



The University of the State of New York

The State Education Department

State Review Officer

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No. 24-293

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

Appearances:

Liz Vladeck, General Counsel, attorneys for respondent, by Thomas W. McLeod, 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 Higher Level Education Resources (HLER) for the 2023-24 school year. The district cross-appeals from the IHO's decision arguing that that the IHO applied an incorrect legal standard, that the parent failed to demonstrate that the unilaterally-obtained services were appropriate for the student, and that the relief awarded by the IHO was not warranted. The appeal must be dismissed. The district's cross-appeal is sustained in part.

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 CSE convened on December 28, 2020, to formulate the student's IESP with an implementation date of January 15, 2021 and an annual review date of December 28, 2021 (see generally Parent Ex. B). The December 2020 IESP recommended that the student receive 10 periods per week of direct and group special educational teacher support services (SETSS); two 30-minute sessions per week of individual speech-language therapy; two 30-minute sessions per week of individual occupational therapy (OT); and two 30-minute sessions per week of group counseling services (id. at p. 9). The December 2020 IESP indicated that the student was parentally placed in a nonpublic school (id. at p. 2).

The parent signed an enrollment agreement for the 2023-24 school year with HLER for the provision of special education services, speech-language therapy, OT, counseling and physical therapy (PT) at a rate of \$192 per hour for individual sessions and \$144 per hour for group sessions (see Parent Ex. C at pp. 1-2).¹ On August 23, 2023, the parent notified the district of the student's need for providers for the 2023-24 school year and stated that it was the parent's intent to obtain the student's mandated services through a private agency at an enhanced market rate if the district elected not to provide the student with his recommended services from his 2020 IESP (Parent Ex. D).

A. Due Process Complaint Notice

In a due process complaint notice dated September 8, 2023, the parent alleged that the district denied the student a free appropriate public education (FAPE) for the 2023-24 school year (Parent Ex. A). The parent alleged that the district failed to provide the student with the special education and related services recommended in the December 2020 IESP for the 2023-24 school year and that the parent was therefore obligated to retain unilateral special education and related services at an enhanced rate (id. at pp. 1-2). As relief, the parent sought an order directing the district to pay the private agency directly and "[c]ompensatory [e]ducation services to be provided to the [s]tudent as a bank, to make-up for any mandated services not provided by the [district]" (id. at p. 3).

B. Impartial Hearing Officer Decision

An impartial hearing convened on December 27, 2023 and concluded on May 8, 2024 after four days of hearings (Tr. pp. 19-112).² In a decision dated May 28, 2024, the IHO found that the district failed to prove that it had provided the student with a FAPE for the 2023-24 school year; that the contract between the parent and HLER was not a valid contract on its face; that the parent's 10-day notice was "not signed by an actual person"; and that the HLER witness's testimony was not credible (IHO Decision at pp. 5-8). The IHO denied the parent's requests for payments for SETSS services and further denied the parent's request for a related services authorization (RSA)

¹ The enrollment agreement is not dated and does not indicate the date the parent signed the agreement (Parent Ex. C).

² Prehearing and status conferences were held on October 17, 2023, November 15, 2023 and December 5, 2023 (Tr. pp. 1-18).

for speech-language therapy, OT or counseling until the student underwent new evaluations (id. at p. 8). The IHO ordered the district to evaluate the student for speech, OT and counseling within 45 days of the date of the IHO's decision, create a new IESP within 60 days after the evaluations were concluded; and that if the new IESP recommended speech-language therapy, OT and/or counseling, the district was directed to provide the parent with RSAs not to exceed \$125 per hour (id.).

IV. Appeal for State-Level Review

The parent appeals, alleging that the IHO erred in finding that the contract between the parent and HLER was invalid; that the HLER witness's testimony was not credible; and that the unsigned 10-day notice warranted a reduction based on the equities. The parent requests that an SRO reverse the IHO's decision and order the district to fund the student's SETSS provider at the rate specified in the parent's contract with HLER.

The district cross-appeals, arguing that: the IHO erred by not applying the Burlington-Carter analysis to the facts of the case; the parent failed to prove that HLER's services were appropriate for the student; the relief awarded by the IHO directing the district to reevaluate the student's needs, reconvene a new IESP meeting and to issue RSAs for any recommended services at an hourly rate not to exceed \$125.00 was inappropriate;³ and equitable considerations did not favor the parent. The district seeks dismissal of the parent's appeal.

The parent's lay advocate submitted an answer to the district's cross-appeal, asserting that the parent provided sufficient evidence to establish the appropriateness of the special education services provided by HLER.

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

³ With respect to that portion of the IHO's decision ordering the issuance of RSAs, the district noted that it "might not object to this third and final order in different circumstances. However, if the SRO correctly vacates the other two orders, this order must be vacated as well" (Dist. Answer with Cross-Appeal. at p. 6).

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 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

A. Legal Standard

I will first address the district's cross-appeal regarding the appropriate legal standard to be applied. In this matter, the student has been parentally placed in a nonpublic school and the parent does not seek tuition reimbursement for the costs of the student's attendance there. Instead, the parent challenges the district's failure to implement the December 2020 IESP and as a self-help remedy, she unilaterally obtained private services from HLER for the student without the consent

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]).

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.

of school district officials, and then commenced due process to obtain remuneration for the costs thereof.

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 Burlington-Carter 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]).⁶ 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).

Accordingly, the district is correct that the IHO should have applied the Burlington-Carter analysis to determine: (1) whether the district met its burden to prove that it offered the student a FAPE for the 2023-24 school year; and (2) whether the parent met her burden to prove that the services provided by HLER were appropriate to meet the student's unique needs. In its cross-appeal, the district does not challenge the IHO's lack of a finding on whether the district met its burden to prove that it had offered the student a FAPE for the 2023-24 school year, so that issue is final and not before me. However, as the IHO failed to analyze the hearing record to determine whether the parent met her burden under Burlington-Carter that the unilateral services provided by HLER were appropriate to meet the unique needs of the student, and instead went directly to the issue of equities, the appropriateness of the unilaterally-obtained services must be determined on this appeal.

⁶ 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 HLER (Educ. Law § 4404[1][c]).

B. Unilaterally Obtained Services

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 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. The Student's Needs

The hearing record contains a December 2020 IESP and there are no IESPs from intervening school years in the hearing record (Parent Ex. B). The 2020 IESP and HLER progress reports are summarized below to provide some context.

The December 2020 IESP stated that the student was approaching grade level in all academic areas but that due to difficulty focusing he often had a hard time attending to classroom tasks (Parent Ex. B at p. 2).⁷ The December 2020 IESP indicated that "[d]iscussing concepts such as 'self control' and 'whole body listening' ha[d] helped [the student]" but that often he continued to require reminders and prompts to express himself and interact in an appropriate manner (id.).

With regard to the student's speech and language development, the December 2020 IESP indicated that the student experienced difficulty with receptive language and noted that he could have difficulty grasping new concepts and sometimes required simplification and repetition (Parent Ex. B at p. 2). When tested informally, the student's receptive language was below grade level, which impacted his understanding and hindered his ability to understand classroom material and instructions (id.). The December 2020 IESP noted that student had shown improvement in his ability to understand age-appropriate vocabulary and made progress in reading comprehension (id.). In addition, the student worked on his ability to problem solve by identifying another person's perspective and labeling cause-effect relationships (id.). According to the December 2020 IESP, the student was motivated and receptive to learning new skills and had improved in his ability to follow multi-step directions (id.). The December 2020 IESP also noted, however, that the student was often impulsive and required prompting to wait for directions to be completed before beginning a task (id.). The December 2020 IESP indicated that the student also had difficulty with expressive language (id.). Although he was generally able to relate personal events in the correct sequence, he had a hard time taking the perspective of the listener and, at times, left out details that were necessary for the listener to understand him (id.). According to the December 2020 IESP, the student had demonstrated some improvement in his expressive language by working on retelling a verbal narrative (id.). The student had also shown improvement in his ability to make inferences and accurate predictions about an age-appropriate story (id.). The December 2020 IESP indicated that the student's impulsivity affected his expressive language as he often made statements and answered questions without first thinking them through (id.).

In terms of social development, the December 2020 IESP indicated that the student needed to be aware of his personal space and boundaries (Parent Ex. B at p. 3). The December 2020 IESP stated that "counseling was working on having [the student] use his words and he has improved socially" (id.). It further stated that the student benefitted from explicit and frequent teaching of social rules and skills, modeling of appropriate responses to social situations, and time to calm down when agitated (id.). The December 2020 IESP noted that the student did not always

⁷ During the 2023-24 school year, the student was in ninth grade (Parent Ex. F at p. 1).

understand another person's perspective and responses and suggested that it might be helpful for him to label the emotional status of others and engage in role-play opportunities to practice appropriate responses (id.). No parental concerns were noted in relation to the student's physical development (id. at p. 3).

The December 2020 IESP identified the following strategies and resources as necessary to address the student's management needs: repetition and rephrasing, instruction broken down into discrete units of learning, use of graphic organizers, prompting and cuing when necessary, explicit and frequent teaching of social rules and skills, model appropriate responses to social situations, time to calm down when agitated, engage in role play opportunities to practice appropriate responses, explain rules/rationales behind social exchanges, instruction to accurately measure his own emotions and those of others, and positive and corrective feedback and reinforcements (Parent Ex. B at p. 4).

The December 2020 IESP included goals that targeted the student's ability to expand his repertoire of words, concepts, and expressions; follow complex directions involving spatial, temporal, and sequential concepts; increase his ability to problem solve by adopting the perspective of another and label cause-effect relationships; wait for instructions to be completed before beginning a task; increase his expressive language by making accurate predictions and relating personal events in the correct sequence; summarize grade-level material properly and identify the main idea and supporting details; retell a story using grammatically correct sentences including all relevant details; and express himself in an age-appropriate manner through five conversational turns (Parent Ex. B at pp. 6-7). The December 2020 IESP included additional goals designed to address the student's ability to answer literal and inferential questions related to text read, both verbally and in writing; produce clear and coherent writing; apply grade-level phonic and word analysis skills to read unfamiliar multisyllabic words; solve multistep word problems involving whole numbers, fractions and decimals using the four operations in which remainders must be interpreted; and increase his visual perceptual and visual motor skills in order to participate in classroom activities (id. at pp. 7-8).

In addition to the December 2020 IESP, the hearing record includes a February 27, 2024 progress report from HLER that described the student's needs at the time it was written (Parent Ex. F). The progress report indicated that the student's performance and ability to work independently were delayed due to his learning challenges (id.). More specifically, the progress report indicated that the student struggled to grasp and master skills and concepts and required "extra repetition and reinforcement to progress" (id.). According to the report, the student presented with significant delays in reading, comprehension, writing, and math skills (id.). With regard to reading, the progress note indicated that the student's skills were at the seventh-grade level and that he had difficulty independently reading a text and demonstrating comprehension (id.). Although the student could decode, he struggled to articulate what he had read or provide a summary (id.). The progress report noted that the student had a limited base of vocabulary and he required "constant review" to reinforce newly learned words (id.). It also noted that the student's reading delays negatively impacted him in other subjects (id.).

With respect to writing, the February 2024 progress report indicated that the student encountered significant challenges in spelling and vocabulary that made it difficult for him to effectively express his thoughts in writing (Parent Ex. F at p. 2). Although the student could

express his ideas verbally, he had difficulty translating them to writing and struggled with capitalization, punctuation, and spelling (*id.*). According to the progress report, with assistance to initiate a paragraph, the student could continue a thought while writing (*id.*). However, the progress report noted that the student's writing delays negatively affected him across all subjects, for example he had difficulty writing clear and coherent responses to his science homework (*id.*).

Turning to mathematics, the February 2024 progress report indicated that the student's skills were at a seventh-grade level (Parent Ex. F at p. 2). According to the progress report, the student required prompting and explanations to break down complex problems into manageable chunks, and he benefitted from guidance on various strategies to solve equations (*id.*). Session notes, written by one of the student's SETSS providers in January 2024, indicated that the student struggled with polynomials (Parent Ex. G at p. 1).

The February 2024 progress report characterized the student as a well-adjusted young man who demonstrated respect toward adults and was helpful in the classroom (Parent Ex. F at p. 3). The report indicated that the student enjoyed a positive social environment, maintained many friendships, and rarely got into trouble (*id.*). Although the student tended to become frustrated when learning new skills, he displayed maturity by managing his frustration and seeking assistance when needed (*id.*).

According to the progress report, the student's optimal learning style involved visual modalities and repetition with a preference for hands-on projects (Parent Ex. F at p. 2). The student benefitted from step-by-step diagrams and equations to aid with understanding and repetition, praise and encouragement were crucial to his learning process (*id.*).

2. SETSS from HLER

The hearing record indicates that HLER began providing the student with SETSS on September 13, 2024 (Parent Ex. H at p. 1). According to the HLER supervisor, the student's services were provided by five different providers, each of whom held a master's degree in special education, although he did not provide documentary evidence of their certifications (Tr. pp. 82-83, 85).

In addition to describing the student's needs, the February 2024 progress report from HLER included goals that targeted the student's ability to add, subtract, multiply and divide fractions, including those with variables; determine the slope and equation of a line; enhance executive functioning skills including task initiation, organization and time management; and respond to verbal and written literal and inferential questions in response to given texts (Parent Ex. F at p. 3). The January 2024 session notes and February 2024 progress report included evidence of the SETSS provider's efforts to deliver specially designed instruction to the student. For example, the January 2024 session note indicated that during the first week in January, the SETSS provider collaborated with the student on adding and subtracting polynomials (*id.*). The SETSS provider reported that the student encountered difficulties in properly aligning and combining like terms when performing these operations (*id.*). The SETSS provider explained that to address the student's challenges he provided step-by-step guidance on how to identify like terms and systematically perform addition and subtraction of polynomials (*id.*). The SETSS provider stated that he and the student organized terms vertically to ensure alignment and clarity and he

emphasized the importance of combining like terms accurately (id.). He also encouraged the student to practice adding and subtracting polynomials using various examples and to check his work carefully for any errors (id.). The SETSS provider recommended regular practice and the review of fundamental concepts to help the student improve his polynomial skills (id.).

For the second week of January 2024, the SETSS provider indicated that he worked with the student on multiplying polynomials (Parent Ex. G). The SETSS provider reported that the student encountered difficulty applying the distributive property and keeping track of all the terms when multiplying binomials or higher-order polynomials (id.). The SETSS provider explained that to assist the student he provided him with step-by-step guidance on how to systematically multiply each term in one polynomial by each term in the other, ensuring that all terms were accounted for and properly combined (id.). In addition, the SETSS provider reported that he and the student broke the multiplication process down into smaller steps and emphasized the importance of carefully distributing each term, and he encouraged the student to use mnemonic devices or visual aids to help remember the steps and to practice regularly to reinforce the concept (id.). The session note included a goal that targeted the student's ability to "proficiently expand, combine, or simplify polynomial expressions" (id.).

The February 2024 progress report stated that during guided reading sessions the SETSS provider taught and modeled strategies to assist the student and to develop his ability to answer literal and inferential questions (Parent Ex. F at p. 1). The SETSS provider also taught the student to highlight context clues and use graphic organizers (id.). The progress report indicated that to remediate the student's comprehension challenges the SETSS provider broke down complex tasks into smaller, more manageable sections and provided regular prompts to the student to summarize what he read (id.). According to the progress report, the SETSS provider also offered the student explicit instruction on inferential questioning techniques and story analysis and helped the student develop strategies for deeper comprehension (id.). The progress report stated that the student needed SETSS intervention to support him during tests to read passages and directions to "assure" comprehension (id.). The report further stated that the SETSS provider tailored remediation efforts to address the student's specific needs and challenges in reading comprehension (id.).

In addition, the February 2024 progress report indicated that the SETSS provider had implemented targeted interventions to assist the student with writing including strategies such as brainstorming, outlining, and revising and provided models and templates to scaffold the student's writing process (id.). The SETSS provider gave "guided writing cross curriculum instruction" using graphic organizers and provided guidance in creating an outline to write responses for his science class (id.). The SETSS provider also supplied the student with individualized support and feedback to improve his spelling, punctuation, and syntax skills through targeted practice and instruction (id.). In math, the progress note indicated that the SETSS provider used a multi-faceted approach to remediation that included providing additional practice and review questions to reinforce concepts, offering explicit instructions on problem solving strategies and chunking information (id.). The SETSS provider also used visual aids, manipulatives, and real-world examples (id.).

The February 2024 progress report also included examples of the progress the student had made during the first half of the 2023-24 school year. Initially, the progress report included a general statement that the student was making progress "toward age-appropriate goals and

objectives" (Parent Ex. F at p. 1). The progress report stated that although the student experienced delays in math, through repetition and personalized attention he demonstrated improved capabilities (Parent Ex. F at p. 2). More specifically, the progress report stated that the student demonstrated progress with respect to dealing with positive and negative integers, order of operations, and fractions (id. at p. 2).

It should be noted that the December 2020 IESP recommended that the student receive 10 sessions per week of SETSS along with related services of two 30-minute sessions per week of individual speech-language therapy, two 30-minute sessions per week of individual OT, and two 30-minute sessions per week of counseling services (Parent Ex. B at p. 9). The parent's enrollment agreement with HLER indicated that the agency would provide the student services at the frequency and duration listed in the student's last agreed upon IESP (Parent Ex. C at p. 1). However, at the impartial hearing, the parent's advocate requested funding for four periods per week of SETSS and RSAs for related services (Tr. pp. 67-68; 106). The advocate explained that although the student was "allowed to have ten" sessions per week of SETSS "he was only using four one hour a day, Monday through Thursday" (Tr. pp. 67-68). The HLER supervisor testified that the student received four sessions per week of SETSS from the agency during the 2023-24 school year (Tr. p. 82; see Tr. pp. 77-78). However, the timesheets submitted by HLER indicated that the student received four sessions of SETSS in September 2023, two sessions of SETSS in October 2023, three sessions of SETSS in November 2023, four sessions of SETSS in December 2023, and three sessions of SETSS in January 2024, for a total of sixteen sessions of SETSS for the first half of the 2023-24 school year (Parent Ex. H). The sessions ranged in length from 40 to 60 minutes (id.).

As detailed above and as noted by the IHO, chronologically, the student should have been in ninth grade for the 2023-24 school year. However, the February 2024 progress report indicated that the student was functioning academically at a seventh-grade level. Here, the hearing record included only one session note, covering the period from January 1, 2024 to January 14, 2024, which showed that the SETSS provider worked with the student on adding, subtracting, and multiplying polynomials (Parent Ex. G). There are no session notes showing that the SETSS provider addressed the student's deficits in reading or writing, which the progress note indicated negatively impacted him in other subject areas (id. at pp. 1, 2). In addition, there is no explanation in the hearing record as to why the parent's advocate requested four SETSS sessions per week rather than the ten hours previously recommended by the district and contracted for with HLER in the undated enrollment agreement for the 2023-24 school year (see Parent Ex. C). There is also no explanation for why the HLER supervisor testified that the student was receiving four sessions per week of SETSS when the timesheets entered into evidence showed that on average the student received one or less sessions per week. HLER's records show that three different providers supplied a total of 16 sessions of SETSS to the student for the first half of the school year and there is no evidence of coordination among the providers (see Parent Ex. H). By HLER's own account, the student has deficits in reading, writing, and math, and it is improbable that his needs could be appropriately addressed by providing him with, on average, less than 3 hours per month of specialized instruction. Therefore, based on the hearing record before me I find that the parent has

not met her burden of showing that HLER provided the student with specially designed instruction sufficient to meet his needs during the 2023-24 school year.^{8 9}

VII. Conclusion

Having determined that the parent failed to meet her burden that HLER was an appropriate unilateral placement for the student, the necessary inquiry is at an end.

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

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

**Dated: Albany, New York
September 9, 2024**

**CAROL H. HAUGE
STATE REVIEW OFFICER**

⁸ Moreover, although the HLER contract indicated that the student's services would be provided "in frequency and duration as listed in the last agreed upon IEP/IESP/FOFD" there is no evidence that the HLER provided the student with speech-language therapy, occupational therapy, or counseling services (see Parent Exs. B at p. 9; C at p. 1).

⁹ The district's request to reverse the IHO's order for it to conduct an evaluation of the student and develop an IEP or an IESP is without merit. The district does not dispute that the student is entitled to special education services in this case. Based on the evidence in the hearing record, the district last developed an IESP for the student in December 2020, and the district has not submitted any evidence showing that it has since evaluated the student. Therefore the IHO's conclusion that district is past the timeframe for conducting a reevaluation of the student and well beyond the annual review requirement for an IEP will not be disturbed. Although this is a dual enrollment case, the failure of the parent to request dual enrollment services does not, by itself, eliminate the district's obligation to evaluate the student and develop appropriate public school programming, the district and the CSE may not simply treat the student as if he had been declassified when he has not. Mere inaction by the parent does not establish that the parent made clear her intention to keep the student enrolled in the nonpublic despite needing special education services and would thus not be required to make a FAPE available in the public school ("Questions and Answers on Serving Children with Disabilities Placed by Their Parents in Private Schools" 80 IDELR 197 [OSERS 2022]; see also "Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the Individuals with Disabilities Education Act (IDEA) 2004 and New York State (NYS) Education Law Section 3602-c," Attachment 1 at p. 12, VESID Mem. [Sept. 2007], available at <https://www.nysed.gov/sites/default/files/special-education/memo/chapter-378-laws-2007-guidance-on-nonpublic-placements-memo-september-2007.pdf>). Therefore, given the potential length of time since the student's last evaluation and development of an educational program for the student, the IHO did not abuse his discretion by ordering the district to reevaluate the student and develop a new educational program. Further, the district is able to inquire whether the parent would like an IEP or IESP upon the completion of the reevaluation and issue RSAs if appropriate at that juncture; therefore, the portion of the IHO's decision ordering RSAs as needed will also not be disturbed.