the student received one 30-minute session per week of counseling services that had begun recently (Parent Ex. K at p. 1). The February 2024 counseling progress report indicated the student was "somewhat aggressive" but he "soften[ed] with care and assertiveness" (*id.*). According to the February 2024 counseling progress report, the student "struggle[d] with interpersonal connection with peers and adults" including a defiance of "authority in his school and home setting" (*id.*). The February 2024 counseling progress report also indicated the student demonstrated "difficulty understanding his emotions," "recognizing and naming basic emotions," and "making choices to support his well[-]being" (*id.*). Additionally, the February 2024 counseling progress report indicated the student demonstrated a "low awareness of others' perspectives and feelings" and that he "ha[d] low adaptability to social contexts" along with "difficulty navigating conflict" (*id.* at pp. 1, 2). The February 2024 counseling progress report indicated that the counselor used "[a] spectrum of methods" during therapy sessions, including child centered play and "[e]lements of [p]sycho-[d]ynamic [t]herapy" "to support mental and emotional development" as well as "to develop positive self-concept, assume responsibility, problem-solving techniques, peer interaction, [and] conflict resolution" skills (*id.* at p. 2). The counselor developed annual goals and short-term objectives for the student to improve his ability to regulate emotions and state positive self-attributes, develop perspective-taking and social interaction skills, adapt to changing social contexts, and develop positive relationships with peers and adults (*id.*).

3. 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).

The February 2024 SETSS progress report indicated the student was improving his decoding and fluency skills, had demonstrated progress in his comprehension skills, and also improved math and letter formation skills (Parent Ex. H at p. 5). In addition, the February 2024 SETSS progress report indicated the student's spelling skills "slightly increased" with the use of "games and worksheets" (*id.*). According to the February 2024 speech-language therapy progress report, the student "ma[de] adequate improvements" including with his ability to "describe details of [a] story" and "repeat a story that he read" (Parent Ex. I at p. 3).

The February 2024 OT progress report indicated that because the sessions had begun "recently" the student had only shown "minimal progress" at that point (Parent Ex. J at p. 3). Similarly, the February 2024 counseling progress report indicated that sessions began recently and that "[f]ull rapport [was] still being established" but that "developments [were] already being observed" (Parent Ex. K at p. 1). The February 2024 counseling progress report indicated the student's "first few" sessions included "very aggressive" behavior on the part of the student and an attempt "to defy all 'rules'" (*id.* at p. 3). After the student "acclimate[d] to therapy," the February 2024 counseling progress report indicated the student "now work[ed] collaboratively on any small task" (*id.*).

The educational director testified that the student's providers indicated the student had "become calmer and more regulated," was better "able to express himself," and had "show[n] improvements in his academics, such as his comprehension, his math, and his writing" (Tr. p. 95; Parent Ex. M ¶ 25).

Therefore, according to the information in the hearing record, the student's needs were accurately described by the student's providers such that the district relied upon the February 2024 SETSS report to prepare its most recent IESP. Each of the progress reports included in the hearing record identified the student's needs as well as the strategies providers used to address them, and examples of progress the student made in his sessions were included as well. While the student's individual providers did not testify, the testimony of the educational director and parent confirmed the information provided in the progress reports. Based on the information in the hearing record, I see no reason to overturn the IHO's conclusion that the unilaterally-obtained services delivered by Upgrade during the 2023-24 school year were appropriate for the student.

B. Equitable Considerations:

The final criterion for a reimbursement award is that the parent's 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"]).

1. 10-Day Notice

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

The district argues that the award of district funding for the SETSS delivered by Upgrade should have been denied altogether based on the parent's failure to provide the district with a timely 10-day notice. In particular, the district argues that, given that the parent executed a contract with Upgrade on August 18, 2023, the 10-day notice letter, dated September 11, 2023, was untimely (compare Parent Ex. C, with Parent Ex. F). However, the timing of the letter must be examined by reference of the date the parent removed the student from public school, the corollary being the date the private services began to the exclusion of any attempt by the district to deliver the services directly. In the instant matter, the parent sent a letter, dated September 11, 2023, to the district, in

which the parent indicated that he consented to the services recommended in the student's IESP and had no way of implementing them (Parent Ex. C at p. 2).¹¹ The parent further indicated he had no choice but to implement services on his own and seek reimbursement or direct payment from the district for the services (*id.*). However, the hearing record does not clearly identify when the student began receiving services from Upgrade. For example, the contract between the parent and Upgrade does not identify a specific start date for services, only noting that the parent "requests for [Upgrade] to start providing Services from the first day of Semester and during the entire period while the due process complaint notice is still pending" (Parent Ex. F at p. 1). Additionally, although the IHO found that the student began receiving SETSS and counseling services in September 2023 and speech-language therapy and OT services at some point during the school year (IHO Decision at p. 8), the IHO cited to the progress reports for this information and the reports do not indicate when services began (Parent Exs. H-K).¹² As such, the hearing record does not include sufficient information to determine if the parent removed the student from the public school program by engaging in self-help prior to 10-business days after his September 11, 2023 letter. Accordingly, the district's argument that the parent did not provide sufficient notice is without merit.

2. Excessive Costs

Among the factors that may warrant a reduction in tuition based on equitable considerations is whether the frequency of the services or the cost for the services was excessive (*M.C.*, 226 F.3d at 68; *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.*, 674 Fed. App'x at 101; *E.M.*, 758 F.3d at 461 [noting that whether the amount of the private school tuition was reasonable is one factor relevant to equitable considerations]). The IHO may consider evidence regarding whether the rate charged by the private school or agency was unreasonable or regarding any segregable costs charged by the private school or agency that exceed the level that the student required to receive a FAPE (*see L.K. v. New York City Dep't of Educ.*, 2016 WL 899321, at *7 [S.D.N.Y. Mar. 1, 2016], *aff'd in part*, 674 Fed. App'x 100).

In the instant matter, the parent argues that the district did not offer documentary or testimonial evidence regarding the costs of the unilaterally obtained services and that no evidence reflected that the costs of the services delivered by Upgrade were unreasonable. Moreover, the parent argues that the IHO had no basis in determining what an appropriate rate would be due to the lack of a comparable rate in the hearing record. The parent's argument has merit as the IHO's stated justification for a reduction was her "[concern] that the rate for SETSS [wa]s more than twice the rate paid . . . the provider" without citation to any evidence of a more appropriate rate (IHO Decision p. 16). Accordingly, there was simply not a sufficient record basis for a reduction

¹¹ The parent filed his initial due process complaint notice in this matter on the same day, September 11, 2023 (Parent Ex. A).

¹² I note that the February 2024 counseling progress report indicated that the student's services had "just recently beg[un]" (Parent Ex. K at p. 1).

in the rate specified in the contract due to a finding that it was excessive and the parent is, therefore, entitled to reimbursement at the contracted rate.

VII. Conclusion

Having determined that the evidence in the hearing record supports the IHO's conclusions that the SETSS and related services delivered by Upgrade to the student during the 2023-24 school year were appropriate, and that the IHO erred in reducing the award as there was insufficient basis in the hearing record to reduce the amount awarded based on equitable considerations, the necessary inquiry is at an end.

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that, the May 23, 2024 IHO decision is modified such that the district shall directly fund the costs of the students SETSS delivered to the student by Upgrade during the 2023-24 school year at the contracted for rate of \$195.00 per hour.

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

CAROL H. HAUGE
STATE REVIEW OFFICER