



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 24-357

**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:**

Law Offices of Lauren A. Baum, PC, attorneys for petitioner, by Lauren A. Baum, Esq.

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) to the extent it awarded an incorrect dollar amount for respondent (the district) to reimburse her for the costs of private special education services she unilaterally obtained for her son during the 2022-23 school year. The district cross-appeals from that portion of the IHO's decision that ordered it to reimburse the costs of the student's private services for the 2022-23 school year. The appeal must be dismissed. The cross-appeal must be sustained.

### **II. Overview—Administrative Procedures**

When a student who resides in New York is eligible for special education services and attends a nonpublic school, Article 73 of the New York State Education Law allows for the creation of an individualized education services program (IESP) under the State's so-called "dual enrollment" statute (*see* Educ. Law § 3602-c). The task of creating an IESP is assigned to the same committee that designs educational programming for students with disabilities under the IDEA (20 U.S.C. §§ 1400-1482), namely a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law

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

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

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

### III. Facts and Procedural History

The student underwent a neuropsychological evaluation in winter 2018 (Parent Ex. D at pp. 1-2).<sup>1</sup> According to the resultant March 2018 neuropsychological evaluation report, the student met the criteria for diagnoses of language disorder, speech sound disorder, other specified attention deficit/hyperactivity disorder (ADHD), and developmental coordination disorder (id. at p. 8).

During the 2017-18, 2018-19 and 2019-20 school years, the student attended a private nursery school at which he received special education itinerant teacher (SEIT) services, occupational therapy (OT), and speech-language therapy (see Parent Ex. E at p. 2).<sup>2</sup> During the 2020-21 school year, the student attended a remote "pod" at the Allen Stevenson School (Allen Stevenson) from September 2020 to February 2021, after which he transitioned to in-person learning at school for the remainder of the 2020-21 school year (Parent Ex. E at p. 2).

According to the district's response to the parent's due process complaint notice, a CSE last convened on March 24, 2021 to hold an annual review for the student, found the student continued to be eligible for special education as a student with a speech or language impairment, and recommended a program that included integrated co-teaching (ICT) services (Parent Ex. B).<sup>3, 4</sup>

The student continued to attend Allen Stevenson for the 2021-22 and 2022-23 school years in a general education classroom (Parent Exs. E at p. 2; T ¶ 9; see Parent Exs. I at p. 1; S ¶ 3). The student's private speech-language pathologist reported that beginning in September 2021 she provided the student with three hours of "individual academic instruction" per week after school that focused on language and literacy (Parent Exs. G at p. 1; S ¶ 4). The instruction was increased to four hours per week in January 2022 (Parent Exs. G at p. 1; S ¶ 6).

On February 7, 2022, the parent informed the district that she was "not pursuing an [individualized education program (IEP)] from the [district]" for the student, and the district deemed the student's "case clos[ed]" due to the parent's "[r]evocation of consent" (Dist. Exs. 1; 2).

On June 1, 2022, the parent sent a letter to the district requesting that it provide special education services to the student at his non-public school during the 2022-23 school year (Parent

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<sup>1</sup> Testing for the neuropsychological evaluation took place on December 15, 2017 and January 12, 2018 and the results of the assessment were reflected in a report dated March 16, 2018 (Parent Ex. D at p. 1). For purposes of this decision the neuropsychological evaluation report shall be referred to as the "March 2018 neuropsychological evaluation."

<sup>2</sup> "SEIT" is defined under State law meaning "an approved program provided by a certified special education teacher on an itinerant basis in accordance with the regulations of the commissioner, at a site determined by the board, including but not limited to an approved or licensed prekindergarten or head start program; the child's home; a hospital; a state facility; or a child care location as defined in paragraph a of subdivision eight of this section" (Educ Law § 4410[1][k]; see 8 NYCRR 200.16[i][3][ii]).

<sup>3</sup> 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>4</sup> The March 2021 IEP was not entered into evidence during the impartial hearing.

Ex. C). During summer 2022, the student attended Windward school summer program and received reading, writing and math intervention (Parent Exs. E at p. 2; G at p. 1).

The student underwent a private neuropsychological and educational evaluation on May 4, May 10, and May 11, 2023, and the evaluator found that the student met the criteria for diagnoses of language disorder; ADHD; specific learning disorder with impairment in mathematics, reading, and written expression; developmental coordination disorder; and adjustment disorder with anxiety and depressed mood (Parent Ex. E at pp. 10-12).

In an independent OT evaluation report dated June 5, 2023, the student's private occupational therapist reported that the student had received one 45-minute session per week of individual OT for the past three years with some breaks due to COVID and summer break (Parent Ex. I at p. 1). During the 2022-23 school year, the student received two hours of private SEIT services per week beginning December 2022 and two hours per week of private counseling services in the form of play therapy and pragmatic social skills therapy (Parent Ex. R ¶¶ 5, 11).<sup>5, 6</sup>

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

In a due process complaint notice dated January 28, 2024, the parent alleged that the district denied the student a free appropriate public education (FAPE) for the 2022-23 school year (see Parent Ex. A). The parent contended that there was no CSE held, no IEP or IESP developed, and no prior written notice for the 2023-24 school year (id. at p. 1). The parent asserted that she sent a letter on June 1, 2022 requesting equitable services from the district but that the CSE failed to conduct evaluations of the student or convene to create an educational program within sixty school days of receipt of her request for equitable services (id. at p. 2). According to the parent, as a result of the lack of action by the district, she unilaterally obtained private services for the student in the form of SEIT services, OT, speech-language therapy, and counseling serves for the 2022-23 school year (id. at p. 2). The parent requested a finding that the district failed to offer the student a FAPE for the 2022-23 school year and funding/direct payment/reimbursement of the costs of the privately obtained related services (id. at p. 3).

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

An impartial hearing convened before the Office of Administrative Trials and Hearings (OATH) on March 13, 2024 and concluded May 20, 2024 after four days of proceedings including a pre-hearing conference (Tr. pp. 1-169).

In a decision dated July 12, 2024, the IHO found that the district failed to timely respond to the parent's June 1, 2022 letter requesting dual enrollment services and thus the district denied the student a FAPE on an equitable basis (IHO Decision at p. 9). The IHO further found that the

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<sup>5</sup> It is noted that the student's private service providers for the 2022-23 school year were independent providers who were not part of a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

<sup>6</sup> Although the student was school aged during the 2022-23 school year, the private services delivered are referred to throughout the hearing record as SEIT services.

evidence demonstrated the parent took on the district's responsibility of finding qualified providers to provide SEIT math services, OT, speech-language therapy, and counseling services to the student during the 2022-23 school year (id. at p. 11). Accordingly, the IHO ordered the district to reimburse the parent for her out-of-pocket costs for such services totaling \$40,383.91 (id.).

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

The parent appeals, alleging that the IHO made a calculation error in the relief ordered and that the total amount of the parent's out-of-pocket costs for the unilaterally obtained services was \$43,712.51. The parent also proposes seven additional documents to be considered as evidence on appeal to support her argument. The parent requests that the IHO's order be modified to correct the alleged mathematical error.

In an answer with cross appeal, the district contends that the IHO erred by granting any relief as the parent failed to meet her burden to prove that private services unilaterally obtained for the student during the 2022-23 school year were appropriate and equitable considerations did not support the parent's request for relief. Initially, the district asserts that the IHO erred in treating the parent's requested relief as compensatory education and that the IHO should have applied the Burlington/Carter standard. The district contends that the parent produced no evidence of the services the district found appropriate or necessary for the student and that the parent did not sustain her burden in demonstrating that the privately-obtained services delivered were specially designed to meet the student's needs. The district argues that the parent rejected the most recent March 2021 IEP by unilaterally enrolling the student in a non-public school and that it is erroneous to allow the parent to "cherry-pick" which "IEP services" she agrees with. The district further contends the IHO had no information upon which to base her finding regarding whether the privately obtained services were appropriate as there was no IEP or IESP introduced into evidence.

Additionally, the district claims that the parent presented no evidence of any contractual obligation between the parent and the private services providers, which is a requisite to an award of relief; that there are no licenses or any provider credentials to indicate whether the providers were appropriately experienced to deliver the services; that the hearing record includes only two progress reports, for private OT and private speech-language therapy, but no progress reports for the SEIT or counseling services; that the parent failed to meet her burden to prove the appropriateness of the privately obtained services; and that the equities did not support an award of funding for the private services given several discrepancies in the private service providers' rates and frequency, which the district argues evidences fraud or provider oversight that the district should not be held liable to fund.

Regarding the parent's additional evidence submitted on appeal, the district argues such evidence should not be considered as it was available at the impartial hearing and is not necessary to render a decision on appeal.<sup>7</sup> As relief, the district requests that the parent's request for review be dismissed and that the IHO's awarded relief be annulled.

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<sup>7</sup> Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an impartial hearing officer's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student

In an answer to the district's cross-appeal, the parent argues the district's claim that the IHO erred by not applying the Burlington/Carter standard was not properly raised in the proceedings before the IHO and thus should not be permitted to be raised for the first time on appeal. Additionally, the parent argues that because she was not seeking tuition reimbursement for the student's unilateral placement, the IHO did not error by not applying the Burlington/Carter standard. The parent also argues that even if the Burlington/Carter standard was to be applied to this matter, she has met her burden of proof that the privately obtained services were appropriate. The parent also argues the IHO had substantial information as to the appropriateness of the privately obtained services and that she offered the student's most recent March 2021 IEP as part of her documentary evidence, but such document was excluded because of the district's objection. The parent argues she should not be faulted for not introducing the student's most recent IEP into evidence when the document was excluded based on the district's assertion that it was not relevant.

Regarding the district's equities argument, the parent alleges she acted reasonably and that the hearing record does not support the district's argument that the private service providers engaged in fraud. Additionally, the parent argues the district's claim that the parent did not establish a financial obligation is outside the scope of the impartial hearing and that such argument is only applicable to matters involving direct funding rather than reimbursement. Further, the parent argues that by paying already for the privately obtained services it shows that she incurred a financial obligation to the service providers.

## **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

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with a Disability, Appeal No. 08-030; Application of the Dep't of Educ., Appeal No. 08-024; Application of a Student with a Disability, Appeal No. 08-003; Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 06-040; Application of a Child with a Disability, Appeal No. 05-080; Application of a Child with a Disability, Appeal No. 05-068; Application of the Bd. of Educ., Appeal No. 04-068). Here, given the determination that the parent did not meet her burden to prove that the unilaterally obtained services were appropriate, the proposed additional evidence, offered to prove the parent's total out-of-pocket cost for all private services provided to the student during the 2022-23 school year, is not necessary to render a decision and, therefore, will not be considered.

services is made (Educ. Law § 3602-c[2]).<sup>8</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>9</sup> Thus, under State law an eligible New York State resident student may be voluntarily enrolled by a parent in a nonpublic school, but at the same time the student is also enrolled in the public school district, that is dually enrolled, for the purpose of receiving special education programming under Education Law § 3602-c, dual enrollment services for which a public school district may be held accountable through an impartial hearing.

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E. v. New York City Dep't of Educ., 694 F.3d 167, 184-85 [2d Cir. 2012]).

## **VI. Discussion**

Initially, the district has not appealed the IHO's determination that it failed to meet its burden to prove that it provided the student with a FAPE for the 2022-23 school year (IHO Decision at p. 9). Accordingly, this finding has become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at \*6-\*7, \*10 [S.D.N.Y. Mar. 21, 2013]).

On appeal, the crux of the dispute between the parties relates to the appropriateness of the parent's unilaterally obtained SEIT/math tutoring services, OT, speech-language therapy, and

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<sup>8</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>9</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 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.

counseling services delivered to the student during the 2022-23 school year and what relief, if any, is appropriate.

Turning first to the district's cross-appeal, 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 offer or provide the student with public special education services under the State's dual enrollment statute for the 2022-23 school year and, as a self-help remedy, she unilaterally obtained private SEIT, counseling, OT, and speech-language therapy services from various providers 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 and the IHO erred by failing to do so. 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>10</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.

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<sup>10</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 the private providers (Educ. Law § 4404[1][c]).



A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129). Citing the Rowley standard, the Supreme Court has explained that "when a public school system has defaulted on its obligations under the Act, a private school placement is 'proper under the Act' if the education provided by the private school is 'reasonably calculated to enable the child to receive educational benefits'" (Carter, 510 U.S. at 11; see Rowley, 458 U.S. at 203-04; Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see also Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] ["evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (id. at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G., 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

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

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

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

## A. Student's Needs

Although not in dispute on appeal, a brief discussion of the student's needs provides context to resolve the issue of whether the speech-language therapy, OT, counseling services, and the SEIT/math tutoring services obtained by the parent were appropriate for the student for the 2022-23 school year. The evidence in the hearing record that describes the student's needs prior to the 2022-23 school year includes the March 2018 neuropsychological evaluation and a June 2022 speech and language progress report (Parent Exs. D; G).

The pediatric neuropsychologist who conducted the March 2018 neuropsychological evaluation began by reviewing the student's developmental, medical, psychological, family, social, and educational histories and recounting the results of previous evaluations administered to the student (Parent Ex. D). According to the neuropsychological evaluation report, in July 2017 the student was diagnosed with a moderate to severe receptive and expressive language disorder by a speech-language pathologist but in response to consistent therapy had demonstrated significant progress (*id.* at p. 3). The March 2018 neuropsychological evaluation indicated that around the same time the student was assessed using the Peabody Developmental Motor Scales-II (PDMS-II), Sensory Motor Analysis (SMA), and a number of parent report scales (*id.*). The results of the PDMS-II indicated that the student presented with very low fine motor and visual motor integration skills and the results of the SMA revealed moderate to severe difficulties related to sensory motor integration (*id.*). The neuropsychological evaluation report stated that according to an October 2017 OT progress note, the student struggled with distractibility, organization and "maintaining a state of alertness" (*id.*).

Further, the March 2018 neuropsychological evaluation report indicated that in November 2017, the student was evaluated through the Committee on Preschool Special Education (CPSE) using the Stanford-Binet Intelligence Scales-Fifth Edition (SB-5), the Vineland Adaptive Behavior Scales-II, the Childhood Autism Rating Scale-II (CARS-II), and the Developmental Assessment of Young Children-II (DAYC-II) (Parent Ex. D at p. 3). The neuropsychological evaluation report stated that the evaluator was unable to generate scores for the student on the SB-5 but that the results of the DAYC-II reflected borderline deficient cognitive and language related skills (*id.*). In addition, it stated that the results of the Vineland Adaptive Behavior Scale-II indicated that the student demonstrated low average communication and motor skills (*id.*). According to the neuropsychological evaluation report, the results of the CARS-II were consistent with the notion that, while the student presented with some features commonly observed in autism spectrum disorder, his presentation was not consistent with this clinical diagnosis (*id.*). The evaluations concluded that the student presented with attention, sensory, and communication related deficits that required the support of special education services (*id.*).

According to the March 2018 neuropsychological evaluation, a CPSE found the student eligible for special education as a preschool student with a disability and created an IEP that recommended the student attend a "small, integrated classroom" and receive speech-language therapy and OT for the 2018-19 school year (Parent Ex. D at p. 3).

Next the pediatric neuropsychologist reviewed the results of her own evaluation of the student (Parent Ex. D at pp. 3-7). The neuropsychological evaluation report indicated the Differential Ability Scales-II (DAS-II), administered to assess the student's intellectual skills, was

attempted but some subtests were discontinued because of the student's self-directed behavior and confusion with the directions (id. at p. 5). The evaluation report indicated that, based on the DAS-II results, some aspects of the student's verbal intellectual skills were well within the average range specifically verbal comprehension and naming vocabulary (id.). The student scored in the low average range on the nonverbal reasoning subtest of picture similarities and in the very low range on the spatial subtest of copying (id.). The student appeared to demonstrate confusion around less familiar tasks related to visuospatial skills and, therefore, the evaluator could not obtain a reliable estimate of the student's non-verbal skills (id.).

In order to assess the student's preacademic skills, the pediatric neuropsychologist administered the DAS-II and the NEPSY: A Developmental Neuropsychological Assessment Test-Second Edition (NEPSY-II) (Parent Ex. D at p. 5). The neuropsychological evaluation report indicated that the student identified shapes, most colors, and many letters of the alphabet (id.). The student performed in the borderline deficient range on a test of phonological processing (id.). According to the evaluation report, the student identified numbers 1-10 and rote counted from 1-10; however, when asked to count a set of ten small objects, the student seemed confused (id.). According to the DAS-II the student performed in the borderline deficient range on a measure of pre-numerical conceptual reasoning (id.).

Specific to the student's speech-language needs, the March 2018 neuropsychological evaluation report noted that administration of the Peabody Picture Vocabulary Test- IV (PPVT-IV) yielded a score in the very low range (Parent Ex. D at p. 6). In addition, the student's performance on NEPSY-II single-word expressive vocabulary measures ranged from the borderline deficient range to the average range (id.). The evaluator commented that the student's attention played a significant role in his ability to engage with test items (id.). The pediatric neuropsychologist noted the student was unable to complete the body part identification subtest and scored in the borderline deficient range on comprehension of instructions (id.). In summary she concluded that, when calm and motivated to listen, the student was able to understand simple verbal directives at a level that was average for his age (id. at p. 7). The neuropsychological evaluation report indicated that although the student's single-word expressive vocabulary was considered average, his performance on receptive language-related tasks was extremely variable (id.). The report noted that while the student's oral motor skill set had improved with intensive speech-language therapy, his speech continued to remain very difficult for most to understand due to articulation difficulties and sound substitutions (id.).

With regard to fine motor development, the March 2018 neuropsychological evaluation indicated the student was beginning to exhibit a left-handed preference, and usually utilized a fist grip but periodically employed a loose, extended grip (Parent Ex. D at p. 6). When writing, the student used light pressure (id.). The NEPSY-II imitating hand positions subtest showed that bilaterally the student's skills were in the very low range (id.). In summary, fine motor coordination and complex motor planning skills were noted as areas of difficulty for the student (id. at p. 7).

The parent's answers on the Connors Early Childhood parent form, as reported in the March 2018 neuropsychological evaluation, reflected the parent's concerns related to inattention/hyperactivity, restlessness/impulsivity, and emotional lability (Parent Ex. D at p. 6). The parent's reported that it was "very often true" that the student was excitable, impulsive, and

tended to grow overstimulated, and "quite a bit true" that the student fidgeted, jumped from one activity to another, and struggled to remain seated (id.). In addition, the parent stated that the student was easily distracted and had "temper outbursts" at home (id.). The parent indicated that the student made friends easily and was well liked by other children (id.). The parent's responses on the Social Responsiveness Scale, Second Edition (SRS-2) Preschool parent form showed that the parent viewed the student's social awareness, cognition, communication, and motivation as being typical of his age (id.). She noted that while sometimes the student engaged in behaviors that could be construed as a bit strange, he did not display restricted, repetitive behaviors (id.). According to the neuropsychological evaluation report, the student's everyday adaptive skills were assessed using the Adaptive Behavior Assessment System-Second Edition (ABAS-II) and based on parent responses the student scored in the borderline deficient on everyday self-help skills but in the average range on all other subtests (id.).

In contrast, the student's SEIT provider's response set on the SRS-II reflected "clinically significant" concerns related to the student's social communication skills and his levels of social awareness and social motivation (Parent Ex. D at pp. 6-7). The neuropsychological evaluation report indicated that the SEIT provider described significant concerns related to the student exhibiting restricted, repetitive behavior sets in the classroom (id. at p. 7). In addition, the SEIT's responses on the ABAS-II indicated that she perceived the student's adaptive functioning skills related to communication, school living, health and safety, self-direction, and self-care skills to be much lower than his same-aged peers and in the very low range (id. at p. 7). Areas of relative strength for the student were related to leisure and social interaction which were both in the borderline deficient range (id.). The student's general composite score based on the SEIT's responses was in the very low range (id.).

Consistent with previous testing, the results of the CARS-II indicated the student displayed a minimal level of symptomology typically observed in Autism Spectrum Disorder (Parent Ex. D at p. 7). The March 2018 neuropsychological evaluation summarized that the student's performance on the formal testing procedures was directly impacted by the degree to which he was able to attend to and understand the direction sets (id.). Despite this, the results of cognitive testing indicated that there were aspects of the student's verbal intellectual skill set that were well within the average range, but the degree to which he was able to exhibit these skills was impacted significantly by his delayed language skills and poor attention span (id.).

The March 2018 neuropsychological evaluation report concluded that the student presented as endearing and social but also as a student with moderate to severe difficulties related to emerging speech, receptive language, expressive language, impulse control, attention, and fine motor skills (Parent Ex. D at p. 8). While the student had made notable progress with the delivery of intensive speech-language and OT services, the variety of developmental difficulties played a "clinically significant" role in his ability to "function" both in the school and home settings (id.). The neuropsychological evaluation report indicated that diagnostically the student met the criteria for a language disorder; speech sound disorder; other specified ADHD, and a developmental coordination disorder (id.).

The March 2018 neuropsychological evaluation indicated the student needed "significant" educational support and services in the following areas: speech, receptive language, expressive language, social communication, fine motor coordination, complex motor planning, low muscle

tone/postural control, attention, and impulsivity (Parent Ex. D at p. 8). The evaluator recommended that the student attend a private language-based special education setting with a low teacher-to-student ratio that was highly structured, predictable, and directed by teachers and speech-language therapists who were specifically trained in servicing children with speech, language, attention, and potential academic-related vulnerabilities (id.). The evaluator also recommended that, academically, the program should offer a systematic and multisensory approach to all aspects of learning, offer integrated adaptive skills support, and provide opportunities for small group therapeutic and academic work (id.). The evaluator concluded that, if an appropriate special education-based classroom was not available for the student's upcoming preschool year, it would be crucial that he continue to receive full-time SEIT support in the classroom, as well as intensive OT to assist in fine motor, complex motor planning, impulse control, and cooperative play skills, and intensive speech-language therapy services to address articulation, oral motor control, and receptive and expressive language (id. at pp. 8-9). The evaluator also indicated the student would benefit from behavior modification techniques and a token economy with the guidance of a psychotherapist or school counselor (id. at p. 9). The evaluator more specifically noted that the behavior system "should never be set up in a way to punish the student for behaviors that are secondary to the fact that a general education classroom expectation [wa]s not realistic or yet attainable for him"(id.). The evaluator also suggested that the student needed explicit statements, frequent rest/exercise breaks, repeated reminders when there is a transition, and frequent positive feedback (id.).

As noted above, in addition to the March 2018 neuropsychological evaluation report, the hearing record contains a June 2022 speech-language progress report that provides insight into the student's educational needs (Parent Ex. G). In the June 2022 speech-language progress report, the student's then-current speech-language pathologist recommended that the student should continue to receive academic intervention daily to address literacy and math and that, to the extent possible, receptive-expressive language support should be incorporated into the academic intervention (id. at p. 3). The June 2022 speech-language progress report noted that the student worked on the following literacy skills during the 2021-22 school year: sight words, consonant letter-sounds, consonant digraphs and blends, short vowel sounds in isolation and CV/CVC words, decoding VC and CVC words, writing lowercase letters, writing sight words and CVC words to dictation, and copying/writing simple sentences using familiar sight words and decodable words (id. at p. 1).

Over the course of the 2021-22 school year, the speech-language pathologist reported that the student made consistent progress towards his literacy goals and skills (Parent Ex. G at p. 2). According to the June 2022 speech-language progress report, the student had mastered at least 100 sight words and could decode VC and CV words with short vowels during structured tasks (id.). The student's independent reading level was E, and his instructional level was F (id.). The speech-language pathologist reported that the student needed to continue working on consonant digraphs and blends with long vowels with CV and CVCE (silent e) word structures and that he had shown some regression with spelling patterns with short versus long vowels (id.). The report noted that the student benefited from exposure to higher level texts to assist with semantic development and exposure to specific vocabulary to increase his ability to answer grade level content (id.).

The June 2022 speech-language progress report documented that, in writing, the student required maximal cueing to slow down and attend to the mechanics of capitalization, spacing, punctuation, and spelling (Parent Ex. G at p. 2). The speech-language pathologist noted that the

student had very complex creative ideas for writing, but his abilities were mismatched and he benefited from writing his own sentences and then referring to printed models when writing (*id.*). The student was provided with strategies for writing such as referring to an alphabet strip and a word list for spelling as he wrote (*id.* at p. 2-3).

According to the June 2022 speech-language progress report, in January 2022 the speech-language pathologist started incorporating math into the student's speech sessions (Parent Ex. G at p. 3). The speech-language pathologist noted that the student had significant difficulty processing the language necessary to complete foundational math concepts (*id.*). For example, the student had difficulty with understanding concepts such as one more/one less, plus sign means adding and minus means taking away/subtraction (*id.*). Number bonds and using a number line were also unfamiliar to the student (*id.*). The report indicated that the student and the speech-language pathologist worked together on writing numbers 1-10, one more/one less, two more/two less, and number bonds to ten with manipulatives, which the student mastered (*id.*). The student had emerging skills in math concepts such as adding and subtracting to 20 with a number line, generating number bonds to 10 with no visual, counting by 2's and identifying/label coins (*id.*).

The speech-language pathologist recommended that the student participate in an intensive summer literacy/math program for summer 2022 (Parent Ex. G at p. 3). The speech-language pathologist also noted that receptive-expressive language support should be incorporated in the student's academic intervention (*id.*). The speech-language pathologist suggested the student's language targets be aligned with his literacy and math curricula and foundational linguistic concepts, and texts should be used to stabilize his vocabulary and content knowledge (*id.*).

## **B. Unilaterally Obtained Services**

As noted above, the March 2018 neuropsychological evaluation had recommended a language-based special education setting for the student with systematic and multisensory approach to all aspect of learning and small group therapeutic and academic work, noting that, in the event such a program was not available, the student required "full-time SEIT support in the classroom" (Parent Ex. D at p. 8 [emphasis added]). The evaluator also noted that the student's behaviors were secondary to the fact that general education classroom expectations were not "realistic or yet attainable" for the student (*id.* at p. 9). Despite there recommendations and cautions, the unilaterally obtained services for the student for the 2022-23 school year were delivered at home with little integration of the services with the student's school program (see Parent Ex. E at p. 3). In particular, according to the May 2023 neuropsychological and educational evaluation, during the 2022-23 school year, the student attended a second-grade general education classroom with approximately 15 students and one teacher and received private related services after school (Parent Ex. E at p. 3). The student received small group reading support in school but no special instruction or services (*id.*). Outside of school, the student received private counseling services twice a week to address self-regulation; reading and writing support three times a week from a private speech-language pathologist; private OT to address fine motor skills/sensory regulation once a week; and private SEIT/math tutor services twice a week (*id.*).

The results of the May 2023 neuropsychological and educational evaluation show that the student continued to need special education as part of the school program and that the home-based private services were not sufficient to allow the student to access the instruction provided in the

general education school placement. For example, the May 2023 neuropsychological and educational evaluation found that the student's phonemic decoding, sight word recognition, and oral reading fluency remained significantly delayed with most skills falling around a mid- to late-first grade level despite the special education services he had been receiving over the 2022-23 school year (Parent Ex. E at p. 11). In addition, in the social/emotional realm, the evaluator noted the student's difficulties with peers and reported information from the student's teachers that he was experiencing an increasing amount of difficulty managing emotions, self-regulation, and behavior in the classroom (*id.*). The evaluator noted that this "functioning may not be primarily due to the student's neurological profile; rather, it appears to be associated with both his learning difficulties and current school placement" (*id.*). The evaluator concluded that the student's "learning challenges and current school placement [were] greatly undermining his confidence and enjoyment of school and stimulating feelings of anxiety and sadness" (*id.*).

Thus, although there is evidence that the home-based providers held appropriate certifications and/or licenses (*see* Parent Exs. R ¶¶ 1-2, 5-6; S ¶ 1; U ¶¶ 2-3) and worked with the student in areas of need (*see* Parent Exs. R; S; U), the evidence is insufficient to overcome a finding of inappropriateness based on the separation of the student's special education programming from the instruction provided in the general education school program.

### **1. Speech-language Therapy**

In the area of speech-language therapy, according to the speech-language pathologist's affidavit, during the 2022-23 school year she worked with the student for four hours per week and continued to focus on language and literacy by working on vocabulary, concepts, and comprehension questions related to texts (Parent Ex. S ¶¶ 9-10). With regards to reading, the speech-language pathologist focused on learning spelling patterns of various long vowels and decoding words including two-syllable words in running text (*id.* ¶ 10). In writing the speech-language pathologist worked with the student on writing three to five sentence paragraphs (*id.*). She noted that socially the student arrived at afterschool sessions looking to discuss social situations that occurred at school previously (*id.* ¶ 9). The speech-language pathologist used comic strip conversations to clarify what happened during these events and in what sequence, then she would share this information with the student's parents and counselor as needed (*id.*). She also worked on helping the student understand the context of topics and the more nuanced meanings of the language and pragmatic speech of what was socially acceptable/unacceptable and in what situations and contexts (*id.*). In addition to language and literacy, the speech-language pathologist incorporated feeding therapy work into their sessions due to the student's avoidant/restrictive food intake disorder (ARFID) diagnosis, by using repeated opportunities for systemic exposure to novel foods and a positive reinforcement system (*id.* ¶ 11).

The speech-language pathologist noted in her affidavit that in second grade it was becoming increasingly evident that the student was struggling academically as well as socially (Parent Ex. S ¶ 12). She continued to provide intensive support after school to the student while the student's parents pursued additional assessments and supports for the student (*id.*). The speech-language pathologist reported that, by the end of the student's second grade year (June 2023), his decoding skills had improved "markedly and were approaching grade level during structured tasks" (*id.* ¶ 13). However, the student still struggled to decode novel words in running text which caused him significant anxiety and frustration and impacted his fluency (*id.*). The speech-language

pathologist described the student's spelling for both decodable and familiar sight words as extremely poor for his age and grade level (*id.*). In writing the student struggled with planning/organization, expressive grammar, and mechanics (*id.*). The speech-language pathologist incorporated novel vocabulary/concepts into receptive and expressive lexicon to work on improving the student's ability to answer comprehension questions about a variety of topics (*id.*).

Regarding progress, according to the speech-language pathologist's testimony, she did not prepare a formal report in June 2023, but she noted that there was ample documentation of the work she had completed with the student and the progress the student was making (Tr. p. 95).<sup>11</sup>

Though the speech-language pathologist testified she had consistent communication with the student's teacher and the learning specialist at his private school, there was no evidence of how the private speech-language therapy was supporting the student in his classroom (Tr. p. 95). Additionally, the speech-language pathologist acknowledged that she had a lengthy conversation with the evaluator who conducted the May 2023 neuropsychological and educational evaluation who had concerns about the student's ability to learn and function effectively in his current setting given the significance of his learning disabilities (Tr. p. 97; Parent Ex. E at p. 12).

## **2. Occupational Therapy**

The occupational therapist provided the student one 45-minute session of individual OT per week after school to work on delays in fine motor and executive functioning skills and overall poor regulation (Parent Ex. U ¶ 4). According to testimony, the occupational therapist worked with the student on fine motor skills, visual perceptual skills, and his sensory integration, handwriting, executive functioning, visual perceptual skills, and overall self-regulation (Tr. pp. 144-45). The occupational therapist reported that she used a multisensory/play based approach to explore different therapeutic activities (*id.* ¶ 8). The occupational therapist reported that a typical session with the student began with a gross motor activity to regulate the student, then a tabletop activity to work on handwriting and fine motor skills (*id.* ¶ 9). The occupational therapist noted that she would also work on the student's homework if it was related to his occupational needs (*id.*). The occupational therapist testified she would typically provide progress reports upon request and about one to two times per year (Tr. p. 144).

According to the occupational therapist's testimony via affidavit, she noted that throughout the 2022-2023 school year the student made progress with his fine motor coordination, dexterity, graphomotor skills and handwriting, especially with his letter formation and pencil control (Parent Exs. I at p. 1; U ¶ 10). The occupational therapist also reported that the student made progress in his overall regulation, especially when he had to attend to a non-preferred task (Parent Ex. U ¶ 10). The occupational therapist further testified that the student's handwriting skills such as letter formation and spacing alignment improved, as well as his overall self-regulation (Tr. p. 145).

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<sup>11</sup> Included in the hearing record were five student work samples dated July 2022 to May 2023 consisting of drawings, dictation, and writing samples the student worked on with the speech-language pathologist (Parent Exs. H; J).



Notwithstanding the foregoing, the evidence does not demonstrate that exclusively home-based OT was sufficient to support the student in the school program. For example, the evaluator of the March 2018 neuropsychological evaluation recommended intensive OT to support the student in the classroom (see Tr. pp. 136-48; Parent Ex. D at p. 8). The occupational therapist testified that she did not push-in or pull-out the student from class to provide OT (Parent Ex. U ¶ 4). Rather the student was provided with OT in an individual setting afterschool (id.).

### 3. Counseling Services

The hearing record includes a counseling "Summary of Services Chart" and "Counseling Invoices" which showed that the student generally received one to two, one-hour weekly sessions of counseling (Parent Exs. N; P).<sup>12</sup> The private psychologist testified via affidavit that she provided the student with play therapy and pragmatic social skills therapy, at her office (Parent Ex. R ¶ 11; see Tr. pp. 42, 44-46). The psychologist reported that often during her sessions she would work with the student on problem solving skills which revolved around "unpacking" conflicts that occurred in school, trying to understand the student's perspective, and helping him plan to address those conflicts (Parent Ex. R ¶ 11; see Tr. p. 44). Toward the end of the 2022-23 school year the psychologist noted that the therapy sessions had become increasingly focused on processing the student's feelings regarding his diagnoses, academic challenges, and potential change in educational placement (Parent Ex. R ¶ 11). The psychologist's affidavit stated that she also provided one additional non-direct hour of consultation for the student one to two times per month through team meetings and parental support (id.; see Tr. pp. 42, 44-45). The psychologist reported that she regularly communicated with student's classroom teachers by reviewing daily emails from his teacher about his conduct at school and then provided recommendations (Parent Ex. R ¶¶ 12, 14). The psychologist's affidavit noted that the student required access to a sensory gym, a snack, and particular toys in order to regulate and play out the scenarios from school (id. ¶ 13). She reported that the student was able to re-enact the situations in play and engaged in productive discussions about them (id.). The psychologist and the student would come up with strategies for him to use, analyzed his play and she provided feedback about his perspective to his teachers, parents, and team (id.). The psychologist reported in her affidavit that "it was essential for the student to have this outlet to help him process his world" (id.). The psychologist also reported that at times the student became anxious and dysregulated from school and required a space to vent and decompress (id. ¶ 14). The psychologist reported that the student's emotional needs fluctuated throughout the year and the student exhibited some anxiety and difficulty with interpreting some social situations and managing some of his behavior (Tr. pp. 44-46).

Notwithstanding the private counseling services provided after school, as noted above, the May 2023 neuropsychological and educational evaluation noted that the student struggled in school in the social/emotional realm, highlighting that the student's language challenges impacted both his peer interactions and his ability to express his feelings and self-advocate when he was feeling overwhelmed or anxious and opined that the student's "functioning may not be primarily

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<sup>12</sup> The psychologist who provided the student's counseling services was also the owner of a related services company and supervised the SEIT provider/special education teacher who provided math tutoring to the student during the 2022-23 school year (Parent Ex. R ¶ 1).

due to the student's neurological profile; rather, it appears to be associated with both his learning difficulties and current school placement" (Parent Ex. E at p. 11).

#### 4. SEIT Services

Regarding the privately obtained SEIT/math tutor services, the hearing record includes invoices with dates of service for math tutoring and a signed affidavit from the private psychologist who was also the supervisor of the SEIT/math tutor (SEIT) (see Parent Exs. O-P; R; V). The SEIT provider did not testify during the impartial hearing and there is no progress report completed by the SEIT included in evidence (see Tr. pp. 1-169). According to the psychologist's affidavit, starting in December 2022 the student received two hours of direct instruction in math per week from a SEIT (Parent Ex. R ¶¶ 5-6). According to the psychologist's affidavit the SEIT provided the student 1:1 support focused on math and also supported his social/emotional and behavioral difficulties (id. ¶ 8). The psychologist testified via affidavit that the SEIT employed specific interventions with the student that included using visual supports and manipulatives to assist him with calculations, organization, and processing questions (id.). The psychologist testified that the SEIT was trained in Stern Math which was a math intervention and methodology that assisted children in visualizing math with specific manipulatives (Tr. pp. 48, 53-54, 64). According to the psychologist, the SEIT's instruction also paralleled the student's math program provided in school (Tr. p. 55).

Regarding the student's progress, according to the psychologist's testimony via affidavit, the student made progress in reading, writing, and math but continued to demonstrate social/emotional delays (Parent Ex. R ¶ 9). The psychologist also testified that the student's approach to learning improved significantly, noting that, in the beginning of the year, he would get extremely dysregulated and become anxious and angry when he was presented with a math problem (Tr. p. 48).

Notwithstanding the psychologist's testimony regarding the private SEIT services, there is little to no evidence regarding the skills the student worked on during the SEIT sessions or where the student's math skills were at the end of the 2022-23 school year. Further, as indicated above the March 2018 neuropsychological evaluation recommended the student receive full-time SEIT services in the classroom to support his academic needs, yet the evidence is insufficient to demonstrate that the home-based private SEIT/math tutoring services sufficiently supported the student's ability to make progress in the general education classroom (see Parent Ex. D at p. 8).

In the May 2023 neuropsychological and educational evaluation, under recommendations, the evaluating neuropsychologist reported he had "significant concerns about the student's ability to learn and function effectively in his [then-]current setting given the significance of his learning disabilities and how they [were] affecting his mood, anxiety levels and self-identity as a capable learner" (Parent Ex. E at p. 12). The evaluator also noted that "the student [was] starting to push back against receiving so much outside treatment/tutoring" (id.).<sup>13</sup>

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<sup>13</sup> The evaluator opined that the student required a small (no more than 8-12 students), self-contained, and highly structured classroom within a small school that could provide focused remediation for his learning challenges and social-emotional/therapeutic support to address his difficulties with language, flexibility, and self-regulation

Specially designed instruction is defined as "adapting, as appropriate to the needs of an eligible student . . . , the content, methodology, or delivery of instruction to address the unique needs that result from the student's disability; and to ensure access of the student to the general curriculum, so that he or she can meet the educational standards that apply to all students" (8 NYCRR 200.1[vv]; see 34 CFR 300.39[b][3]). Based on the foregoing, the evidence in the hearing record summarized above reflects that the student needed support in the classroom, yet it is undisputed that the unilaterally obtained services were delivered after school. Although the after school services may have addressed certain areas of need, under the totality of the circumstances, the evidence does not demonstrate that the services assisted the student in accessing the instruction provided in the general education classroom.

## **VII. Conclusion**

Based on the foregoing, the evidence in the hearing record demonstrates that the parent did not meet her burden to prove that the privately obtained SEIT/math tutoring services, OT, speech-language therapy, and counseling services provided to the student during the 2022-23 school year were appropriate, and the IHO's findings to the contrary must be reversed.

I have considered the parties' remaining contentions, including the issues raised in the parent's request for review, and find them unnecessary to address given my determination above.

**THE APPEAL IS DISMISSED.**

**THE CROSS-APPEAL IS SUSTAINED.**

**IT IS ORDERED** that the IHO's decision, dated July 12, 2024, is modified by reversing the portion which ordered the district to reimburse the parent for the cost of private services unilaterally obtained during the 2022-23 school year.

**Dated:**            **Albany, New York**  
                         **November 4, 2024**

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**SARAH L. HARRINGTON**  
**STATE REVIEW OFFICER**

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(Parent Ex. E at p. 12). The evaluator also suggested that the student required a calm, predictable and low-stimulation academic environment that featured an integrated and highly individualized program of remediation/services as well as other types of accommodations and instructional supports to address his needs more broadly (id.). The evaluating neuropsychologist also made the following recommendations for the student's learning program: daily intensive instruction to address reading challenges using a systematic, phonologically-based reading program such as Orton-Gillingham; specialized support in writing skills similar to reading - explicit and systematic; highly systematic and explicit math instruction, broken down step-by-step using visual and graphic depictions, and key words for word problems (id. at pp. 12-13). For executive functioning skills the evaluator opined the student required scaffolding and support for multistep tasks and visual cues, "scripts," or checklists and support with organizing materials (id. at p. 13). The evaluator stated that speech and language therapy was also required to treat the student's difficulties with expressive, receptive and pragmatic language (id.). In addition, he recommended on-going OT to work on the student's handwriting/graphomotor skills, executive functioning, self-regulation and/or other relevant treatment targets (id.). Counseling support was also recommended, so that the student could learn strategies to manage anxiety/frustration in adaptive ways (id.).