The University of the State of New York

The State Education Department
State Review Officer
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No. 24-321

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

Appearances:
Kerben Law Group, PLLC., attorneys for petitioner, by Janaya S. Kerben, Esq..

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

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from a decision of an impartial hearing officer (IHO) which denied her request that respondent (the district) fund the costs of her daughter's private services delivered by Tachlis Ed Services, LLC (Tachlis) for the 2023-24 school year. The district cross-appeals from those portions of the IHO's decision which ordered it to conduct evaluations of the student and which dismissed the parent's request for compensatory education without prejudice. The appeal must be sustained. The cross-appeal must be 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 programing for students with disabilities under the IDEA (20 U.S.C. §§ 1400-1482), namely a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law

§ 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, State law provides that "[r]eview of the recommendation of the committee on special education may be obtained by the parent or person in parental relation of the pupil pursuant to the provisions of [Education Law § 4404]," which effectuates the due process provisions called for by the IDEA (Educ. Law § 3602-c[2][b][1]). Incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

III. Facts and Procedural History

A CSE convened on December 14, 2021 to develop an IESP for the student to be implemented on the same date (Parent Ex. B at p. 1). The December 2021 CSE found the student eligible for special education as a student with a speech or language impairment and recommended that the student receive three periods per week of direct group special education teacher support services (SETSS) to be delivered in Yiddish in a separate location, and three 30-minute sessions per week of individual speech-language therapy to be delivered in English in a separate location (id. at pp. 1, 7).[1, 2] The IESP indicated that the student was "Parentally Placed in a Non-Public School" (id. at p. 10).

As relevant to the 2023-24 school year at issue in this matter, by notice dated May 8, 2023, the parent requested equitable services from the district (Parent Ex. C at p. 1). The parent signed an agreement with Tachlis "[e]ffective February 20, 2024," which provided that the company would "make every effort to implement" the services set forth in the December 2021 IESP "to whatever extent possible" and that the parent would be liable to the company for the costs of the services in the event she was unable to secure funding from the district "or elsewhere" (Parent Ex. E).[3] The agreement set forth an hourly rate for SETSS (id. at p. 2). According to the hearing record, the student began receiving private SETSS on February 20, 2024 (Parent Ex. G at ¶ 12).

A. Due Process Complaint Notice

In a due process complaint notice dated March 15, 2024, the parent, through an attorney, alleged that the district failed to provide the student a free appropriate public education (FAPE) and/or equitable services for the 2023-24 school year (Parent Ex. A at p. 1).[4] The parent asserted that the district had not developed an IESP since December 14, 2021, and that the district failed to provide and implement a program for the 2023-24 school year (id. at pp. 1-2). The parent also alleged that she was unable to find a special education provider for the student at the district's standard rate but found a provider seeking an enhanced rate (id. at p. 2). As relief, the parent

[1] The student's eligibility for special education as a student with a speech or language impairment is not in dispute (see 34 CFR 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

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

[3] Tachlis is a private corporation and has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

[4] The hearing record reflects that a due process complaint notice was filed on December 20, 2023, on behalf of the parent by an advocate, which related to the student's speech-language therapy services (Tr. pp. 3-11). The parent testified that she did not speak to the advocate, but recalled signing a form that was presented to her by the speech-language therapist (Tr. pp. 9-10). The parent further testified that the speech-language therapist subsequently accepted payment from the district via a related services authorization (RSA) and began providing services to the student on November 21, 2023 (Tr. pp. 7, 8, 11, 12, 16). The parent also testified that she was unaware that the advocate had filed a due process complaint notice on her behalf (Tr. pp. 10-11). During this discussion, the parent withdrew the December 20, 2023 due process complaint notice (Tr. pp. 10-11, 17).

requested a pendency hearing and a final decision awarding direct funding of three sessions per week of SETSS at an enhanced rate for the entire 10-month 2023-24 school year (id.).[5]

B. Impartial Hearing Officer Decision

An impartial hearing convened before the Office of Administrative Trials and Hearings (OATH) on May 15, 2024 (Tr. pp. 27-115).[6] In a decision dated June 28, 2024, the IHO found that the district conceded that it had failed to provide the student with equitable services and, as a result, the student was denied a FAPE (IHO Decision at pp. 7-8). The IHO then determined that the parent did not meet her burden of demonstrating the appropriateness of her unilaterally-obtained services (id. at pp. 8-9). Specifically, the IHO found that the parent did not present evidence of the student's needs and did not provide any proof that the private provider met the student's needs (id. at p. 8). In addition, the IHO noted that the representative from Tachlis was not credible and that her testimony was not supported by documentary evidence of assessments conducted, services provided to the student, or progress made by the student (id.). The IHO also found that the student's provider was not certified to teach the student's age group, and that the representative from Tachlis was not qualified to supervise the provider's delivery of Orton-Gillingham based reading instruction (id. at p. 9). The IHO further determined that the parent did not provide evidence of the services the student received or of her "current level of academic performance, instructional deficits, instructional strategies and methods used to develop those deficits, assessments or benchmarks towards progress or attainment of skill" (id.). For those reasons, the IHO determined that the parent failed to meet her burden (id.). The IHO also addressed equitable considerations and found that the IESP the parent sought to implement was "outdated, and potentially unnecessary" (id.). The IHO further determined that the parent's request for an enhanced rate for services was unsupported by the hearing record (id.).

Turning to the parent's other requested relief, the IHO denied compensatory education finding that the parent did not present information on how the student lost educational opportunity or data that informed a compensatory relief package (IHO Decision at p. 10). The IHO further characterized the "limited evaluative record" as consisting of "subjective observational data and not any objective metrics, and the outdated, potentially unnecessary IESP," which did not sufficiently detail the student's needs or deficiencies based on lack of services (id.). The IHO determined that the parent's failure to "share data from the purported informal metrics gathered by the service provider to help forecast any missed educational opportunity" undermined her claim for compensatory education (id.). The IHO ordered the district to conduct a psychoeducational evaluation and a speech-language evaluation within 60 days to determine the student's continued eligibility and need for special education (id.). The IHO further ordered the district to convene a CSE to review the results of the evaluations within 30 days of their completion (id. at p. 11). The

[5] The parent also requested an award of all related services on the IESP for the entire 10-month 2023-24 school year, along with RSAs for such services if accepted by the provider, or direct funding to each of the chosen providers at the rates they charge (Parent Ex. A at p. 2). According to the IHO's decision, it was determined at the prehearing conference that "the sole issue for resolution during [the] hearing would be SETSS services and not all other related services, as written in the initial complaint" (IHO Decision at p. 3; see Tr. pp. 17, 52).

[6] The parties initially convened on April 10, 2024 for a "discussion of -- actually two due process complaints" (Tr. pp. 1-26).

IHO dismissed the parent's request for compensatory education "without prejudice to allow for pending evaluation and CSE reconvene" (id.).

IV. Appeal for State-Level Review

The parent appeals, alleging that the IHO erred in finding that the parent's unilaterally-obtained SETSS were not appropriate.[7] The parent asserts that the IHO failed to consider all of the parent's evidence and that her decision was not based on the complete hearing record and did not comport with procedural due process. The parent further argues that the IHO erred in finding that equitable considerations did not support an award of direct funding for the unilaterally obtained SETSS and also asserts that she was entitled to relief under pendency. Lastly, the parent contends that the IHO erred in failing to award compensatory education to be delivered by her chosen provider at the contracted rate. As relief, the parent requests direct funding for SETSS and for a bank of hours of compensatory education.

In an answer with cross-appeal, the district argues that the IHO's decision was based upon a fair and complete hearing record, that the IHO correctly determined that the parent failed to demonstrate the appropriateness of her unilaterally-obtained SETSS and that equitable considerations warranted a denial of funding, and that the IHO correctly denied the parent's requested relief of direct funding for SETSS and compensatory education. As for a cross-appeal, the district challenges the IHO's award of evaluations and order to reconvene the CSE, arguing that the parent did not request this relief in her due process complaint notice. The district also asserts that the IHO erred in dismissing the parent's claim for compensatory education without prejudice.

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

[7] The parent filed a "Verified Petition" with the Office of State Review on August 5, 2024. The regulations governing practice before the Office of State Review were amended (see N.Y. Reg., Sept. 28, 2016, at pp. 37-38; N.Y. Reg., June 29, 2016, at pp. 49-52; N.Y. Reg., Jan. 27, 2016, at pp. 24-26) to, among other things, align with federal terminology and change the name of the pleading to initiate a review from "petition" to "request for review" (8 NYCRR 279.4[a]; see 34 CFR 300.515[b]).

services is made (Educ. Law § 3602-c[2]).[8] "Boards of education of all school districts of the state shall furnish services to students who are residents of this state and who attend nonpublic schools located in such school districts, upon the written request of the parent" (Educ. Law § 3602-c[2][a]). In such circumstances, the district of location's CSE must review the request for services and "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an [IEP]" (Educ. Law § 3602-c[2][b][1]). The CSE must "assure that special education programs and services are made available to students with disabilities attending nonpublic schools located within the school district on an equitable basis, as compared to special education programs and services provided to other students with disabilities attending public or nonpublic schools located within the school district (id.).[9] 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

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 Tachlis 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

[8] State law provides that "services" includes "education for students with disabilities," which means "special educational programs designed to serve persons who meet the definition of children with disabilities set forth in [Education Law § 4401(1)]" (Educ. Law § 3602-c[1][a], [d]).

[9] State guidance explains that providing services on an "equitable basis" means that "special education services are provided to parentally placed nonpublic school students with disabilities in the same manner as compared to other students with disabilities attending public or nonpublic schools located within the school district" ("Chapter 378 of the Laws of 2007–Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the Individuals with Disabilities Education Act (IDEA) 2004 and New York State (NYS) Education Law Section 3602-c," Attachment 1 (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.

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

A. Unilaterally-Obtained SETSS

Turning to a review of the appropriateness of the unilaterally-obtained services, the federal standard for adjudicating these types of disputes is instructive. A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998]). Citing the Rowley standard, the Supreme Court has explained that "when a public school system has defaulted on its obligations under the Act, a private school placement is 'proper under the Act' if the education provided by the private school is 'reasonably calculated to enable the child to receive educational benefits'" (Carter, 510 U.S. at 11; see 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,

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

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. Student's Needs

To address the appropriateness of the unilaterally-obtained services, it is initially necessary to describe the student's needs, and thereafter, to review the instruction delivered to the student to determine if the methods and strategies used constituted specially designed instruction.

As noted by the IHO, the hearing record contains little evidence of the student's needs, other than the December 14, 2021 IESP, which for all intents and purposes, expired more than two years (December 2022) before the parent filed the March 2024 due process complaint notice (compare Parent Ex. B at p. 1, with Parent Ex. A at p. 1). While the IHO correctly found that the hearing record failed to contain any evidence that the district evaluated the student or engaged in educational planning leading up to the 2023-24 school year at issue, the IHO erred in faulting the

parent for the lack of evidence of the student's needs. It has been found that it is the district's responsibility to identify the student's needs through the evaluation process and its burden to present evidence regarding the student's needs during the impartial hearing (see A.D. v. Bd. of Educ. of City Sch. Dist. of City of New York, 690 F. Supp. 2d 193, 208 [S.D.N.Y. 2010] [finding that a unilateral placement was appropriate even where the private school reports were alleged by the district to be incomplete or inaccurate and finding that the fault for such inaccuracy or incomplete assessment of the student's needs lies with the district]). The IHO cannot shift the responsibility to evaluate the student onto the parent or Tachlis, neither of which have that responsibility under IDEA. Consequently, the IHO's findings that the parent's or Tachlis' failure to establish the student's needs in this matter, by evaluation or otherwise, weighs against finding that the unilaterally-obtained SETSS was appropriate, is inapposite.

The December 14, 2021 IESP, which was developed when the student was seven years old, reveals that the evaluative information obtained by the district at that time only included parent and teacher reports (Parent Ex. B at pp. 1-2).[11]

According to the December 2021 IESP, the student's preferred learning style appeared to be "kinesthetic [and] tactile" (Parent Ex. B at p. 2 The IESP indicated that the student was a bilingual student who presented with deficits related to attention span, receptive language, and expressive language and noted the student had difficulty completing tasks without redirection (id. at pp. 1, 2). In terms of the student's executive functioning needs and the impact of those needs on her academics, the IESP stated the student was "often sidetracked by things on the table, things in a nearby closet, or noises from outside the room" and further noted that the student demonstrated difficulty in her ability to focus on her teacher's lesson during circle time (id. at p. 1). The IESP described the student as "somewhat immature and generally happy" (id.).

With respect to the student's receptive and expressive language skills, the IESP reflected in the area of receptive language skills, the student demonstrated progress in her ability to identify spatial concepts; follow one step directions; identify target vocabulary by descriptions; match associations, e.g., baby/bottle; comprehend "before/after concepts"; and arrange three-to-four step story cards in sequential order (Parent Ex. B at p. 2). Regarding expressive language skills, the IESP indicated the student expressed herself using short, choppy sentences, often omitted the subject of a sentence which made her difficult to understand, demonstrated continuous challenges producing pronouns in conversational speech including use of the pronoun "I" when referring to herself, and had difficulty "telling a personal narrative or story in a manner easily understood by the listener" (id. at p. 1). However, the IESP noted the student "demonstrated progress using taught pronouns during sessions" (id. at p. 2). The IESP further reflected the student had not learned to express her thoughts and feelings in a verbally appropriate manner (id.).

[11] The parent testified she did not know and did not remember if the student was evaluated again after the age of two years old, but she recalled she tried to get her occupational therapy (OT) services, but the student did not end up getting any OT services (Tr. pp. 98-99). The parent testified she further recalled that the student received a formal evaluation from the district for speech-language therapy services, but she did not remember when that evaluation occurred, how old the student was, or if the evaluation was conducted prior to the December 2021 CSE meeting (Tr. pp. 98-100).

Regarding the student's social/emotional skills, the IESP indicated the student socialized with peers appropriately, shared toys and classroom materials, and transitioned easily when requested, specifically noting the student presented with "no social needs that require[d] intervention of special education at th[at] time" (Parent Ex. B at p. 2). However, the IESP reflected the student could not explain the rules of a game to others (id.). In terms of physical development needs, the IESP noted the student was in good health, and had "[a]ge appropriate gross and fine motor development" (id. at p. 3).

The IESP identified the modifications and resources needed to address the student's management needs which included among other things: pre-teaching/review; movement breaks; extended time; visuals; audio books; graphic organizes; directions simplified; check-ins for understanding; and positive reinforcement (Parent Ex. B at p. 3). The section of the IESP describing the effect of her needs on involvement and progress in the general education curriculum indicated that "[d]ue to the student's expressive, receptive and focusing weaknesses, additional support [wa]s required to adequately access the general education curriculum" (id. at p. 4). The December 2021 CSE recommended annual goals that targeted the student's ability to follow single-step verbal direction to improve her attention span; improve her expressive and receptive language skills; demonstrate understanding and organization of base 10; identify the math concept and process and sequence involved in solving a word problem; demonstrate correct use of punctuation and grammar in writing; and identify text structure or author's purpose and main idea to summarize age-appropriate material (id. at pp. 4-6). Finally, as noted above, the December 2021 CSE recommended three periods per week of direct, group SETSS and three 30-minute sessions per week of individual speech-language therapy (id. at pp. 1, 7).

2. Appropriateness of SETSS Delivered by Tachlis

During the 2023-24 school year (fourth grade) the student attended a nonpublic school (Tr. pp. 41, 49-50; Parent Ex. C). To determine the sufficiency of the SETSS provided to the student during the 2023-24 school year by Tachlis, I will turn to the testimony of the educational director (director) of Tachlis, the parent's testimony, and the documentary evidence in the hearing record (see Tr. pp. 41-42).

The director of Tachlis provided affidavit testimony that, on February 20, 2024, a certified special education teacher began the delivery of three hours per week of SETSS to the student (Parent Ex. G at ¶¶ 11-14; see Tr. p. 65).[12] The parent testified that the student received her SETSS at home after school (Tr. pp. 13-15, 41-42).

The director testified that prior to working with a student the SETSS provider would "speak[] to the teacher and in some cases even the principal and the service coordinated [sic] in

[12] Notwithstanding that the documentation included in the hearing record to demonstrate the SETSS provider's qualifications is, as the IHO described it, "a barely visible copy" of her credentials (IHO Decision at p. 10; see Parent Ex. H), the director testified the SETSS provider had a master's degree and an effective teaching certificate to teach students with disabilities (Tr. pp. 65-66, 74-76). Moreover, it is well settled that a parent need not engage the services of a certified special education teacher—or, as here, a SETSS provider—in order to qualify for reimbursement or direct funding of those services. Therefore, whether the SETSS provider held a teaching certificate in the student's age group would not be determinative in this matter.

the school to find out about the child" and also speak to the student's mother (Tr. p. 76-77, 79). The provider would then perform assessments like the Fountas and Pinnell assessment and assessments in math, (Tr. pp. 77, 78). According to the director, the student was performing at level "L" on Fountas and Pinnell, which was approximately a second-grade level (Tr. pp. 77-78). The director assumed that the student's math skills were assessed by the provider using her own assessment based off what the teacher was teaching in class or using the class tests (Tr. p. 78). She reported that the student's language and social skills would be assessed informally (Tr. p. 78). According to the director's testimony, the student's SETSS provider was working on her goals related to reading comprehension, language, math, and social/emotional skills (Tr. p. 80).

According to the April 2024 Tachlis progress report, the student, who was in fourth grade at the time, struggled tremendously in the classroom, had extreme difficulty attending to tasks, and was constantly distracted (Parent Ex. F at p. 1). With respect to language, the progress report indicated the student had difficulty following directions, completing tasks accurately, paying attention to her lessons even when stimuli were minimized, and often asked unrelated questions and commented on her surroundings inappropriately (id. at p. 2). The progress report reflected two classroom participation goals which targeted the student's ability to remain focused when completing multi-step tasks and to complete such tasks correctly and to participate in classroom discussion (id. at p. 3).

Regarding reading skills, the Tachlis progress report reflected that the student's reading skills were two years below grade level (second grade), the student was reading on an "independent level 'L' with 70 [percent] accuracy," and the student struggled to understand the concepts of what she read and often skipped and mispronounced words (Parent Ex. F at p. 1). The student had difficulty reading and identifying grade level sight words, got distracted by her surroundings and skipped sentences and even paragraphs while reading, and struggled with content specific vocabulary (id.). In addition, the student struggled with spelling (id.). Although she was able to spell words with a phonetic base, she could not remember rules or how to spell words with irregular patterns (id.). To address the student's reading needs, the report reflected the following methods, techniques and programs were being used: Orton-Gillingham, the Read Bright program, and multisensory instruction (id.). The report included two reading goals which targeted the student's need to "increase her fluency and accuracy when reading texts that include[d] non-phonetic based and multi-syllabic words" and to "increase her sight word vocabulary" by identifying and using sight words in a sentence (id.).

Turning to reading comprehension, the Tachlis April 2024 progress report characterized the student's skills as "compromised" (Parent Ex. F at p. 2). The report indicated that the student could independently identify the character and setting when reading a short story (Parent Ex. F at p. 2). The report noted, however, that the student struggled with answering higher-level thinking questions such as inferences and predictions; had difficulty identifying the climax, theme, conflict and resolution to a story; and often confused the sequence of events and omitted main events (id.). The Tachlis progress report included three goals that targeted the student's reading comprehension needs related to the student's ability to answer inferencing and predicting questions, identify the theme, climax, and conflict/resolution in a story, and sequence the events in a story (id.). The report stated that, in addition to the Reading Bright program, visual aids, graphic organizers, and scaffolded learning were used to help the student progress and attain her goals (id.).

With regard to mathematics, the Tachlis progress report indicated the student presented with significant delays evidenced by her difficulty adding double digits "that require[d] carrying" and with subtraction problems that required borrowing (Parent Ex. F at p. 2). The report reflected the student struggled with understanding multiplication and was only familiar with the "0, 1, 2, 5, [and] 10-times tables by rote" (id.). The report noted that due to the student's delay in comprehension skills, she struggled to complete math word problems (id.). According to the report, the student could not identify key words in math word problems to tell whether to use addition or subtraction and even when presented with visual aids and support, the student struggled to complete word problems (id.). To address the student's needs in math, the report indicated the student's provider employed the following interventions: the "Making Math Real" program, use of manipulatives and counters, and scaffolded learning and direct instruction (id.). The report included three math goals which targeted the student's ability to compute double digit addition and subtraction examples, gain an understanding of multiplication concepts and complete single digit multiplication problems, and complete math word problems (id.).

In terms of receptive and expressive language skills, the Tachlis progress report reflected the student had difficulty expressing her thoughts and feelings which affected both academic and social aspects within the classroom (Parent Ex. F at p. 1). According to the report, due to the student's difficulty focusing, she often mixed up her teacher's directions and "le[ft] out some parts" which affected her ability to accurately complete tasks throughout the school day (id. at p. 2). However, the report indicated that, in the area of receptive language skills, the student made progress in her ability to follow two step basic directions with prompts but she "still struggle[d] with tasks that contain[ed] more than [one] element as well as conditional directions" (id. at p. 3). The progress report noted that the student struggled with social language in the classroom and due to her comprehension difficulties, she had trouble participating in class discussions and often lost focus during classroom conversations (id.). According to the report, to address the student's needs related to language development, the SETSS provider used visual aids, modified instruction, checklists, role playing, and modeling (id.).

Turning to the student's social development, in contrast to the December 2021 IESP, the April 2024 Tachlis progress report indicated the student often struggled when conversing with her peers on an age-appropriate level noting her interactions with peers were "somewhat immature" and she often commented on how her peers did not understand what she was saying (compare Parent Ex. B at p. 2, with Parent Ex. F at p. 3). According to the report, the student was often overwhelmed by her emotions, had difficulty expressing her thoughts and feelings, struggled to name her emotions, and had difficulty problem solving within the classroom (Parent Ex. F at p. 3). The report indicated that the SETSS provider used the following interventions to address the student's social/emotional needs: a social thinking curriculum, social stories, and role playing and modeling (id.). The report further noted two goals which targeted the student's need to problem solve simulated problems and problems within the classroom and to identify and name emotions she was experiencing (id.).

The foregoing evidence shows that the SETSS delivered by Tachlis were specially designed to meet the student's needs.

Turning to the IHO's concerns regarding a lack of evidence of progress, it is well settled that a finding of progress is not required for a determination that a student's unilateral placement

is adequate (Scarsdale Union Free Sch. Dist. v. R.C., 2013 WL 563377, at *9-*10 [S.D.N.Y. Feb. 4, 2013] [noting that evidence of academic progress is not dispositive in determining whether a unilateral placement is appropriate]; see M.B. v. Minisink Valley Cent. Sch. Dist., 523 Fed. App'x 76, 78 [2d Cir. Mar. 29, 2013]; D.D-S. v. Southold Union Free Sch. Dist., 506 Fed. App'x 80, 81 [2d Cir. Dec. 26, 2012]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 486-87 [S.D.N.Y. 2013]; C.L. v. Scarsdale Union Free Sch. Dist., 913 F. Supp. 2d 26, 34, 39 [S.D.N.Y. 2012]; G.R. v. New York City Dep't of Educ., 2009 WL 2432369, at *3 [S.D.N.Y. Aug. 7, 2009]; Omidian v. Bd. of Educ. of New Hartford Cent. Sch. Dist., 2009 WL 904077, at *22-*23 [N.D.N.Y. Mar. 31, 2009]; see also Frank G., 459 F.3d at 364). However, while not dispositive, a finding of progress is, nevertheless, 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]).

According to the parent's testimony, since the student began receiving SETSS, the student's teachers at her nonpublic school saw "a huge, huge difference" and "huge progress," whereas in the past they had reported that the student was "really, really struggling" (Tr. p. 57). Specifically, the parent testified that the teachers reported tremendous progress in terms of the student's reading comprehension, reading in general, and math as it related to reading comprehension "because math is also word problems" (Tr. pp. 56-57). The educational director testified by affidavit that, as a result of her SETSS, the student "ha[d] already shown signs of progress" (Parent Ex. G ¶ 20). With respect to the 2023-24 school year, the educational director testified that the student had "made fantastic progress" and the student's principal, service coordinator, and teachers from her school and her parent "were, like, wow. This [student] has made so much progress in so little time" (Tr. p. 80).

To be sure the evidence of progress is subjective and not robust, however, given that the student had only been receiving the SETSS for less than three months as of the date of the impartial hearing on May 15, 2024, and given that progress is not dispositive, I do not find the lack of additional evidence to be determinative in this instance.

In summary, the hearing record includes testimony from the parent's witnesses and the April 2024 progress report which demonstrate that the SETSS provided to the student were designed to address her needs through specific goals, strategies, and accommodations and, therefore, this evidence supports a finding that the parent's unilaterally-obtained SETSS were appropriate (see Parent Ex. F at pp. 1-3). Accordingly, the IHO erred in determining that the SETSS provided by Tachlis were not appropriate and that finding must be reversed.

B. Equitable Considerations

The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]; L.K. v. New York City Dep't of Educ., 674 Fed. App'x 100, 101 [2d Cir. Jan. 19, 2017]). With respect

to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014] [identifying factors relevant to equitable considerations, including whether the withdrawal of the student from public school was justified, whether the parent provided adequate notice, whether the amount of the private school tuition was reasonable, possible scholarships or other financial aid from the private school, and any fraud or collusion on the part of the parent or private school]; C.L., 744 F.3d at 840 [noting that "[i]mportant to the equitable consideration is whether the parents obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA"]).

Out of an abundance of caution, the IHO addressed equitable considerations and found that the IESP the parent sought to implement was "outdated, and potentially unnecessary" (IHO Decision at p. 9). The IHO further determined that the parent's request for an enhanced rate for services was unsupported by the hearing record (id.).

Regarding the IHO's concern about the IESP being outdated and potentially unnecessary, the timing of the IESP was a disputed matter and the district did not defend its failure to reconvene to develop an IESP for the student for the 2023-24 school year. In addition, the district did not declassify the student and, during the impartial hearing, did not contest the student's entitlement to services in accordance with the December 2021 IESP (Tr. pp. 38, 40, 103). Accordingly, these factors do not weigh against the parent in this instance.

As for the rate sought, among the factors that may warrant a reduction in tuition under equitable considerations is whether the frequency of the services or the rate for the services were excessive (see 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]). An IHO may consider evidence regarding whether the rate charged by the private agency was unreasonable or regarding any segregable costs charged by the private 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).

The district argued during the impartial hearing and in its answer with cross-appeal that the rate charged by Tachlis was unreasonably excessive. In her decision, the IHO stated that she "defer[ed] to the [d]istrict's proposed service provision rate" and found that the parent "did not present a clear, coherent case for . . . how overhead costs [we]re reasonably 125% of service costs" (IHO Decision at p. 9). As a result, the IHO denied the request for an enhanced rate (id.).

The parent's contract with Tachlis set the hourly rate for SETSS at $225 per hour (Parent Ex. E at p. 2). The educational director testified that the hourly rates set forth in the contract with the parent included $100 per hour paid to the SETSS provider (Tr. p. 64). The director indicated that the total rates included "one-on-one supervision, educational resources and support, professional development and materials, taxes, administrative costs and overhead costs" as well as "whichever resources, educational resources and materials, necessary for this child" (Parent Ex. G ¶ 9; see Tr. p. 83).

An excessive cost argument focuses on whether the rate charged for a service was reasonable and requires, at a minimum, evidence of not only the rate charged by the private provider but evidence of reasonable market rates for the same or similar services. During the impartial hearing, the district argued that the rate charged by Tachlis was "excessive and not an appropriate rate," that the parent failed to demonstrate that the rate was reasonable, and that "the appropriate rate [wa]s closer to the $100 per hour that [wa]s paid to the teacher" (Tr. pp. 39, 102); however, the district presented no evidence regarding the reasonableness of the rate charged by Tachlis. According to the IHO's decision, she deferred to the district's argument, however, in the absence of any reliable documentary or testimonial evidence regarding the reasonableness of the costs of the SETSS provided by Tachlis, the IHO's finding that the hourly rate charged was not reasonable lacks support in the hearing record (see IHO Decision at p. 9).

The district does not raise any additional equitable considerations as grounds for a reduction or denial of relief. Based on the foregoing, the IHO erred in denying the parent's request for direct funding to Tachlis for the provision of three hours per week of SETSS at a rate of $225 per hour during the 2023-24 school year on or after February 20, 2024.

C. Compensatory Education

Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). The purpose of an award of compensatory education is to provide an appropriate remedy for a denial of a FAPE (see E.M., 758 F.3d at 451; P. v. Newington Bd. of Educ., 546 F.3d 111, 123 [2d Cir. 2008] [holding that compensatory education is a remedy designed to "make up for" a denial of a FAPE]; see also Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 456 [2d Cir. 2015]; Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005] [holding that, in fashioning an appropriate compensatory education remedy, "the inquiry must be fact-specific, and to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"]; Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1497 [9th Cir. 1994]). Accordingly, an award of compensatory education should aim to place the student in the position he or she would have been in had the district complied with its obligations under the IDEA (see Newington, 546 F.3d at 123 [holding that compensatory education awards should be designed so as to "appropriately address[] the problems with the IEP"]; see also Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1289 [11th Cir. 2008] [holding that "[c]ompensatory awards should place children in the position they would have been in but for the violation of the Act"]; Bd. of Educ. of Fayette County v. L.M., 478 F.3d 307, 316 [6th Cir. 2007] [holding that "a flexible approach, rather than a rote hour-by-hour compensation award, is more likely to address [the student's] educational problems successfully"]; Reid, 401 F.3d at 518 [holding that compensatory education is a "replacement of educational services the child should have received in the first place" and that compensatory education awards "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA"]).

There is no dispute between the parties that the student was entitled to the SETSS recommended in the December 2021 IESP during the 2023-24 school year and that the parent did not unilaterally obtain services until February 20, 2024. The parent and the director of Tachlis testified that, prior to obtaining SETSS from Tachlis, the district had not sent a provider to deliver

the student's services and the parent could not find a provider (Tr. p. 81; Parent Ex. I at ¶¶ 10-12). In her affidavit testimony, the parent requested "makeup hours" for the SETSS sessions missed from September 2023 through February 2024 so the student could "catch up and succeed in school" (Parent Ex. I ¶ 17). The director testified that she believed the student would benefit from compensatory education to make-up for the lack of services for the period of September 2023 through February 2024, opining that "[i]f [the student] would be able to use that over the summer, . . . that would give her a very good boost to be able to go into the next grade . . . . [o]n a stronger foothold" (Tr. pp. 81-82).

With that said, on appeal, the parent does not specifically request that her chosen private provider deliver compensatory education and there is no evidence that Tachlis could deliver the additional sessions of SETSS. In most cases, the district, as the party responsible to implement special education services in the first place, should be directed to carry out the remedial relief ordered by an administrative hearing officer. Thus, from the first day of the 10-month 2023-24 school year through February 19, 2024, the evidence in the hearing record supports an award of up to three hours per week of compensatory SETSS to be delivered by the district. The parent calculates that this totals 48 hours of SETSS.[13] The parent does not specify how the total of 48 hours was reached but, taking into account three sessions per week over the period of September 2023 through February 2024, I find no basis to award an amount less than that requested.

D. Additional Relief - Evaluations and CSE Reconvene

Finally, the district cross-appeals from the IHO's order for the district to conduct a "formal psychoeducational and speech and language evaluation" for the student and to "convene a CSE to incorporate the results and findings from the evaluation within thirty (30) days of completing its evaluation," as the parent never requested such relief, and requests that the order to conduct evaluations and reconvene the CSE be annulled (see IHO Decision at pp. 10-11; Parent Ex. A at p. 2).

An IHO generally has broad authority to fashion appropriate equitable relief (see, e.g., Mr. and Mrs. A v. New York City Dep't of Educ., 769 F. Supp. 2d 403, 422-23, 427-30 [S.D.N.Y. 2011]; see Forest Grove v. T.A., 129 S.Ct. 2484 [2009]); however, an IHO should ensure that equitable relief awarded is designed to remedy an issue that was not raised. Generally, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). Under the IDEA and its implementing regulations, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[i][7][i][a]; [j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]). With respect to relief, State and federal regulations require the due process complaint notice state a "proposed resolution

[13] The IHO found that the parent "did not state a direct case for how many hours were missed (IHO Decision at p. 10); however, there is no dispute that the student did not receive three hours per week of SETSS for the period of September 2023 through February 2024, which is sufficient to establish a quantitative award.

of the problem to the extent known and available to the party at the time" (8 NYCRR 200.5[i][1] [emphasis added]; see 20 U.S.C. §1415[b][7][A][ii]; 34 CFR 300.508[b]). Moreover, it is essential that an IHO disclose his or her intention to reach an issue which the parties have not raised as a matter of basic fairness and due process of law (Application of a Child with a Handicapping Condition, Appeal No. 91-40; see John M. v. Bd. of Educ., 502 F.3d 708 [7th Cir. 2007]).

Review of the parent's March 12, 2024 due process complaint notice reveals that the parent did not request an order for the district to conduct evaluations or an order for the district to reconvene the CSE (see generally Parent Ex. A). Additionally, as noted above, the parent has not disagreed with the district's educational programming for the student, at least as part of this proceeding, and was merely seeking that the services recommended in the December 2021 IESP be implemented (id.). Based on the foregoing, the IHO's award ordering the district to evaluate the student did not address issues raised in the present matter, and therefore the district's cross-appeal on this point will be sustained.

Nevertheless, the district is reminded of its obligations in that generally a district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]).

The district is similarly reminded that the CSE is obligated by law and regulation to conduct an annual review for the student and there is some evidence that as of the filing of the due process complaint notice in this matter that the CSE had not conducted such review since its December 2021 meeting. Accordingly, while the parent did not seek a reconvene of the CSE as a remedy in this instance, the district nonetheless is required, even absent an order to do so, to fulfill its obligation to convene for the student's annual review in accordance with the aforesaid statutory and regulatory framework.

VII. Conclusion

Based on the foregoing, the parent sustained her burden of demonstrating the appropriateness of the unilaterally-obtained SETSS from Tachlis. As for equitable considerations, the evidence in the hearing record does not support the IHO's findings and denial of direct funding at the rate requested by the parent. In addition, the parent is entitled to 48 hours of compensatory education for missed SETSS to be provided by the district. Lastly, the IHO erred in ordering the district to conduct evaluations and to convene a CSE meeting.

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision dated June 28, 2024, is modified by vacating those portions which ordered the district to conduct a psychoeducational evaluation and speech-language therapy evaluation and to convene a CSE meeting; and

IT IS FURTHER ORDERED that the IHO's decision dated June 28, 2024, is modified by reversing those portions which found that the parent did not meet her burden to prove that the unilaterally-obtained SETSS from Tachlis were appropriate, and which denied the parent's request for the district to fund the unilaterally-obtained SETSS delivered by Tachlis during the 2023-24 school year; and

IT IS FURTHER ORDERED that, upon proof of delivery, the district shall directly fund the costs of up to three hours per week of SETSS delivered to the student by Tachlis during the 2023-24 school year on or after February 20, 2024; and

IT IS FURTHER ORDERED that, unless the parties otherwise agree, the district shall provide the student with 48 hours of compensatory education for missed SETSS.

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

CAROL H. HAUGE
STATE REVIEW OFFICER