



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 24-348

**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 Sarah M. Pourhosseini, Esq.

## **DECISION**

### **I. Introduction**

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from a decision of an impartial hearing officer (IHO) which denied her request that respondent (the district) fund the costs of her son's private services delivered by Succeed Support Services, LLC (Succeed) and Headway Services (Headway) for the 2023-24 school year. The district cross-appeals from the IHO's alternative findings as to equitable considerations asserting that they would warrant a further reduction of any relief awarded. 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). 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 March 23, 2021, determined the student was eligible for special education as a student with a speech or language impairment, and developed an IESP for the

student with a projected implementation date of July 1, 2021 (Parent Ex. B at p. 1).<sup>1</sup> The March 2021 CSE recommended that the student receive five periods of group SETSS in Yiddish, two 30-minute sessions of speech-language therapy (one individual, one group) in Yiddish, and two 30-minute sessions of individual occupational therapy (OT) in English per week (id. at pp. 12-13).<sup>2</sup> An April 19, 2021 prior written notice reiterated the March 2023 CSE's recommendations and considerations (Dist. Ex. 3).

In a completed district form, dated May 15, 2023, the parent informed the district that she placed the student in a nonpublic school at her expense for the 2023-24 school year, requested that the district provide special education services to the student for the 2023-24 school year, and granted permission for the district to provide information about the student to the nonpublic school the student would attend (Parent Ex. E).

In another form dated August 11, 2023, the district sent the parent a request for permission for the district to provide information to the nonpublic school that the student would be attending for the 2023-24 school year (Dist. Ex. 4 at pp. 1, 3).

On September 1, 2023, the parent executed a contract with Headway for the provision of speech-language therapy to the student at a rate of \$350 for two 30-minute sessions per week (Parent Ex. J).<sup>3</sup>

In a letter, dated September 27, 2023 and described as a ten day notice, the parent, through her advocate "Prime Advocacy, LLC," informed the district that it had not assigned the student a provider for the student's mandated services for the 2023-24 school year and requested that the district "fulfill the mandate" or the parent would "unilaterally obtain the mandated services through a private agency at an enhanced market rate" (Parent Ex. D). The hearing record did not include a district response to the parent's September 2023 letter (see Parent Exs. A-E; Dist. Exs. 1-6).

The parent electronically signed a contract with Succeed to provide services to the student for the 2023-24 school year (Parent Ex. C).<sup>4</sup> The contract included a listing of Succeed's rates for special education (\$215 per hour for individual; \$160 per hour for group) and related services

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<sup>1</sup> At the time the March 2021 IESP was developed, during the 2020-21 school year, the student was receiving services as a preschool student with a disability and based on the student's age, the 2021-22 school year was set to be the student's kindergarten school year in the district (see Educ. Law § 4410[1][i]; 8 NYCRR 200.1[mm]; see also Educ. Law § 3202[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]).

<sup>2</sup> 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.

<sup>3</sup> The Commissioner of Education has not approved Headway as a school or agency with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

<sup>4</sup> Although the document indicates that the parent electronically signed the document, the document does not include the date or time stamp for the parent's signature (Parent Ex. C).

(\$350 per hour for individual, with no group rate offered) but did not list the specific services to be provided to the student (Parent Ex. C at p. 3).

### **A. Due Process Complaint Notice**

In a due process complaint notice dated April 15, 2024, the parent, through an advocate with Prime Advocacy, LLC, alleged that the district denied the student a free appropriate public education (FAPE) "and/or [e]quitable [s]ervices" for the 2023-24 school year (Parent Ex. A at p. 2).<sup>5</sup> More specifically, the parent asserted that the CSE failed to develop and implement an appropriate program of services for the 2023-24 school year, as the last IESP developed for the student was dated March 23, 2021 (*id.* at p. 1). The parent argued that she was unable to "procure a provider" to implement the student's services at the district's rates, as such, she had "no choice but to retain the services" of agencies to deliver "the mandated services at an enhanced rate set by the provider" (*id.* at p. 2). Additionally, the parent sought an "[o]rder of [p]endency" and district funding of the "last agreed upon program" from the March 2021 IESP, which included five sessions per week of SETSS, one individual and one group session per week of speech-language therapy for 30 minutes, and two sessions per week of individual OT for 30 minutes (*id.* at p. 3). In addition, the parent sought compensatory education services "as a bank, at an enhanced rate set by the provider, to make-up for any mandated services not provided by" the district (*id.*).

### **B. Impartial Hearing Officer Decision**

An impartial hearing convened and concluded before the Office of Administrative Trials and Hearings (OATH) on June 3, 2024 (Tr. pp. 1-48). In a decision dated July 2, 2024, the IHO identified "Burlington-Carter" as "the appropriate test to be used in SETSS cases" and found that the "[d]istrict did not meaningfully challenge [the s]tudent's eligibility to receive equitable services for the 2023-24 school year" (IHO Decision at pp. 7, 8). The IHO reiterated the parent's allegation that the district failed to implement the student's services, and found that the district failed to introduce any evidence or argument to the contrary, therefore, she determined that "it [wa]s undisputed that [the d]istrict failed to provide [the s]tudent with equitable services" (*id.* at p. 8).

Next, the IHO determined that the parent did not meet her evidentiary burden to demonstrate that Succeed and Headway offered educational programs which met the student's unique needs (IHO Decision at p. 9). First, regarding the services delivered by Success, the IHO found that although the undated SETSS report described the student's academic challenges, "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.*). Regarding the SETSS session notes, the IHO found that they described the activity to be performed in a given week and a goal, but did not describe how the student performed in the activity, whether the student achieved the goal, or whether there was any progress towards the goal (*id.*).

Turning to the speech-language therapy delivered by Headway, the IHO found that while the progress report generally described the student's challenges and included goals for the student,

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<sup>5</sup> The name of the advocate who appeared on behalf of the parent at the hearing is printed on the due process complaint notice over a box labeled "[Case Attorney], Esq." next to an abbreviation noting a conformed signature (Parent Ex. A at p. 4).

it "failed to describe the methods used to instruct [the s]tudent or a description of the instruction being used to address [the s]tudent's unique needs" (IHO Decision at p. 9). The IHO also determined that the Headway educational director's affidavit did not describe the student's performance as of the start of services in November 2023, how the instruction was tailored to meet the student's needs, or any progress that may have been made (id.). Additionally, the IHO found that the evidence did not establish that the witness from Headway "would be qualified to offer an opinion as to the appropriateness of the [speech-language therapy] services provided" or that the provider of the student's speech-language therapy was qualified to deliver services in Yiddish (id.). Lastly, as the IHO found that neither the educational director's affidavit nor the speech-language therapy progress report adequately described the type of instruction the student received and failed to demonstrate that he was receiving services tailored to meet his needs by a bilingual Yiddish provider, the parent failed to show the appropriateness of the services provided by Headway (id.).

Although the IHO found the parent was not entitled to funding, "for completeness of the record," the IHO addressed equitable considerations (IHO Decision at pp. 9-10). The IHO determined that the evidence showed that the parent attended the March 2021 CSE meeting, and made a timely request for equitable services on May 15, 2023, but "failed to establish how and when the [t]en-[d]ay [n]otice was submitted to the [d]istrict" (id. at p. 10). Therefore, "were an award to be ordered," the IHO found that "a reduction of 20[percent]" of the SETSS and speech-language therapy rate was warranted (id.). The IHO indicated that the district did not address the parent's request for OT services, found that the student was entitled to OT during the 2023-24 school year, and granted the parent's request for a related services authorization (RSA) for OT services (id. at pp. 10, 11).

#### **IV. Appeal for State-Level Review**

The parent appeals, alleging that the IHO erred in finding that the parent failed to prove the appropriateness of the unilaterally obtained services from Succeed and Headway. The parent asserts that, while not dispositive, the student made academic progress, and that the SETSS progress report demonstrated that the SETSS provider "both identified the [s]tudent's academic needs and provided instruction to address those needs," and that the speech-language therapy supervisor testified that the student had shown progress. As such, the parent argues that "the IHO's assertion that the testimonial and documentary evidence provided with respect to SETSS and speech[-]language therapy was insufficient" to demonstrate the appropriateness of the services was incorrect. The parent requests reversal of the IHO's determination and an order that the district fund the student's SETSS at the contracted for rate of \$215.00 per hour and speech-language therapy at the contracted for rate of \$350.00 per hour.

In an answer, the district asserts that the IHO correctly determined that the parent failed to sustain her burden to show that the unilaterally obtained services provided to the student by Succeed were appropriate, as the documentary evidence "lack[s] credibility" and did not describe the services provided or how those services addressed the student's needs. The district also argues that Succeed inappropriately delivered the student's SETSS on an individual basis rather than in a group as mandated by the student's IESP, and the parent "chose to delay" the initiation of the student's SETSS until November 2023. Regarding the speech-language therapy delivered by Headway, the district asserts that the progress report "lacks credibility and otherwise fails to establish that the services were appropriate." The district agrees with the IHO's findings that the

progress report did not indicate how services were provided or how they addressed the student's needs, and that there was no evidence the speech-language therapy provider delivered services to the student in Yiddish pursuant to his IESP, or was qualified to do so.

Additionally, the district asserts that the parent did not appeal from the IHO's determination, should equitable considerations be reached, to reduce a funding award by 20 percent and therefore that finding is final and binding on the parties. As for a cross-appeal, the district argues, in the event relief is awarded, that the SETSS rate should be further reduced due to the IHO's failure to consider the district's documentary evidence regarding the rate for SETSS, which shows that Succeed's rate was "unreasonable." To the extent that relief to the parent is not denied in full, the district requests that the SETSS rate be limited to \$110.00 per hour.

## 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]).<sup>6</sup> "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.).<sup>7</sup> Thus, under State law an eligible New

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<sup>6</sup> 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]).

<sup>7</sup> 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

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-Unilaterally Obtained Services**

At the outset, the parties have not appealed from the IHO's finding that the district failed to implement the student's SETSS and speech-language therapy services during the 2023-24 school year, or the IHO's award of an RSA for OT services and therefore, those determinations are 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

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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.

[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]).<sup>8</sup> In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

Turning to a review of the appropriateness of the unilaterally-obtained services, the federal standard for adjudicating these types of disputes is instructive. A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129). Citing the Rowley standard, the Supreme Court has explained that "when a public school system has defaulted on its obligations under the Act, a private school placement is 'proper under the Act' if the education provided by the private school is 'reasonably calculated to enable the child to receive educational benefits'" (Carter, 510 U.S. at 11; see Rowley, 458 U.S. at 203-04; Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see also Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] ["evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (id. at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain 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).

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<sup>8</sup> 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 (Educ. Law § 4404[1][c]).



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).

#### **A. 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 unilaterally obtained SETSS and speech-language therapy services were appropriate to meet the student's needs.

The hearing record included the last district IESP developed for the student on March 23, 2021 with an implementation date of July 1, 2021 (Parent Ex. B at p. 1). The IESP indicated that the student demonstrated "low levels of performance and need[ed] to develop age appropriate skills in the . . . areas of: cognition, reading and decoding skills, receptive language, social and emotional behavior and regulation, self-regulation skills, attention, math and numbers," and expressive language (id. at pp. 2-3). In terms of language development, the IESP reported that the student was bilingual, and both his expressive and receptive language skills were limited (id. at pp. 2, 4). The student followed one step directions, answered "simple" topic-related questions and while able to label objects, he struggled to speak in full sentences that were understandable to adults (id.). Socially, the IESP indicated that the student's self-regulation skills and his attention span were limited, and he had difficulty verbalizing his feelings in an appropriate manner and adjusting to the changes that were occurring around him (id. at p. 5). The student liked to play with his toys and was interested in playing with other children, but he struggled to express himself with peers (id.). Regarding physical development, the IESP indicated that the student "lagged behind his peers in gross motor development" and demonstrated delays in sensory processing modulation,

motor coordination, pre-writing and visual perceptual skills, and neuromuscular development (id. at pp. 6-7).

A 2023-24 Succeed SETSS progress report reflected that the student was in second grade at the nonpublic school and received five periods of SETSS per week (Parent Ex. G at p. 1). The progress report described the student's preferred learning style as "visual, auditory, and kinesthetic/tactile," and indicated that his reading skills were equivalent to a kindergarten level (id.). According to the progress report, the student was reading at a Fountas and Pinnell level "C" with 80 percent accuracy, was able to identify letters and their sounds, and tried to read words (id. at p. 2). The progress report indicated that the student recognized letters but confused upper and lower-case letters, read one-syllable words but with errors and without fluency, and read at a very slow pace due to "his confusion with letters and sounds" (id.). The SETSS provider stated that the student's writing skills were "inconsistent with his peers," and he was able to write letters independently and was "starting to write sentences" (id. at p. 3). His teacher had difficulty reading what he wrote, and he required practice and review to improve his writing skills (id.). In math, the progress report noted that the student's skills were equivalent to a kindergarten level (id. at p. 1). The student wrote numbers and understood addition and subtraction concepts, compared groups of objects, and completed simple mental math problems; however, he did not identify the correct operation to use in word problems or tell time (id. at p. 4). The SETSS progress report indicated that the student presented with social delays and had difficulty understanding and expressing his emotions (id. at p. 6). In the physical development section of the progress report, the student was described as "doing well" (id.).

With regard to the student's speech-language needs, a May 2024 Headway speech-language progress note reported that he presented with "moderate delays in his receptive language (comprehension) and auditory processing skills, expressive language skills, articulation skills, and [a] mild delay in his pragmatic and behavioral skills" (Parent Ex. K at p. 1). Specifically, the student's speech-language pathologist stated that the student had difficulty understanding and processing spoken information, "following multistep commands," and "forming thoughts for narratives" (id.). In addition, the speech-language progress report indicated that the student exhibited difficulty with his speech clarity and articulation skills, which required "modeling and prompting for proper placement of articulators for fluent speech" (id.).

## **B. 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. F-L).

With respect to SETSS, the documentary evidence offered by the parent included a 2023-24 contract with Succeed, which demonstrated the parent's financial obligation for the unilaterally obtained SETSS delivered to the student, session notes, an affidavit from the SETSS educational supervisor from Succeed (supervisor), the SETSS provider's timesheet, and the aforementioned 2023-24 SETSS progress report (Parent Exs. C; F-I).

The student began receiving SETSS from Succeed on or about November 13, 2023 and the hearing record shows that the student was provided with SETSS through, at least, April 17, 2024 (Parent Exs. F at ¶ 6; H-I).

In an affidavit, the educational supervisor from Succeed reported 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 (Parent Ex. F ¶ 2). The supervisor testified that in her role at Succeed, she collaborated with providers to establish effective strategies, teaching methods and goals to properly address students' specific learning needs, provided educational guidance and academic support to the providers, and assisted in the development and implementation of behavior intervention plans (id. ¶ 3).

At the impartial hearing, the supervisor testified to her belief that, during the 2023-24 school year, the student was recommended to receive five hours of SETSS per week in a group setting, and that he was seen individually because there were no other students with similar academic levels as the student who were available during his sessions (Tr. p. 23). The supervisor further testified that the student's SETSS sessions were conducted in Yiddish and in-person at the student's nonpublic school, by a provider who held a "master's degree in special education and [was] certified by New York State to work with students with disabilities" (Tr. pp. 30, 39; Parent Ex. F ¶ 8).

To assist the student with his academic needs, the SETSS progress report indicated that the "sessions [we]re utilized to address [the student's] deficits through activities and strategies specifically created to remediate [his] weaknesses and support him in progressing towards age-appropriate goals and objectives" (Parent Ex. G at p. 1). Further, the progress report stated that the "educational services [we]re designed to meet [the student's] unique needs and [we]re necessary to help [him] advance toward his goals and objectives" (id.).

In reading, the supervisor testified that the SETSS provider used "different modalities like echo reading, scaffolding and rhyming skill games to help" the student, and also used phonological awareness activities, letter cards, and "constant repetition" during instruction (Parent Ex. F ¶ 10). In addition, the supervisor noted that the provider used the "ReadBright program" with the student to "facilitate interest in reading and build comprehension skills" (id.).

To address the student's writing needs, the SETSS provider reported she used strategies of "hand-over-hand, wipe-off boards, lots of practice sheets, sensory activities, praise, and reinforcements," and that the student's writing was improving with "practice and review" (Parent Ex. G at p. 3). The supervisor indicated that the student needed "much prompting, guidance and repetition to formulate his thoughts coherently," and "reminders to sound out words and include all necessary letters" (Parent Ex. F ¶ 11).

The SETSS provider reported that the student required prompting to identify the correct operation needed for solving math word problems, demonstrated understanding of time using a graphic organizer, and that "[m]anipulatives, counters, timers, graphic organizers, and praise help[ed] him gain math skills" (Parent Ex. G at p. 4). The supervisor stated that "individualized instruction [wa]s highly beneficial for [the student] to be able to focus and concentrate on

computing his work" in math, and that the SETSS provider used "various methods and techniques to prompt [him] and help him with problem solving" (Parent Ex. F ¶ 12).

With regard to the student's social/emotional needs, the SETSS progress report indicated that the student needed prompting to attempt a task, play a game, and show improvement in his involvement in classroom activities (Parent Ex. G at p. 6). He also needed positive behavioral approaches to "behave in the classroom setting" (id.). The supervisor reported that the SETSS provider worked with the student on identifying and understanding his emotions by using "emotion social skills stories" (Parent Ex. F ¶ 13). According to the supervisor, the SETSS provider also worked "on helping [the student] express himself in a calm and coherent manner," and "incorporating the idea of mature problem solving" (id.). The supervisor testified that continued one-on-one guidance from his SETSS provider would enable the student to "join his peers in the age appropriate social/emotional realm" (id.).

The Succeed progress report included reading annual goals focused on improving the student's ability to recognize and produce rhyming words; count, produce, blend, and segment syllables in spoken words; blend and segment onsets and rimes of single-syllable words; isolate and pronounce specific phonemes; and add or substitute individual phonemes to make new words (Parent Ex. G at p. 3). The student's annual writing goals included using a combination of drawing, dictating and writing to explain his writing, narrate a single event, tell about the events in order, and provide a reaction to what happened; responding to questions and suggestions from peers and adding details to strengthen his writing; and exploring a variety of digital tools to produce and publish writing (id. at p. 4). The SETSS progress report included math goals to improve the student's ability to count objects, "understand that the last number counted t[old] the number of objects counted" regardless of the arrangement, and that "each successive number name refers to a quantity that [wa]s one larger" (id. at p. 5). Additionally, the SETSS progress note included social/emotional annual goals to improve the student's ability to identify his own emotions using a feelings chart and identify an appropriate response to a "hypothetical anger provoking situation" (id. at p. 6).

In her affidavit, the supervisor indicated that the SETSS provider recorded the date and time of her sessions with the student and submitted an invoice at the end of the month (Parent Exs. F ¶ 4; H). The SETSS session notes were also submitted to the supervisor at the end of each month for review (Tr. p. 30; Parent Ex. I). Review of the November 2023-April 2024 SETSS session notes shows that the provider recorded a weekly entry identifying the goal addressed and a general statement of what the student and provider had worked on during the week (see Parent Ex. I). A review of the SETSS provider's timesheets shows that she generally saw the student for two 90-minute sessions and one 120-minute session per week (see Parent Ex. H). The SETSS session notes and the SETSS provider's timesheets both show that the student's sessions occurred between November 12 or 13, 2023 and approximately April 17, 2024 (Parent Exs. H; I). The supervisor testified that she did not know the date the parent signed the contract with Succeed for the provision of the student's SETSS (Tr. pp. 25-26). She testified that SETSS sessions did not begin until November 2023 because the parent "decided to wait" for a specific provider who was out of the country until that time (Tr. p. 26; Parent Ex. I). The hearing concluded on June 3, 2024, and, although the supervisor testified that session notes were submitted at the end of each month and she reviewed them every month when submitted (Tr. p. 30), the hearing record does not include evidence of SETSS sessions occurring after April 17, 2024 (see Tr. pp. 1-48; Parent Exs. A-L).

Turning to the speech-language therapy services obtained by the parent, the hearing record included a September 2023 Headway contract for speech-language therapy, a May 2023 Headway speech-language progress report, and an affidavit from the educational director at Headway (director) (Parent Exs. J; K; L).<sup>9</sup> The director indicated 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 (Parent Ex. L ¶ 5). The director further noted that she communicated with the parents to "better understand their child's learning needs," and worked closely with the supervisory team to ensure that the needs of every student and teacher were being met (*id.* ¶¶ 5, 6). In her testimony by affidavit, the director reported that Headway provided the student with two 30-minute sessions per week of speech-language therapy for the 2023-24 school year (*id.* ¶ 12). The director testified that the student's assigned provider was a speech-language therapist licensed in New York State and that she oversaw the provider's work (*id.* ¶¶ 13, 14). She stated that aside from providing direct 1:1 services to the student, "the providers also t[ook] time to prepare for sessions, create[d] goals, wr[ote] progress reports, and me[t] with teachers and parents," and that goals were created for the student to work on during the 2023-24 school year, which were reviewed quarterly (*id.* ¶¶ 15, 16).

The May 2023 Headway speech-language progress report provided a description of the student's communication needs and indicated that the student received 60 minutes of speech-language therapy per week to address his receptive, expressive, and pragmatic language skills (Parent Ex. K at p. 1).<sup>10</sup> The speech-language progress report included annual goals and short-term objectives to improve the student's receptive and expressive language and articulation skills (*id.* at p. 2). The short-term objectives targeted the student's ability to recall salient information from a short story read to him, understand and correctly respond to age appropriate "wh" and yes/no questions, improve his receptive language skills by following multistep directions, learn and incorporate 40 new vocabulary words, understand and use positional, quantitative, and descriptive concepts, identify categories and items that fit within those categories, and improve articulation skills by controlling speech rate and phrasing to improve overall intelligibility (*id.*). Despite the information about the student's needs and the annual goals/short-term objectives in the progress report, the hearing record lacks session notes or attendance records from Headway describing when and where the speech-language therapy sessions were delivered, and whether they were delivered in Yiddish or English (*see id.* at pp. 1-2). In addition, the speech-language provider's progress report did not detail any materials, strategies, or specially designed instruction techniques she used to address the student's speech-language deficits, nor did she indicate how the student performed in relation to the annual goals and short-term objectives, or how her services supported the student in the classroom during the 2023-24 school year (*id.*). Further, review of

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<sup>9</sup> The parent signed the 2023-24 Headway "Parent Services Contract" on September 1, 2023, financially obligating the parent for the services delivered to the student, and included the district's recommendation for two 30-minute sessions per week of speech-language therapy (Parent Ex. J at p. 1). The contract did not specify that the therapy was to occur in Yiddish, or whether it was to be delivered in a group or individually, and also indicated that the rate for speech-language therapy was \$350 for the 2023-24 school year (*id.*).

<sup>10</sup> In addition to the student's speech-language needs as described above, the speech-language therapist indicated that the student presented with "significant fine motor skill delays as well as emotional dis-regulation" and that the parent reported "trying hard" to obtain OT services for him but had not been successful "thus far" (Parent Ex. K at p. 1).

the information regarding the student's SETSS does not provide additional information about the speech-language therapy delivered by Headway, or how the SETSS delivered may have addressed the student's communication needs (see Parent Exs. F; G; H; I; J).

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]). Thus, based on the totality of the circumstances, there is insufficient evidence in the hearing record to support a finding that the unilaterally obtained SETSS and speech-language therapy provided to the student by Succeed and Headway constituted specially designed instruction sufficient to meet the student's identified needs.

Regarding SETSS, although the hearing record contained some sparse information regarding the specially designed instruction the student received, the evidence shows that the parent chose to obtain services from Succeed for only five months of the 2023-24 10-month school year (Tr. p. 26; Parent Exs. H; I). Turning to the speech-language therapy delivered by Headway, the IHO suggested that the student's speech-language therapy may have also started in November 2023, the provider's progress note was dated May 13, 2024 and did not indicate when services began, nor does the hearing record otherwise identify a start date (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. 9). 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. L).

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 the first half of the school year and the lack of evidence as to when speech-language therapy services began for the student.<sup>11</sup> However, as discussed above, neither the SETSS progress report nor the speech-

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<sup>11</sup> 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).<sup>11</sup> However, a finding of progress is, nevertheless, a relevant factor to

language therapy progress report evidenced that the student made progress during the course of the 2023-24 school year (Parent Exs. G; K). 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 supervisor testified that the student made "some slow and steady progress" and the Headway educational director testified that the student "has already shown signs of progress" (Parent Ex. F at ¶10; L at ¶18), these general statements are not sufficient to establish that the student was progressing with whatever services were being provided to him.

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, in that there is insufficient evidence that the services were specially designed to address the student's identified needs, particularly in the area of speech-language therapy, and particularly given the lack of information within the hearing record as to how long the student received services during the course of the 2023-24 school year. Accordingly, the parent failed to meet her burden to prove that the services she privately obtained from Succeed and Headway provided specially designed instruction that was reasonably calculated to enable the student to receive an educational benefit under the totality of the circumstances.

## **VII. Conclusion**

While my reasoning may differ, there is no reason to disturb the IHO's ultimate conclusion that the parent failed to show that the unilaterally obtained services delivered to the student by Succeed and Headway were appropriate, and the necessary inquiry is at an end.

I have considered the parties' remaining contentions and find it is unnecessary to address them in light of my findings herein.

**THE APPEAL IS DISMISSED.**

**THE CROSS-APPEAL IS DISMISSED.**

**Dated: Albany, New York  
September 18, 2024**

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**JUSTYN P. BATES  
STATE REVIEW OFFICER**

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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]).