



The University of the State of New York

The State Education Department

State Review Officer

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No. 24-347

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 Emily A. McNamara, 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 the decision of an impartial hearing officer (IHO) which denied her request for respondent (the district) to fund the costs of her son's unilaterally-obtained special education teacher support services (SETSS) delivered by Succeed Support Services, LLC (Succeed) and her son's unilaterally-obtained speech-language therapy services delivered by Headway Services (Headway) for the 2023-24 school year. The district cross-appeals from the IHO's decision. The appeal must be dismissed. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

When a student who resides in New York is eligible for special education services and attends a nonpublic school, Article 73 of the New York State Education Law allows for the creation of an individualized education services program (IESP) under the State's so-called "dual enrollment" statute (see Educ. Law § 3602-c). The task of creating an IESP is assigned to the same committee that designs educational 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[a]). 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

In this case, the evidence in the hearing record reflects that, a CSE met on March 30, 2023, and finding the student eligible to receive special education as a student with an other health impairment, developed an IESP for the student (March 2023 IESP) with a projected

implementation date of September 6, 2023 and a projected annual review date of May 30, 2024 (see Dist. Ex. 3 at p. 1). The March 2023 CSE recommended that the student receive five periods per week of SETSS in a group (Yiddish), two 30-minute session per week of individual occupational therapy (OT) (English), and one 30-minute session per week of counseling services in a group (Yiddish) (id. at p. 10).¹ At the March 2023 CSE meeting, the parent expressed concerns with the student's expressive language skills and requested a speech-language therapy evaluation to determine if the student was eligible for speech-language therapy services (id. at p. 3).

On May 3, 2023, the district conducted a speech-language evaluation of the student, which included the administration of the Preschool Language Scales, Fifth Edition (PLS-5); the Clinical Evaluation of Language Fundamentals-5 (CELF-5); the Goldman-Fristoe Test of Articulation-3 (GFTA-3); the Crowley and Sundar SLAM (School-age Language Assessment Measures); informal language observation; a language sample; parent and teacher interviews; and informed clinical opinion (see Dist. Ex. 10 at pp. 1-2).

The evidence in the hearing record also reflects that, on May 15, 2023, the parent executed a district form, which advised the district that she would be placing the student in a nonpublic school for the 2023-24 school year and requested that the district provide educational services to the student under the State's dual enrollment statute (see Parent Ex. E at p. 1).

Shortly thereafter, a CSE convened on May 30, 2023 to review and consider the student's speech-language evaluation results, and found the student eligible to receive special education as a student with a speech or language impairment (see Parent Ex. B at p. 1).² The May 2023 CSE modified the student's March 2023 IESP and developed an IESP for the student (May 2023 IESP) with a projected implementation date of September 6, 2023 and a projected annual review date of May 30, 2024 (id.). The May 2023 CSE recommended that the student receive five periods per week of SETSS in a group (Yiddish), two 30-minute sessions per week of speech-language therapy in a group (Yiddish), two 30-minute sessions per week of individual OT (English), and one 30-minute session per week of counseling services in a group (Yiddish) (id. at p. 13). In addition, the May 2023 IESP included annual goals targeting the student's needs in the areas of speech-language skills, academic skills, OT skills, and counseling (id. at pp. 9-12).

On September 1, 2023, the parent electronically signed a "Parent Service Contract" with Headway, which confirmed that Headway would provide the student with speech-language therapy services at a rate of \$350.00 per hour for the 2023-24 school year (Parent Ex. J at p. 1).³ The hearing record does not include any evidence establishing when the student began receiving

¹ 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 among parents, practitioners, and the district.

² 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]).

³ Headway has not been approved by the Commissioner of Education as a school or company with which districts may contract to instruct students with disabilities (see NYCRR 200.1[d], 200.7).

speech-language therapy services from Headway (see generally Tr. pp. 1-34; Parent Exs. A-L; Dist. Exs. 1-14).

In a letter, dated September 27, 2023, the parent, through "Prime Advocacy, LLC, duly Authorized o/b/o Parent," (Prime Advocacy) notified the district that it had failed to assign the student any providers to deliver the student's mandated services for the 2023-24 school year (Parent Ex. D). Additionally, the parent requested that the district "fulfill the mandate" or she would be "compelled to unilaterally obtain the mandated services through a private agency at an enhanced market rate" (id.).

Evidence in the hearing record reveals that the student reportedly began receiving five hours per week of individual SETSS on or about November 13, 2023, by a provider with Succeed (see Parent Exs. F ¶¶ 6-8; H at p. 1; I at p. 1).⁴ The evidence also reveals that Succeed delivered SETSS to the student at his religious, nonpublic school (see Parent Exs. F ¶ 7; H at p. 1).⁵ Although the evidence in the hearing record includes a copy of an "Enrollment Agreement for the 2023-2024 School Year" between Succeed and the parent, who electronically signed the document, the agreement does not identify a date indicating when the parent signed the agreement (see generally Parent Ex. C). According to the agreement, Succeed would deliver services at the "frequency and duration and at rates detailed in Schedule A," which did not reflect any frequencies or durations of services but instead listed an individual SETSS rate of \$215.00 per hour and a group SETSS rate of \$160.00 per hour, as well as rates for speech, OT, physical therapy, counseling and paraprofessional services (id. at pp. 1, 3).

A. Due Process Complaint Notice

By due process complaint notice dated April 15, 2024, the parent, through an advocate with Prime Advocacy, alleged that the district failed to develop and implement a program for the student for the 2023-24 school year, thereby denying the student a free appropriate public education (FAPE) (see Parent Ex. A at p. 1). According to the parent, the district impermissibly shifted its responsibilities to the parent by failing to supply "providers for the services it recommended" for the student and by "fail[ing] to inform the [p]arent how the services would be implemented" (id. at p. 2). The parent indicated that she was unable to find providers willing to accept the district's standard rates but found providers willing to provide the student with his mandated services for the 2023-24 school year at enhanced rates (id.). Among other relief, the parent sought pendency, an order directing the district to fund the costs of the student's SETSS and related services at enhanced rates, and an award of compensatory educational services for any mandated services not provided by the district (id. at pp. 2-3).⁶

⁴ Succeed is a limited liability company and it has not been approved by the Commissioner of Education as a school or company with which districts may contract to instruct students with disabilities (see NYCRR 200.1[d], 200.7).

⁵ Session notes in the hearing record reflect a variety of locations within which Succeed purportedly delivered SETSS to the student, including at home, remotely, and at school (see Parent Ex. H at p. 1).

⁶ On May 21, 2024, the district executed a pendency implementation form, which indicated that the student's May 2023 IESP formed the basis of his pendency services and which consisted of the following: five periods per week

B. Impartial Hearing Officer Decision

On June 3, 2024, the parties proceeded to, and completed, an impartial hearing before an IHO with the Office of Administrative Trials and Hearings (OATH) (see Tr. pp. 1-34). In a decision dated July 2, 2024, the IHO found that the district failed to offer the student a FAPE for the 2023-24 school year by failing to implement the student's services (see IHO Decision at pp. 6-8). With regard to the parent's unilaterally-obtained services, the IHO determined that the parent failed to sustain her burden to establish that the SETSS and speech-language therapy services were appropriate to meet the student's needs (*id.* at pp. 8-10). Turning first to whether the SETSS delivered by Succeed was appropriate, the IHO found that the hearing record failed to contain sufficient evidence demonstrating that the student received specially designed instruction (*id.* at p. 9). The IHO reviewed the session notes entered into the hearing record, and found that the session notes reported "vague activities with seemingly immeasurable goals," which appeared to be "repeated" and which lacked any "discussion of how [the s]tudent was progressing towards those goals" (*id.*). The IHO also noted that the session notes reflected a "very minimal description of the actual activities performed" (*id.*). In reviewing the SETSS progress report, the IHO found that although it described the student's "challenges and goals in reading, writing and math, it did not establish the specific methods used to instruct [the s]tudent or how the instruction was addressing [the s]tudent's specific needs" (*id.*). Consequently, the IHO concluded that the parent failed to sustain her burden to establish that Succeed was providing specially designed instruction to the student to meet his needs, and moreover, the parent failed to present evidence demonstrating that the SETSS provider delivered services to the student in Yiddish and whether he received SETSS individually or in a group as recommended in the May 2023 IESP (*id.*).

Next, the IHO examined the unilaterally-obtained speech-language therapy services delivered to the student by Headway during the 2023-24 school year (see IHO Decision at p. 10). Similar to the findings regarding SETSS, the IHO determined that the speech-language progress report "generally described [the s]tudent's challenges and included goals"; however, the IHO noted that the progress report failed to "describe the methods used to instruct [the s]tudent or [otherwise provide] a description of the instruction being used to address [the s]tudent's unique needs" (*id.*). In reviewing the affidavit testimony by the educational director of Headway (director), the IHO noted that the affidavit did not include any description of the student's "levels of performance when services started in November of 2023, how the instruction provided [had been] tailored to [the s]tudent's needs, or any progress that had been made to date" (*id.*). In addition, the IHO indicated that, given the director's background and experience, the hearing record was devoid of evidence demonstrating that the director had "any experience in [speech-language therapy] such that they would be qualified to offer an opinion as to the appropriateness of the [speech-language therapy] services provided" to the student (*id.*). Additionally, the IHO found the hearing record devoid of evidence demonstrating that the speech-language provider was "qualified" to deliver services to the student in Yiddish as recommended in the May 2023 IESP (*id.*). Finally, the IHO found that, because the evidence in the hearing record failed to "adequately describe the type of instruction received by [the s]tudent and failed to demonstrate that [the s]tudent was receiving services tailored to meet [his] needs by a bilingual Yiddish provider," the parent had failed to sustain her burden to

of SETSS in a group (Yiddish), two 30-minute sessions per week of speech-language therapy in a group (Yiddish), two 30-minute session per week of individual OT (English), and one 30-minute session per week of counseling services in a group (Yiddish) (see Pendency Impl. Form).

establish the appropriateness of the speech-language therapy services delivered by Headway during the 2023-24 school year (id.).

Having found that the parent failed to sustain her burden with regard to the unilaterally-obtained services, the IHO nonetheless examined equitable considerations (see IHO Decision at pp. 10-11). Initially, the IHO noted that the parent had timely provided the district with her request for equitable services on May 15, 2023 and that she had attended the May 2023 CSE meeting to develop the student's IESP for the 2023-24 school year (id. at p. 10). However, the IHO found that the parent failed to establish "how and when" she submitted a 10-day notice of unilateral placement to the district (id.). Noting the purpose of providing the district with notice of a unilateral placement, the IHO determined that, in the "absence of proof of how and when" the parent submitted a notice to the district, a "reduction of 20 [percent], in the rate sought for SETSS and [speech-language therapy]" would have been warranted had an award been ordered in this matter (id. at pp. 10-11).

As final points, the IHO noted that the district had not addressed the parent's request for a related services authorization (RSA) at the impartial hearing to obtain the student's OT services (see IHO Decision at p. 11). Finding that the student was entitled to receive OT and the district failed to provide OT services, the IHO granted the parent's request for an RSA (id.). In addition, the IHO noted that, although the parent had not requested any relief with regard to counseling services recommended in the May 2023 IESP, the student was entitled to receive one 30-minute session per week and the IHO awarded the parent an RSA to obtain counseling services (id.).

Thus, as relief, the IHO ordered the district to provide the parent with an RSA to obtain counseling services for the student, as well as to provide an RSA for the parent to obtain OT services for the student (see IHO Decision at p. 11).

IV. Appeal for State-Level Review

The parent appeals with the assistance of a lay advocate from Prime Advocacy, and alleges that the IHO erred by finding that she failed to sustain her burden with regard to the appropriateness of the unilaterally-obtained SETSS and speech-language therapy services. More specifically, the parent argues that the documentary and testimonial evidence demonstrated that, with respect to SETSS, the student made progress. In addition, the parent contends that testimonial evidence supports a finding that the student made progress with the speech-language therapy services. Alternatively, the parent asserts that a showing of progress is not required to find that the unilaterally-obtained services were appropriate. As relief, the parent seeks to overturn the IHO's findings and an order for the district to fund the unilaterally-obtained SETSS and speech-language therapy services at the contracted rates.

In an answer, the district responds to the parent's allegations and generally argues to uphold the IHO's findings that the SETSS and speech-language therapy services were not appropriate. As a cross-appeal, the district contends that equitable considerations do not weigh in favor of the parent's requested relief. In addition to arguing that the IHO appropriately found that equitable considerations warranted a reduction for failure to provide the district with a 10-day notice, the district also argues that any award should be further reduced for various factors, such as session lengths, provider certifications, administrative costs, and fair market value. Additionally, the district contends that the parent's contracts do not create a clear financial obligation for the parent.

Finally, the district cross-appeals the IHO's order to issue the parent RSAs to obtain OT and counseling services for the student because the parent did not request such relief in the due process complaint notice.

V. Applicable Standards

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

However, under State law, parents of a student with a disability who have privately enrolled their child in a nonpublic school may seek to obtain educational "services" for their child by filing a request for such services in the public school district of location where the nonpublic school is located on or before the first day of June preceding the school year for which the request for services is made (Educ. Law § 3602-c[2]).⁷ "Boards of education of all school districts of the state shall furnish services to students who are residents of this state and who attend nonpublic schools located in such school districts, upon the written request of the parent" (Educ. Law § 3602-c[2][a]). In such circumstances, the district of location's CSE must review the request for services and "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an [IEP]" (Educ. Law § 3602-c[2][b][1]). The CSE must "assure that special education programs and services are made available to students with disabilities attending nonpublic schools located within the school district on an equitable basis, as compared to special education programs and services provided to other students with disabilities attending public or nonpublic schools located within the school district (*id.*).⁸ Thus, under State law an eligible New York State resident student may be voluntarily enrolled by a parent in a nonpublic school, but at

⁷ State law provides that "services" includes "education for students with disabilities," which means "special educational programs designed to serve persons who meet the definition of children with disabilities set forth in [Education Law § 4401(1)]" (Educ. Law § 3602-c[1][a], [d]).

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

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. Unilateral Placement

At the outset, the parties have not appealed from the IHO's finding that the district failed to implement the student's educational program during the 2023-24 school year and, therefore, that determination is final and binding on the parties and will not be further discussed (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]). The primary issue to be resolved on appeal is the appropriateness of the unilaterally obtained services delivered to the student by Succeed and Headway.

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 Succeed and Headway for the student without the consent of the school district officials, and then commenced due process to obtain remuneration for the costs thereof. Generally, districts that fail to comply with their statutory mandates to provide special education can be made to pay for special education services privately obtained for which a parent paid or became legally obligated to pay, a process that is essentially the same as the federal process under IDEA. Accordingly, the issue in this matter is whether the parent is entitled to public funding of the costs of the private services. "Parents who are dissatisfied with their child's education can unilaterally change their child's placement . . . and can, for example, pay for private services, including private schooling. They do so, however, at their own financial risk. They can obtain retroactive reimbursement from the school district after the [IESP] dispute is resolved, if they satisfy a three-part test that has come to be known as the Burlington-Carter test" (Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 526 [2d Cir. 2020] [internal quotations and citations omitted]; see Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 14 [1993] [finding that the "Parents' failure to select a program known to be approved by the State in favor of an unapproved option is not itself a bar to reimbursement."]).

The parent's request for district funding of privately-obtained services must be assessed under this framework. Thus, a board of education may be required to reimburse parents for their expenditures for private educational services they obtained for a student if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Carter, 510 U.S. 7; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85;

T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 252 [2d Cir. 2009]).⁹ In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

In this matter, the IHO relied on the appropriate legal standard in reaching her conclusions of law, and neither party challenges this aspect of the IHO's decision (see generally Req. for Rev.; Answer & Cr. App.).

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

⁹ State law provides that the parent has the obligation to establish that a unilateral placement is appropriate, which in this case is the special education that the parent obtained from Succeed Educational Support Services and Headway Services (Educ. Law § 4404[1][c]).

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

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

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

1. The Student's Needs

While the student's needs are not in dispute, a brief discussion thereof provides context for the issue to be resolved on appeal, namely, whether the parent's unilaterally-obtained SETSS and speech-language therapy services were appropriate to meet the student's needs.

Evidence in the hearing record reflects that, at the time the May 2023 CSE developed the student's IESP, he was attending a nonpublic preschool and was preparing to transition to kindergarten in September 2023 (school-age services) (see Parent Ex. B at p. 15; Dist. Ex. 11 at p. 1). It was noted, at that time, that the student's primary language was Yiddish and that he had been receiving special education itinerant teacher (SEIT) services through the CPSE (five hours per week in a group of two students) (see Parent Ex. B at p. 2; Dist. Ex. 11 at p. 1).¹⁰ According to the May 2023 IESP, the student's full-scale IQ fell within the "[l]ow [a]verage [r]ange" as measured by the Wechsler Preschool and Primary Scale of Intelligence—Fourth Edition (WPPSI-IV) and within the "[p]oor [r]ange" as measured by the Developmental Assessment of Young Children—Second Edition (DAYC-2) (Parent Ex. B at pp. 3-4).¹¹ The IESP noted that the student demonstrated cognitive delays and was unable to: identify, match, or sort items based on colors; sort items based on category or function; identify similarities and differences between objects; or sequence three or more picture story cards (id. at p. 3). In addition, he had difficulty answering questions related to a classroom lesson or a story that had been read to him (id.). With regard to reading readiness, the IESP indicated that the student lacked concepts of print, was unable to recite

¹⁰ According to the May 2023 IESP, although OT services had been recommended for the student, he was not receiving them due to the unavailability of a provider (see Parent Ex. B at p. 2).

¹¹ The May 2023 IESP indicated that, based on the WPPSI-IV, the student's verbal comprehension was in the "[b]orderline [r]ange" and visual spatial skills were in the "[a]verage [r]ange" (Parent Ex. B at p. 3-4).

the alphabet or identify any letters, and was unable to identify letter sounds (id.).¹² However, the IESP indicated that, according to the student's SEIT, the student was able to find an item that was out of place, match and identify objects with visual prompting, and sequence a two-step story (id. at p. 4).

In terms of language development, the May 2023 IESP indicated that the student exhibited both expressive and receptive language delays (see Parent Ex. B at p. 3). The IESP reflected that, according to the PLS-5 and other informal measures, the student's oral language skills were mildly reduced (id. at p. 1).¹³ In addition, according to an administration of the GFTA-3 and other informal measures, the student's overall intelligibility was judged to be mildly reduced in single words and in running speech (id.). With respect to expressive language, the IESP indicated that the student was able to repeat sentences in an age-appropriate manner and formulated meaningful, grammatically intact questions about pictures (id.). The student was unable to answer questions in class but was able to "answer questions that people ask[ed]" (id. at p. 3). According to the IESP, the student's relative weaknesses in expressive language included his use of possessive pronouns and prepositions (id.). In terms of receptive language, the May 2023 IESP described the student's ability to comprehend "wh" questions about narratives as "inadequate," but noted that when questions were rephrased, the student exhibited comprehension of the main idea and recalled supporting details (id. at p. 1). The IESP noted that the student was unable to follow two-step related directives and required visual and verbal prompts to follow directions and complete tasks (id. at p. 3).¹⁴ The IESP indicated that, according to the student's preschool IEP, his auditory processing skills were delayed (id. at p. 7).

Turning to the student's social skills, the May 2023 IESP reflected information provided by the student's SEIT, which indicated that the student demonstrated significant delays and needed to develop age-appropriate skills related to explaining rules to others, engaging in turn taking, and trying new activities (see Parent Ex. B at p. 6). According to the SEIT, the student was friendly and demonstrated the ability to maintain eye contact and to respond to and greet others (id. at p. 6). However, the SEIT also noted that the student's social/emotional/behavioral skills were

¹² Based on information reported by the parent in a January 2023 updated social history, the May 2023 IESP reflected that the student was an "eager and curious learner" (Parent Ex. B at p. 2; Dist. Ex. 11 at pp. 1-2). In addition, the parent had reported that the student was able to "listen well to stories read aloud and show[ed] interest in reading related activities" (Parent Ex. B at p. 2). The parent further reported that he could recite the Hebrew alphabet and sometimes identify the letter each sound made, but that he did not yet know the English alphabet and was not able to match upper- and lower-case letters (id.). Based on parent report, the student was able to copy some letters of the Hebrew alphabet, as well as a cross, square, V, and triangle (id.). In addition, the student understood early math concepts and could sort by color, size, and shape (id.). The parent reported the student was able to count to 10 and identify at least four shapes (id.).

¹³ The IESP further indicated that, according to the PLS-5, the student's receptive and expressive language skills were within the "[a]verage [r]ange" (Parent Ex. B at p. 4).

¹⁴ Additional information included in the May 2023 IESP and gleaned from the January 2023 social history update indicated that, according to the parent, the student spoke quickly but could generally be understood without context clues (see Parent Ex. B at 2). The parent reported that the student could speak in full sentences and used appropriate volume when speaking (id.). She further reported that the student was able to follow one- and two-step directions (id.). However, the parent indicated that she was concerned about the student's expressive language skills (id. at p. 5).

deficient and limited him from successfully playing in a group (*id.*). As reported by the SEIT, the IESP reflected that the student had difficulty taking turns and waiting for his turn without becoming frustrated (*id.*). In addition, the student was unwilling to try new and different activities (*id.*).¹⁵ The IESP also noted that, according to the parent, the student did not always express his feelings adequately (*id.* at p. 5). As measured by the Vineland Adaptive Behavior Scale—Third Edition (Vineland 3), the student's adaptive behavior composite was within the "[m]oderately [l]ow [r]ange" (*id.* at p. 4).

In terms of motor development, the May 2023 IESP indicated that the student had not yet been assigned an occupational therapist and cited information from a previous administration of the Peabody Developmental Motor Scale—Second Edition (PDMS-2) to the student, which indicated that his fine motor skills were two standard deviations below the mean (*see* Parent Ex. B at p. 7). The IESP noted that the student used an awkward grasp when picking up pellets and beads, as well as when performing graphomotor activities (*id.*). In addition, the IESP noted that the student scribbled but was unable to copy vertical lines, horizontal lines, or circles (*id.*). The IESP indicated that the student lacked safety awareness and had "significant delays in the sub-area of [s]ensation [s]eeking/[u]nder-responsiveness" (*id.*). Although the student used some eating utensils, he tended to be messy while eating due to his difficulty handling a fork and spoon (*id.*). The IESP noted that the student did not dress himself and struggled to remove clothing; however, he was able to manage zippers and snaps on his clothing (*id.*). In contrast, the IESP indicated that the student's gross motor skills were age appropriate (*id.*).

As reflected in the May 2023 IESP, the CSE recommended the following strategies to address the student's management needs: verbal prompts, repetition, and rephrasing; multisensory instruction; scaffolding of new instructional material; positive reinforcement; verbal and visual cuing; chunking and simplification of directives; small group instruction; and verbal preparation and modeling (*see* Parent Ex. B at p. 8). The annual goals in the May 2023 IESP targeted the student's ability to respond to "wh" questions about narratives, retell narratives in a logical manner, correctly produce targeted phonemes in all positions and contexts, identify all letters of the alphabet and their sounds, demonstrate one-to-one correspondence, copy the letters of the alphabet, use a static tripod grasp while using an adaptive grip, copy horizontal and vertical lines, participate in a tabletop activity for 8 to 10 minutes, and identify and describe his feelings (*id.* at pp. 9-12).

In addition, and as noted previously, the May 2023 CSE recommended that the student receive five periods per week of SETSS in a group (Yiddish), two 30-minute sessions per week of speech-language therapy in a group (Yiddish), two 30-minute session per week of individual OT (English), and one 30-minute session per week of counseling services in a group (Yiddish) (*id.* at p. 13).

¹⁵ In terms of the student's social development, the parent reported that the student was able to take turns, share, and played well with others (Parent Ex. B at p. 5). She indicated that the student was able to clean up after play activities and followed rules and routines (*id.*). The student's mother noted that the student was generally considerate of other's feeling and respectful of items belonging to others (*id.*). According to the parent, the student was working on further developing his ability to listen when others were speaking and to seek adult help during conflicts (*id.*). The parent characterized the student as "active" and noted that he had difficulty transitioning between activities and could at times become frustrated (*id.*). She further noted that the student had difficulty with change and was self-directed (*id.*).

2. Unilaterally Obtained Services

As noted above, the hearing record shows that for the 2023-24 school year, or portions thereof, the parent obtained SETSS for the student from Succeed and speech-language therapy from Headway (Parent Exs. C; F-L).

With respect to SETSS, the parent contends that the IHO erred in finding that the SETSS delivered by Succeed was not appropriate to meet the student's needs. The parent asserts that while progress need not be demonstrated to find a unilateral placement appropriate, an IHO may not ignore progress reports when determining appropriateness. In addition, the parent argues that an IHO may not find a hearing record devoid of progress reports if the parent or supervisor testified. Next, the parent contends that a unilateral placement need not have annual goals or evaluations similar to an IEP, and moreover, a parent need not establish that unilaterally-obtained services were delivered pursuant to a formal IEP. The parent further asserts that a private placement is appropriate if it provides specially designed instruction to meet the student's needs, and even if the student had not made progress, that reason, alone, would not be sufficient to find the services were not appropriate. As support for the contention that the SETSS delivered by Succeed was appropriate, the parent points to evidence in the hearing record, including the Succeed educational supervisor's testimony and a SETSS progress report.

In response, the district argues that the IHO properly determined that SETSS delivered by Succeed was not appropriate because the parent presented "little evidence" demonstrating how SETSS was implemented, the deficits addressed by SETSS, or how SETSS was specially designed instruction for the student. In addition, the district contends that, because the SETSS progress report was undated, it did not provide information regarding whether the student's goals were implemented in November 2023 when the student began receiving services from Succeed or whether the goals were implemented in anticipation of the April 2024 impartial hearing. In addition, the district argues that there was no method, schedule, or specific criteria as to how the student's goals would be measured, and the goals did not change for six months. Additionally, the district contends that the parent did not establish that SETSS was delivered in Yiddish, as mandated in the May 2023 IESP, or present evidence of the provider's certification or qualifications.

As noted above, to qualify for reimbursement under the IDEA, parents must demonstrate that the unilateral placement provided instruction specially designed to meet the student's unique needs, supported by services necessary to permit the student to benefit from instruction (Gagliardo, 489 F.3d at 112; see Frank G., 459 F.3d at 364-65). Regulations define specially designed instruction, in part, as "adapting, as appropriate to the needs of an eligible student under this Part, the content, methodology, or delivery of instruction to address the unique needs that result from the student's disability" (8 NYCRR 200.1[vv]; see 34 CFR 300.39[b][3]).

As noted above, evidence in the hearing record reveals that the student reportedly began receiving five hours per week of individual SETSS on or about November 13, 2023, delivered by a provider with Succeed (see Parent Exs. F ¶¶ 6-8; H at p. 1; I at p. 1). The educational supervisor for Succeed (supervisor) testified that Succeed was an educational agency that provided SETSS and related services (see Parent Ex. F ¶ 1). The supervisor also testified that she held a master's degree in "Middle School Education—Teaching Students with Disabilities," as well as New York State certification as a special education teacher for students with disabilities (id. ¶ 2). In her

testimony, she explained that in her role as a supervisor, she communicated with providers to get a clear picture of students' strengths and weaknesses; reviewed IEPs and IESPs, assessments, annual reports, and session notes; and collaborated with providers to establish effective strategies, teaching methods, and goals to properly address specific learning concerns (id. ¶ 3). The supervisor also testified that she communicated with parents to discuss their child's progress and address their concerns and acted as a liaison between parents and providers (id.). According to the Succeed supervisor, Succeed providers "possess[ed] licenses, experience, and training to provide services" (id. ¶ 4).

According to the supervisor's May 21, 2024 testimony by affidavit, the student began receiving SETSS from Succeed on November 13, 2023 and the supervisor had been functioning as the student's SETSS supervisor beginning on October 9, 2023; however, it is unclear what services were being supervised between October 9, 2023 through November 13, 2023 (see Parent Ex. F ¶ 6). The supervisor noted that the student was "mandated for 5 hours per week of SETSS" and that the services were provided to him at a religious nonpublic school (id. ¶ 7). The supervisor reported that, for the 2023-24 school year, the student was provided with services by a teacher with a master's degree in special education, certified by New York State to work with students with disabilities (id. ¶ 8). According to the supervisor, the student was "assessed at the beginning of the school year for decoding and reading comprehension and informal assessments for math" (id. ¶ 9). The supervisor also reported that the student could "identify the alphabet, for the most part, independently," but noted that he had difficulty "with phonemic awareness skills such as—rhyming and blending" (id. ¶ 10). With regard to reading comprehension, the supervisor testified that the student "ha[d] a hard time with critical thinking skills, such as inferencing, self-to-text connection, summarizing and analyzing" (id.). The student enjoyed drawing and could neatly sketch shapes, but he could not write any letters of the alphabet (id. ¶ 11). In addition, the supervisor testified that the student could "count to 10," but had difficulty "recognizing the written numbers" (id. ¶ 12). In terms of social/emotional development, the supervisor reported that the student found it difficult to "relate to and play nicely with his peers" (id. ¶ 13). When things did not go his way, the student would become "very easily frustrated and w[ould] lash out at anyone" around him (id.). The supervisor described the student as having "very low self-esteem" and being very self-directed (id.).

To address the student's academic delays, the supervisor testified that the "provider utilized various modalities like books and rhyming games" to help the student with his phonemic awareness (Parent Ex. F ¶10). She reported that the student had "made some progress [in reading] since November when he began services, yet [he wa]s still not on par with his class mates" (id.). With regard to the student's social/emotional needs, the supervisor testified that the "provider worked [with the student] on identifying emotions and perspective taking" (id. ¶ 13). She indicated that the student had "learned how to identify his emotions" and those of others (id.). She also testified that the parent had observed "nice progress at home" in this area, and more specifically that the student had "share[d] more easily with his brother and w[ould] talk calmly when things d[id no]t go his way" (id.). The supervisor reported that the "provider incorporate[d] functional life skills lessons into the academic curriculum" (id.).

In addition to the supervisor's testimony, the hearing record also includes an undated and untitled report for the 2023-24 school year, which bears the Succeed SETSS provider's name at

the end of the report (see Parent Ex. G at pp. 1-4; see also Parent Ex. F ¶ 8).¹⁶ In the SETSS progress report, the student was described as "motivated" and as a student "who want[ed] to learn and want[ed] to please his teachers and peers" (Parent Ex. G at p. 1). The progress report reflected that the student became easily frustrated when he did not succeed, and had difficulty with self-regulation and low self-esteem (id.). In addition, it noted that the student displayed sensory-seeking behaviors (id.).

In terms of academic achievement and functional levels, the SETSS progress report indicated that the student was functioning at a kindergarten level in reading and math (see Parent Ex. G at p. 1). With regard to reading, the student enjoyed listening to stories read to him but struggled to answer open-ended and inferential questions, and he required "a lot of prompting and guiding" (id.). The SETSS progress report also indicated that the student could not "repeat a story" read to him and struggled to identify the main idea (id.). According to the progress report, the student could not "compare items by category and function" (id.). In addition, at the beginning of the school year, it was noted that he "struggled with basic concepts such as opposites, sequencing and positional concepts," but he had since "shown improvement" (id.).

The SETSS progress report indicated that the student could "identify and label all the letters of the Yiddish alphabet," as well as "vowels" and their "sounds," and the student could also "blend letters and vowels" (Parent Ex. G at p. 2). However, it was also noted that the student had "poor auditory processing skills with poor phonemic awareness" (id.). The student had difficulty with "breaking words into phonemes and syllables," "manipulat[ing] phonemes," "rhym[ing]," and "identify[ing] which of two words beg[a]n with the same sound" (id.). The progress report noted that the student could not "label or identify any of the ABC's (sic)" and indicated that he was not currently working on these in his class as they would be taught the following year (id.).

In terms of writing, the SETSS progress report indicated that the student enjoyed "coloring worksheets such as color by number" and noted that he could "draw a simple picture" (Parent Ex. G at p. 2). The student was unable to write numbers, letters, or his name independently (id.). Also, when the student copied numbers or letters from his workbook they were "not very neat or legible" (id.).

Turning to mathematics, the SETSS progress report indicated that the student could "identify and label numbers [one to five]," but he struggled to "identify numbers [six to ten]" (Parent Ex. G at p. 3). The student could also rote count to 20, match groups that had an "equal number of objects," and identify which group had more or less (id.). The progress report indicated that the student could not add ones or twos in a "story format" (id.).

According to the SETSS progress report, the student learned best using "auditory, visual, [and] kinesthetic" modalities, and the progress report indicated that the provider used "lots of repetition" with the student (Parent Ex. G at p. 3).

¹⁶ At the impartial hearing, parent exhibit G was entered into the hearing record as a "SETSS progress report" (Tr. pp. 21, 23). For the sake of clarity, it will be referred to as a SETSS progress report although the report is untitled and the hearing record does not include any evidence describing who drafted the report or when it was drafted (see generally Tr. pp. 1-34; Parent Exs. A-L; Dist. Exs. 1-14).

In terms of social development, the SETSS progress report indicated that the student was "well-liked" and enjoyed "interacting and communicating with his peers" (Parent Ex. G at p. 3). However, it was noted that the student could be self-centered and found it "difficult to see the viewpoints of others and to understand that other children/people ha[d] feelings and emotions" (id.). In addition, the student had "difficulty expressing his emotions" and "struggle[d] with turn-taking and [became] very frustrated if he los[t] the game" (id.). The progress report indicated that the provider was working on improving the student's social skills through social skills books, manner cards, and modeling (id.). The progress report described the student's physical development as "up to par" (id.).

In addition to the foregoing information, the SETSS progress report included goals for the student in the areas of reading, writing, and mathematics (see Parent Ex. G at pp. 1-3). The progress report indicated that, for the goals in each area, the "skills w[ould] be reinforced with practice" and "[p]rogress w[ould] be measured by teacher observation and formal/informal assessments" (id.).

Next, the hearing record includes copies of timesheets for the SETSS provider, which reflect purported dates of services for this student from November 13, 2023 through April 17, 2024 (see Parent Ex. I at pp. 1, 3). The timesheets show that the provider generally saw the student for two 90-minute sessions and one 120-minute session per week (id.). In addition, the hearing record includes copies of weekly session notes on Succeed letterhead, which reflect sessions beginning on or about the week of November 12, 2023 through the week of April 22, 2024 (i.e., noting the provider's absence and "no school") (see Parent Ex. H at pp. 1, 9). The session notes identified the student's name and date of birth, the provider's name, the service delivered (i.e., SETSS), the group size (i.e., "1"), the location of services ("Home, Remote, School"), and the mandate of the services ("5.0 x 60") (id. at p. 1). The session notes reported on the "Goal, Activity and Outcome" in one column and the dates of service in another column (id.). According to the session notes, the SETSS provider—from November 2023 through April 2024—addressed goals targeting the student's ability to adapt to changes in routine, use effective coping strategies when faced with conflicting situations, express his displeasure or frustration verbally rather than withdrawing, identify number symbols zero through nine, seek out appropriate personnel to ask for help when under pressure or stress, rhyme simple words, follow multistep verbal directions, focus on teacher directed tasks to completion, and decode specific word families (id. at pp. 1-9).

The SETSS provider detailed various strategies within the session notes that she employed to address the student's needs, including the use of a visual schedule to explain to the student what to expect; discussions with the student on how to react to schedule changes; the use of emotion cards, manipulatives, and homemade books to communicate a solution to a problem; the use of worksheets, flash cards, and games to teach numbers; practicing using words to express feelings; using an erase board to practice writing numbers; the creation of a social story book on how a person looks when they feel upset; using games related to finding rhyming words; modeling how to use words when stressed; practicing different scenarios and what to do if the student needed help; using picture cards to practice rhyming; discussions regarding the appropriate way to react to a change in routine; using tracers and playdough to draw numbers; playing an interactive game that incorporated multistep directions; assisting the student with prompting to stay on tasks; using worksheets to work on decoding word families; and reviewing the alphabet and sounds (see generally Parent Ex. H).

With respect to progress, the SETSS provider indicated within the session notes that the student had "made some progress" in his ability to follow multistep verbal directions, and according to the Succeed supervisor, the parent reported that the student had "seen nice progress" in his ability to identify his emotions and those of others (Parent Exs. F ¶ 13; H at p. 8). With respect to reading comprehension, the supervisor testified that the student had made "some progress since November when he began services," while noting that the student was still "not on par with his class mates" (Parent Ex. F ¶ 10).

Based on the above, the supervisor's testimony, the session notes, and the SETSS progress report, cumulatively provided a description, albeit briefly, of the materials and strategies—or specially designed instruction—used by the SETSS provider to address the student's identified academic and social/emotional needs.

Finally, with regard to the IHO's findings that the parent failed to establish whether the student received SETSS individually or in a group or if the SETSS provider was bilingual in Yiddish, the evidence reflects that, within the session notes, there are two references to the student working "in a one to one group setting," and the SETSS progress report noted that the student "could identify and label all the letters of the Yiddish alphabet and vowels as well as their sounds" but did not explicitly state if SETSS was provided in Yiddish (Parent Exs. G at p. 2; H at pp. 1-2). However, the SETSS progress report did note that the student's current level of SETSS—"5 hours of 1:1" SETSS—should remain unchanged (Parent Ex. H at p. 4). Additionally, the district correctly notes that, although the Succeed supervisor testified that the SETSS provider was appropriately certified, the provider's certification was not entered into the hearing record as evidence (see generally Tr. pp. 1-34; Parent Exs. A-L; Dist. Exs. 1-14). However, as noted above, teachers and providers at a unilateral placement need not be State-certified (Carter, 510 U.S. 7, 14 [noting that unilateral placements need not meet state standards such as state certification for teachers]); however, there must be objective evidence of special education instruction or supports that are specially designed by the student's providers of the unilaterally-obtained services who have reasonable qualifications that are specifically related to the student's deficits.

Turning to the speech-language therapy services provided by Headway, the parent argues that, based on the speech-language provider's testimony, the student made progress. She also argues that the IHO erred by finding that the hearing record lacked evidence to find that the speech-language therapy services from Headway were not appropriate.

The district asserts that the hearing record is devoid of evidence, such as attendance records, session notes, or a provider certification, to support the parent's claim that the speech-language therapy services from Headway were appropriate. Although the hearing record includes a progress report, the district argues that it does not provide any indication of the student's baseline performance, methods used during services, or how the instruction addressed the student's needs. In addition, the district contends that the hearing record does not establish when services began, whether the student made progress, or if the speech-language therapy services were delivered in Yiddish as mandated in the student's IESP.

Turning to the evidence in the hearing record related to the parent's unilaterally-obtained speech-language therapy services, the Headway director testified that her role with the agency included screening and hiring special education teachers and providers, researching the latest

techniques for teaching children, and making sure that the agency had the supplies to meet the students' needs (see Parent Ex. K ¶¶ 4-5). She also testified that she communicated with parents to better understand their child's learning needs (id. ¶ 5). The director explained in her testimony that she worked closely with the agency's supervisory team to make sure the needs of every student and teacher were met, and she also visited the schools where Headway offered services and worked together with service providers and staff members to solve any needs or issues (id. ¶¶ 6-7).

The director testified that Headway provided the student in this matter with two 30-minute sessions per week of speech-language therapy for the 2023-24 school year (see Parent Ex. K ¶ 12). She further testified that the services were provided by a speech therapist licensed in New York State and that she oversaw the provider's work (id. ¶¶ 13-14). According to the director, in addition to providing 1:1 direct services to the student, the speech-language provider also prepared for sessions, created goals, wrote progress notes, and met with teachers and parents (id. ¶ 15). As reflected in the director's testimony, "[g]oals were created for [the student] to work on during the 2023-24 school year and [we]re reviewed quarterly" (id. ¶ 16). The director testified that the progress report entered into evidence was an "accurate representation of what the providers ha[d] been working on with [the student], including goals, over the course of the 2023-24 school year," and further noted that the student had "already shown signs of progress" (id. ¶¶ 17-18).

In addition to the director's testimony, the evidence in the hearing record included a progress report, dated May 13, 2024 (May 2024 progress report) and written on Headway letterhead, that bears the agency speech-language provider's name at the end of the document (see Parent Ex. L at pp. 1-2; see also Parent Ex. K ¶ 13). According to the May 2024 progress report, the student received "60 minutes per week" of speech-language therapy to address his receptive, expressive, and pragmatic language skills (Parent Ex. L at p. 1). The progress report reflects that the student demonstrated "moderate delays" in receptive language, auditory processing skills, expressive language skills and articulation, and a "mild delay" in his pragmatic language skills (id.). According to the progress report, the student had difficulty understanding and processing information presented orally, following multistep commands, and forming thoughts for narratives (id.). In addition, the student had difficulty with his speech clarity and articulation skills and required "a lot of modeling and prompting for proper placement of articulators for fluent speech" (id.). As noted in the progress report, the student presented with "significant fine motor delays" and "emotional d[ysr]egulation," and the report further indicated that the parent had been "trying hard to get [the student] OT services but ha[d] not been successful thus far" (id.).

A further review of the May 2024 progress report reveals three goals and six short-term objectives targeting the student's receptive and expressive language skills, as well as his articulation and oral motor development (see Parent Ex. L at p. 2). According to the progress report, it was anticipated that the student would achieve all of the goals within the year and that progress was "measured using a combination of formal and informal assessment tools"; however, the student's actual progress towards the identified goals was not reported (id.). Overall, the short-term objectives targeted the student's abilities to: "recall salient information from a short story being read to him using visual and auditory prompting with 70 [percent] accuracy"; "understand and correctly respond to age appropriate 'wh questions,' yes/no questions from picture cards, multisensory games and books with 70 [percent] accuracy with fading verbal prompts"; "use of a combination of drawing, dictating and writing/coloring to tell about events in a story or narrative in the order which they occurred using increase[d] mean length of utterance going from [two to

four] words to [five to seven] words per utterance with minimal prompting"; "learn and incorporate 15 new vocabulary words including descriptive and adverbs in the course of conversation and multisensory play over the course of yearly therapy using cue cards and modeling"; "improve articulation skills" with specifically targeted phonemes; and "increase the strength of oral and facial musculature through various sensory oral motor exercises to strengthen articulations for correct sound production" (*id.*).

Consistent with the district's contentions, the hearing record does not include copies of session notes or attendance records related to the Headway services, therefore there is no indication of when the student began receiving speech-language therapy services from Headway (see generally Tr. pp. 1-34; Parent Exs. A-L; Dist. Exs. 1-14). In addition, although the May 2024 Headway speech-language progress report indicates that the student's progress would be measured using a variety of formal and informal tools, it does not indicate how the student performed in relation to the goals and short-term objectives reflected in the report (see generally Parent Ex. L).

As noted above, to qualify for reimbursement under the IDEA, parents must demonstrate that the unilateral placement provided instruction specially designed to meet the student's unique needs, supported by services necessary to permit the student to benefit from instruction (Gagliardo, 489 F.3d at 112; see Frank G., 459 F.3d at 364-65). Regulations define specially designed instruction, in part, as "adapting, as appropriate to the needs of an eligible student under this Part, the content, methodology, or delivery of instruction to address the unique needs that result from the student's disability" (8 NYCRR 200.1[vv]; see 34 CFR 300.39[b][3]).

Overall review of the hearing record does not show that the services provided to the student by Succeed and Headway during the 2023-24 school year were appropriate to address the student's identified needs so that they would have permitted the student to benefit from instruction. In particular, as noted above, although the hearing record included some information regarding the specially designed instruction delivered to the student through SETSS, there is no explanation as to why the student received SETSS for only a portion of the school year (see Parent Exs. F at ¶ 6; G-I).¹⁷ With respect to the speech-language therapy delivered by Headway, the hearing record does not identify when services began' in particular neither the provider's progress report nor the Headway educational director's testimony identify a start date for the student's speech-language therapy services (IHO Decision at p. 9; see Tr. pp. 1-48; Parent Exs. A-J). Accordingly, the hearing record only supports finding that the student received SETSS for a limited period of time during the 2023-24 school year, with no information as to when the student began receiving speech-language therapy services. In addition, the hearing record supports the IHO's decision which found that the speech-language progress report failed to describe the methods used to instruct the student or the specially designed instruction used to address the student's needs (IHO Decision at p. 10).

¹⁷ The SETSS supervisor testified that the student began receiving services on November 13, 2023 and the session logs indicate that services were delivered from November 13, 2023 through April 17, 2024; however, the final note on the session notes indicates that on April 22, 2024 the provider was absent and despite the SETSS supervisor testifying by affidavit dated May 21, 2024 there is no further explanation included in the hearing record as to services delivered to the student after April 17, 2024 (Parent Exs. F; H; I). Accordingly, the hearing record only supports finding that the student received SETSS between November 13, 2023 and April 2024, which equates to approximately five months out of the 10-month school year.

In addition, the Headway director's affidavit was devoid of any description of speech-language therapy and how it was tailored to address the student's needs (see Parent Ex. K).

In determining that the unilaterally-obtained speech-language therapy services from Headway were not appropriate, the IHO found that, although the May 2024 progress report "generally described [the s]tudent's challenges and included goals," it had "failed to describe the methods used to instruct [the s]tudent or the instruction being used to address the student's unique needs" (IHO Decision at p. 10). Review of the progress report supports this finding. While the progress report does include some short term objectives that could be read to include methods of instruction that could support a finding that the student was provided with specially designed instruction, such as the use of prompts, cue cards, multisensory games, and modeling, the hearing record does not sufficiently describe how instruction was delivered to the student during the course of the 2023-24 school year to overturn the IHO's findings.

Finally, in addressing the parent's assertion that the student made progress during the 2023-24 school year, while a finding of progress would not in itself be dispositive, it would have helped to overcome the evidence noted above regarding the lack of SETSS during a substantial portion of the school year and the lack of evidence as to when speech-language therapy services began for the student.¹⁸ However, as discussed above, neither the SETSS progress report nor the speech-language therapy progress report evidenced that the student made progress during the course of the 2023-24 school year (Parent Exs. G; L). While both reports included annual goals for the student, neither report indicated how the student was performing in either making progress towards meeting the identified goals or completing them (id.). In addition, while the SETSS progress report generally states that the student has "shown improvement" in basic concepts such as opposites, sequencing, and positional concepts, it did not specify any other areas where the student made progress (Parent Ex. G). Additionally, the SETSS supervisor testified that the student made "some progress" and the student's mother indicated, as per the affidavit testimony of the SETSS supervisor, she "ha[d] seen nice progress at home" in the student identifying his emotions, and the Headway educational director testified that the student "has already shown signs of progress" (Parent Ex. F at ¶¶10, 13; L at ¶18), these general statements are not sufficient to establish that the student was progressing with whatever services were being provided to him during the course of the 2023-24 school year.

Based on the above, the evidence in the hearing record does not, under the totality of the circumstances, lead me to the conclusion that the unilaterally obtained services were appropriate,

¹⁸ Related to the delivery of services during the 2023-24 school year, is the student's progress when receiving the unilaterally obtained services. 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, a finding of progress is, nevertheless, a relevant factor to be considered (Gagliardo, 489 F.3d at 115, citing Berger, 348 F.3d at 522 and Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]).

in that there is insufficient evidence that the services were specially designed to address the student's identified needs for the 2023-24 school year. In particular, while the May 2023 IESP indicated that the student required SETSS, speech-language therapy, OT and counseling, and the parent has not objected to the services as recommended in the May 2023 IESP, the hearing record does not identify how the student's needs related to OT or counseling were addressed during the 2023-24 school year. In addition, as discussed above, the evidence in the hearing record does not support finding that the student was provided with appropriate speech-language therapy services. Further, given the lack of information as to how long the student received services during the course of the 2023-24 school year and the lack of objective measures of progress, there is not a sufficient basis to depart from the IHO's finding that the unilaterally obtained services were not appropriate.

While I am certainly conscious of the fact that the district failed to deliver any services to the student during the 2023-24 school year and there could be an argument that obtaining any services might be beneficial to the student in light of the district's lapse in providing the student with an education, in this instance, there was no evidence submitted that the parent made an attempt to obtain any services in addition to what was provided by Succeed and Headway or that they were the only agencies willing to deliver services to the student. Accordingly, based on the totality of the circumstances, in this matter, the parent failed to meet her burden of proving that the services obtained from Succeed and Headway provided specially designed instruction that was reasonably calculated to enable the student to receive an educational benefit.

B. Compensatory Education

Having determined that the parent did not meet her burden of proving the appropriateness of the unilaterally obtained services for the 2023-24 school year, I need not address equitable considerations; however, I must address the district's cross-appeal of the compensatory education awarded by the IHO. The district cross-appeals from the IHO's award of RSA's for the OT and counseling services recommended for the student that was not delivered to the student during the 2023-24 school year.

According to the district, the parent's due process complaint notice did not include a request for RSA's for OT or counseling services. Review of the due process complaint notice shows that the parent did not specifically request RSA's, but requested "[c]ompensatory [e]ducation services to be provided to the [s]tudent as a bank, at an enhanced rate set by the provider, to make-up for any mandated services not provided by the [district]" (Parent Ex. A at p. 3). The district does not clarify why the IHO's award is not encompassed by the parent's request for compensatory education and, accordingly, does not provide a basis for disturbing the IHO's award, which was explicitly designed to make up for services the district was required to provide to the student during the 2023-24 school year but did not provide (see IHO Decision at p. 11).

While some courts have held that compensatory education is not available as an additional or alternative remedy when reimbursement for the costs of a unilateral placement is also at issue for the same time period (see D.F. v. Collingswood Borough Bd. of Educ., 694 F.3d 488, 498 [3rd Cir. 2012] [holding that "[b]ecause compensatory education is at issue only when tuition reimbursement is not, it is implicated only where parents could not afford to 'front' the costs of a child's education"]; P.P. v. West Chester Area Sch. Dist., 585 F.3d 727, 739 [3rd Cir. 2009]

[holding that "compensatory education is not an available remedy when a student has been unilaterally enrolled in private school"]), the district has not raised this issue on appeal. Additionally, the Second Circuit Court of Appeals has not directly addressed this question and, generally, appears to have adopted a broader reading of the purposes of compensatory education than the Third Circuit (compare P.P., 585 F.3d at 739 [finding that "[t]he right to compensatory education arises not from the denial of an appropriate IEP, but from the denial of appropriate education"], with E. Lyme, 790 F.3d at 456-57 [treating compensatory education as an available equitable remedy for a denial of a FAPE so as to effectuate the purposes of the IDEA and put a student in the same position he or she would have been in had the denial of a FAPE not occurred]). Unlike the Third Circuit, the Second Circuit's approach to compensatory education thus far may have left room for unique circumstances where an award of compensatory education may be warranted where, for example, a student is unilaterally placed but additional related services are required in order for the placement to provide the student with a FAPE (see V.W. v. New York City Dep't of Educ., 2022 WL 3448096, at *5-7 [S.D.N.Y. Aug. 17, 2022] [finding that awards of tuition reimbursement and compensatory education are not mutually exclusive and that an award of "both education placement and additional services may be necessary to provide a particular student with a FAPE"])).

For the reasons set forth above, there is no basis to modify the compensatory education awarded by the IHO.

VII. Conclusion

As discussed above, the hearing record does not support the parent's contention that the IHO erred in finding the unilaterally obtained services provided to the student by Succeed and Headway during the 2023-24 school year were appropriate to address his special education needs, and, therefore, I need not address equitable factors as they relate to funding for those services. Additionally, as noted above, the parent specifically requested compensatory education services as part of the due process complaint notice and there is insufficient reason presented on appeal to modify the awarded compensatory education.

I have considered the parties' remaining contentions and find that I need not address them in light of my determinations above.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

Dated: Albany, New York
September 30, 2024

STEVEN KROLAK
STATE REVIEW OFFICER