



The University of the State of New York

The State Education Department

State Review Officer

www.sro.nysed.gov

No. 24-283

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:

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

Liz Vladeck, General Counsel, attorneys for respondent, by Jay St. George, 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 son's private services delivered by Learning Learners LLC (Learning Learners) for the 2023-24 school year. The 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 here in detail. In this matter, the evidence in the hearing record reflects that a CSE convened on May 12, 2022 for the student's

annual review and developed an IESP that included recommendations for the student—who was eligible to receive special education as a student with a learning disability—to receive six periods per week of special education teacher support service (SETSS) in a group, one 30-minute session per week of individual counseling services, and one 30-minute session per week of group counseling services (Parent Ex. B at pp. 1, 10).

In a due process complaint notice, dated September 27, 2023, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) and/or equitable services under State law for the 2023-24 school year (Parent Ex. A at p. 1). The parent indicated that the May 2022 IESP was the last agreed-upon educational program developed for the student and that "the student require[d] the same special education services" for the 2023-24 school year (*id.*). The parent asserted she was unable to locate service providers on her own at the district's standard rates for the 2023-24 school year and that the district failed to provide the student with services in accordance with his IESP (*id.*). The parent claimed that she found providers willing to provide the student "with all required services" for the 2023-24 school year but at rates higher than the standard district rates (*id.*). The parent sought an order requiring the district to continue the student's services under pendency and an award of funding for SETSS delivered by a private company during the 2023-24 school year at "enhanced rates" and directing the district to issue a related service authorization (RSA) or directly fund related services for providers of the parent's choosing at the rate the providers charge (*id.* at p. 2).

The parties proceeded to a pendency hearing on November 10, 2023 where the parties indicated a resolution regarding pendency was reached (Tr. pp. 7-13). According to the pendency implementation form signed by a district reviewer on November 3, 2023, the parties agreed that the student's pendency program consisted of a 10-month program with six hours per week of SETSS in a group, one 30-minute session per week of individual counseling services, and one 30-minute session per week of group counseling services (*see* Pendency Implementation Form). An impartial hearing continued on February 9, 2023 and concluded on April 2, 2024 after three days of proceedings devoted to the merits (Tr. pp. 23-103).¹

In a decision dated May 25, 2024, the IHO determined that the district did not dispute that it failed to create an IESP for the 2023-24 school year and thereby denied the student a free appropriate public education (FAPE) (IHO Decision at p. 3). However, the IHO determined that the unilaterally obtained SETSS and counseling services provided by Learning Learners was not appropriate (*id.* at pp. 3-5). In her decision, the IHO acknowledged that the service providers were appropriately licensed, but determined that the unilaterally-obtained SETSS and counseling services were inappropriate for the following reasons: the director of Learning Learners testified that the agency used evaluations to determine what services a student required but did not know what evaluations, if any, were used to determine the student's services; the SETSS provider's progress report lacked details about the program contents; there was no progress report from the counseling provider; and the director testified that she lacked knowledge regarding the student's counseling services or the student's learning disability (*id.*). The IHO also noted that the May 2022

¹ A prehearing conference took place on November 2, 2023, and two status conferences took place on December 13, 2023 and January 16, 2024 but only the parent's attorney appeared before the IHO on those dates (*see* Tr. pp. 1-6, 14-22). During the two status conferences the parent's attorney represented that the parent preferred to resolve the matter (Tr. pp. 14-22).

CSE recommended group SETSS and counseling but that there was no evidence that such group services were provided by Learning Learners or any evidence explaining why group services were no longer appropriate for the student even though the student's May 2022 IESP indicated group services could help the student's social skills (id. at p. 5). As a result, the IHO denied the parent's request relief (id.).

IV. Appeal for State-Level Review

The parent appeals. The parent argues that the IHO erred in denying her request for funding of the unilaterally-obtained SETSS and counseling services. The parent asserts that the burden of proof should have laid entirely with the district as the parent was only seeking implementation of the district's recommended program, but also asserts that the IHO erred in finding the parent's privately obtained SETSS and counseling services were inappropriate. As relief, the parent requests direct funding for the six hours per week of SETSS at a rate of \$215 per hour and two 30-minute sessions per week of counseling services at a rate of \$250 per hour provided to her son by Learning Learners for the 2023-24 school year.

In an answer, the district argues that the IHO properly determined the unilaterally-obtained SETSS and counseling services were inappropriate and denied the parent's requested relief.

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]).² "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

² 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.*).³ 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, neither party appealed the IHO's findings that the district failed to meet its burden to prove that it provided the student a FAPE for the 2023-24 school year, and as such, the determination 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. Unilateral Placement

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 and, as a self-help remedy, she unilaterally obtained private services from Learning Learners LLC 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

³ 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.

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]).⁴ 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., 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

⁴ 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 Learning Learners (Educ. Law § 4404[1][c]).

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 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

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

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

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

1. Student's Needs

Although not in dispute, a discussion of the student's needs provides context to resolve the issue on appeal, namely whether the SETSS and counseling services delivered by Learning Learners were appropriate to meet the student's needs. According to the May 2022 IESP the student was attending a private religious school in a kindergarten-transition class for the 2021-22 school year (Parent Ex. B at p. 1). According to his classroom teacher, the student exhibited "significant" difficulty focusing during classroom activities and received most of his instruction from his SEIT provider (id.). The student was "approaching grade level" academically and was "working on his letters" (id.).

The May 2022 IESP indicated that, according to his SEIT provider, the student had made academic progress during the year, but could be distractible and impulsive (Parent Ex. B at p. 1). The student benefitted from one-to-one instruction outside of the classroom, "pre-teaching," and minimal distractions (id. at pp. 1, 2). The student's SEIT provider reported that he was "on grade level" (id. at p. 1).

A February 27, 2022 special education progress report, reflected in the May 2022 IESP, indicated the student had made progress in his cognitive skills and was better able to attend to lessons (Parent Ex. B at p. 1). As summarized in the IESP, the progress note stated that the student was not yet able to answer "Wh" questions related to picture books and stories, group objects based on two criteria, and identify differences and similarities among common objects (id.). In addition, the student exhibited additional weaknesses related to listening to stories and enjoying books and using "comparative words" regarding number, size, shape, texture, color, speed, amount, and volume (id.). The student needed to work on following related and unrelated multi-step verbal directions (id. at pp. 1-2).

The May 2022 IESP also reflected the content of a March 2, 2022 speech and language progress report which indicated the student had progressed in his ability to follow two step directions, sort objects by category, and exhibit understanding of spatial concepts (Parent Ex. B at p. 2). As described in the IESP, the student's articulation skills had improved as he was now "fully understood" by his teachers and peers (id.). The student was able to answer "Wh" questions, label common objects and their function, and identify "what is wrong in a picture" and how to fix it (id.). As memorialized in the May 2022 IESP, the speech-language progress report noted that there were "no further concerns" with the student's speech and therefore "discharge" was recommended (id.). According to the parent, the student was making "great progress" given the support he received but had difficulty completing homework due to lack of focus and continued to require support (id.).

Turning to the student's social development, the IESP indicated that the student's classroom teacher reported that he was very impulsive, frequently got out of his seat, and sought the attention of other students in the classroom (Parent Ex. B at p. 3). The student's SEIT noted that he made progress in the areas of social/emotional functioning, but continued to exhibit impulsivity, leading to unintentionally aggressive behavior (id.). The student did not have difficulty initiating or engaging with others, but often became frustrated with peers, demanding to be "in charge" during activities (id.). The student had difficulty playing appropriately with peers, following class rules, taking turns, and regulating his emotions, and had outbursts when he did not get his way (id.).

In terms of the student's physical development, the May 2022 cited a March 1, 2022 occupational therapy progress report, that stated the student had made "significant" progress with his fine motor and sensory processing skills (Parent Ex. B at p. 4). According to the IESP, the progress report noted the student was now able to utilize a tripod grasp and appropriate pressure during prewriting activities, cut various shapes and lines with accuracy, negotiate the school environment with ease, inhibit vestibular self-stimulating behaviors, and sustain attention to tasks given minimal redirection when distractions existed (id.). At the time of the student's May 2022 IESP, his classroom teacher and SEIT provider did not report any major concerns with his gross or fine motor abilities, and the March 2022 OT progress report recommended "discharge" of the student (id.). However, the parent reported concerns related to the student's impulsivity and difficulty focusing (id.).

The May 2022 IESP identified the modifications and resources needed to address the student's management needs including multi-modal presentation of learned skills, visual aids, verbal prompting, minimizing distractions, preferential seating, classroom behavior management,

clear expression of rules and expectations, and frequent praise and encouragement (Parent Ex. B at p. 5).

The May 2022 IESP featured seven annual goals to address the student's needs in the areas of academics, speech-language development, attention and focus, and social skills (Parent Ex. B at pp. 6-9). Specifically, the student's goals included improving his reading comprehension by answering "wh" questions related to stories and grouping objects based on criteria and identify differences and similarities (*id.* at pp. 6-7). Further, the goals targeted the student's ability to use comparative words related to number, size, shape, texture, color, and volume, and identify and use specific words related to amount (*id.* at p. 7). In addition, the IESP goals targeted the student's ability to follow three-step directions, increase his attention and focusing skills for academic and social functioning, and improve social interactions by playing with and taking turns with a peer without becoming frustrated (*id.* at pp. 8-9).

2. Services Provided by Learning Learners

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]).

Here, the Learning Learners director testified that her role at the agency included finding and assigning providers, overseeing services, and addressing any concerns of parents or providers regarding student services (Tr. p. 55). In her testimony via affidavit, the director of Learning Learners (the director) stated that the agency provided the student six hours per week of SETSS beginning on September 7, 2023, and intended to continue providing services consisting of 240 sessions of SETSS and 40 sessions of counseling for the remainder of the 2023-24 school year in accordance with his May 2022 IESP (Parent Ex. F at p. 1). The director noted that the student received services, including counseling, after school (Tr. p. 71).⁵

The director stated that she met with the student's SETSS provider and therapist, but at the time she testified had not been updated regarding the student's current progress (Tr. p. 60). However, the director had spoken to the parent regarding the student's progress and was told that everything was "going smoothly" (Tr. p. 61). The director also stated that to measure student progress providers were required to "do some testings [sic]" but was unsure specifically which testing was used for the student in this case (Tr. pp. 61-62). The director stated that she did not know the specific nature of the student's learning disability or why he received counseling and acknowledged that although a counseling progress report should have been prepared for the student, it was not included in the hearing record (Tr. pp. 64-65). Given the director's lack of direct knowledge about the student's services, the IHO did not err in giving the testimony little weight.

⁵ The hearing record includes copies of the SETSS and counseling providers' certification and license (Tr. p. 68-69; see Parent Ex. G).

Turning to the documentary evidence, a January 18, 2024 SETSS progress report indicated that at the time it was written the student was struggling in ELA and math, and had difficulty focusing in a large group setting (Parent Ex. H at p. 1). The progress report stated the student was distracted by external stimuli and struggled to remain seated during activities but also noted that he had made progress using a token economy and self-monitoring chart (id.). The report specifically noted progress in the student's ability to return his focus to a text with a visual prompt and his ability to return to his seat given redirection (id.). According to the progress report, the student struggled with following multi-step instructions and required redirection during transitions (id.). He was able to attend in large-group sessions when he was pre-taught and distractions were minimized (id.).

The January 2024 SETSS progress report indicated the student was "meticulous" in his work and presented with a positive attitude but that he often missed social cues due to distractibility in social settings (Parent Ex. H at p. 2). The student had difficulty responding appropriately when he did not get his way, tending to become "overwhelmed and disenfranchised" in large groups (id.). The student exhibited difficulty focusing during games, often breaking the rules, disrupting the game, or becoming uncooperative when redirected (id.). According to the SETSS progress report, the student was working on exhibiting self-control during classroom lessons, following rules during a game, and focusing on lessons for increasing periods of time (id.).

With regard to academic skills, the January 2024 SETSS progress report indicated the student was able to add and subtract within 20, and order objects by length, but struggled with identifying place value and adding within 100 (Parent Ex. H at p. 1). The student had difficulty telling time and identifying coins (id.). The student was working on identifying place value, adding within 100, and telling time using hours and half hours (id. at p. 2). With respect to reading, the SETSS progress report indicated that the student was able to manipulate phoneme in single-syllable spoken words and sort words into categories to determine word relations (id.). However, the SETSS progress report also indicated the student had difficulty blending and segmenting single-syllable words with consonant blends, creating new words by manipulating individual sounds in spoken one-syllable words, and decoding long vowel sounds in regularly spelled one-syllable words (id. at pp. 1-2). According to the progress report, the student was working on blending and segmenting single-syllable words that included consonant blends, encoding new words by manipulating individual sounds in spoken one-syllable words, and decoding long vowel sounds in regularly spelled one-syllable words (id. at p. 2).

In order to address the student's needs, the SETSS provider recommended accommodations such as breaking tasks down into smaller steps, reteaching, reducing distractions, preferential seating, "Elkonin boxes" to help him segment syllables, drills to increase fluency, math manipulatives, color coding, hands on instruction, verbal cues and feedback, a structured learning environment, token economies, self-monitoring charts, and regular communication between educators, parents, and specialists (Parent Ex. H at p. 2).

As to counseling services provided by Learning Learners, there is no evidence in the hearing record that such services were delivered to the student, or what student needs were being addressed by the counseling services (see Parent Exs. A-C, E-H). Although a mental health counselor registration certificate is included in the hearing record, there is no evidence regarding

the provision of services to the student by the mental health counselor during the 2023-24 school year (id.).

In arguing that the IHO erred in finding that she did not meet her burden to demonstrate the appropriateness of services provided by Learning Learners, the parent does not challenge the IHO's factual finding that the services provided by the company were delivered on an individual basis in the student's home. Instead, the parent argues that there was "nothing in the record to indicate that home-based service or lack of any group service diminished the positive effect of Agency's services."

However, contrary to the parent's characterization, the description of the student in the SETSS progress report summarized above reflects that the student needed support in the classroom, yet it is undisputed that the unilaterally obtained services were delivered after school. Moreover, the progress report describes that the student was working on focusing within the classroom and functioning in group settings; however, the evidence shows the student only received after-school services, and there is no evidence that the SETSS provider observed the student's needs in the classroom setting or how she otherwise obtained information about his current functioning while at school. Similarly, the progress report does not describe how the SETSS was able to provide the student with specially designed instruction which addressed his need to work on self-control during classroom lessons and focusing on lessons delivered at school when he was not receiving SETSS in a classroom setting (see Tr. p. 71). While the SETSS provider recommended reducing distractions and preferential seating as strategies to address his needs in the classroom, it is unclear how these strategies would be utilized in an after-school environment. Further, because the SETSS provider did not testify in this matter, it is unclear if the provider had any communications with the student's classroom teacher at his private school; the director testified she did not speak with the student's classroom teachers and the only information regarding the student's progress in school came from the parent (see Tr. pp. 60-61).

Finally, regarding group versus individual sessions, contrary to the parent's argument in her request for review that a recommendation for group services is "merely an allowance for a student to be seen in a group if available not an absolute requirement for appropriateness," there is evidence that the student would benefit from group services. In particular, as noted, the evidence shows that student had difficulty attending in large groups settings and interacting with peers in typical school activities and needed learn to how to function and attend in a classroom setting and participate appropriately in social situations within the classroom (see generally Parent Exs. B; H). As indicated above, the May 2022 IESP noted the student made progress related to his social/emotional functioning but continued to be impulsive as he had a hard time regulating his emotions and had outbursts when he didn't get his way (Parent Ex. B at p. 3).

Based on the totality of the circumstances, there is insufficient basis in the hearing record to disturb the IHO's determination that the parent did not meet her burden to prove that the services delivered to the student by Learning Learners were specially designed to meet the student's unique needs. While the SETSS progress report briefly described the student's academic skills being addressed, the majority of the student's needs were specifically related to his functioning in a classroom setting, and therefore could not be appropriately addressed outside of the classroom with afterschool services. Therefore, I find that the IHO did not err in finding the services provided by the private agency were not reasonably calculated to provide educational benefit.

VII. Conclusion

Having determined that the parent failed to establish the appropriateness of the services delivered by Learning Learners during the 2023-24 school year, the necessary inquiry is at an end and there is no need to reach the issue of whether equitable considerations support an award of district funding for the services delivered by Learning Learners (see M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]).

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
September 26, 2024**

**SARAH L. HARRINGTON
STATE REVIEW OFFICER**