The University of the State of New York

The State Education Department
State Review Officer
www.sro.nysed.gov

No. 24-365

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

Appearances:
Liz Vladeck, General Counsel, attorneys for respondent, by Nate Munk, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from a decision of an impartial hearing officer (IHO) which denied her request that respondent (the district) fund the costs of her daughter's private services delivered by Kinship Resources, LLC (Kinship) for the 2023-24 school year. The appeal must be sustained in part.

II. Overview—Administrative Procedures

When a student who resides in New York is eligible for special education services and attends a nonpublic school, Article 73 of the New York State Education Law allows for the creation of an individualized education services program (IESP) under the State's so-called "dual enrollment" statute (see Educ. Law § 3602-c). The task of creating an IESP is assigned to the same committee that designs educational programing for students with disabilities under the IDEA (20 U.S.C. §§ 1400-1482), namely a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, State law provides that "[r]eview of the recommendation of the committee on special education may be obtained by the parent or person in parental relation of the pupil pursuant to the provisions of [Education Law § 4404]," which effectuates the due process provisions called for by the IDEA (Educ. Law § 3602-

c[2][b][1]). Incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

III. Facts and Procedural History

The parties' familiarity with this matter is presumed and, therefore, the facts and procedural history of the case and the IHO's decision will not be recited here in detail. Briefly, a CSE convened on February 28, 2017, to formulate the student's IESP for a prior school year not at issue

in the present matter (see generally Parent Ex. B).[1] The February 2017 CSE recommended that the student receive five periods per week of group special education teacher support services (SETSS); two 30-minute sessions per week of individual counseling services; one 30-minute session per week of group counseling services; three 30-minute sessions per week of individual occupational therapy (OT); and a full time paraprofessional for behavior management due to the student's impulsivity (id. at pp. 14-15).

According to the parent, for the 2023-24 school year at issue, the student remained parentally placed in a private school (see Parent Ex. A). On August 30, 2023, the parent signed a contract with Kinship to provide special education supports and services to the student for the 2023-24 school year at enhanced rates (Parent Ex. C at pp. 1-4). On September 6, 2023, Kinship began providing the student five hours per week of SETSS (Parent Ex. G ¶¶ C-D). In or around October 2023, a district-contracted provider from a private agency began delivering counseling services to the student three times a week for 30-minutes (Tr. p. 102).

A. Due Process Complaint Notice

In a due process complaint notice dated October 18, 2023, the parent alleged that the district denied the student a free appropriate public education (FAPE) and/or equitable services for the 2023-24 school year (see Parent Ex. A). Specifically, the parent alleged that the district failed to develop an appropriate special education program for the student for the 2023-24 school year and failed to implement the student's most recent "agreed upon" IESP, which was dated February 28, 2017 (Parent Exs. A at p. 1; B at p. 1).

B. Impartial Hearing Officer Decision

After prehearing and status conferences and a hearing date devoted to addressing the student's pendency placement (see Tr. pp. 1-20), the parties executed a pendency agreement, agreeing that the student's pendency placement consisted of the services set forth on the February 2017 IESP (Tr. p. 17; Pendency Implementation Form).[2] An impartial hearing convened on May 15, 2024 and concluded on May 29, 2024, after two days of proceedings devoted to addressing the merits of the parent's claims (Tr. pp. 57-115). In a decision dated July 11, 2024, the IHO determined that the district failed to present a case, but timely asserted the June 1 affirmative defense (IHO Decision at pp. 3, 6). The IHO held that the parent's argument that the district waived its June 1 affirmative defense by providing counseling services to the student for the 2023-24 school year was unpersuasive because the testimony presented during the impartial hearing did not establish why the district was providing counseling services to the student (id. at p. 7). Because the IHO held that the district did not waive its June 1 affirmative defense, the IHO determined that the district did not have an obligation to provide the student with equitable services and dismissed the parent's due process complaint (id. at p. 8).

[1] The student has been enrolled in a private school since the 2016-17 school year (Parent Ex. B at p. 2).

[2] A prehearing conference was held on November 29, 2023, a status conference was held on January 9, 2024, a pendency hearing was held on January 19, 2024, and additional status conferences were held on February 21, 2024, March 27, 2024, March 29, 2024, and April 19, 2024 (Tr. pp. 1-56).

IV. Appeal for State-Level Review

The parent appeals, alleging that the IHO erred in holding that the district did not waive its June 1 affirmative defense by providing the student with counseling services during the 2023-24 school year. The parent further asserts that the district waived the June 1 affirmative defense by failing to send the parent a request for special education services form to complete and return pursuant to the family guide to special education school aged services. As relief, the parent requests full reimbursement for the SETSS at the contracted rate of $185 per hour and an award of compensatory education services for the student's missed OT services.

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]).[3] "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.).[4] Thus, under State law an eligible New

[3] 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]).

[4] 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-

York State resident student may be voluntarily enrolled by a parent in a nonpublic school, but at the same time the student is also enrolled in the public school district, that is dually enrolled, for the purpose of receiving special education programming under Education Law § 3602-c, dual enrollment services for which a public school district may be held accountable through an impartial hearing.

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

VI. Discussion

A. June 1 Deadline

The State's dual enrollment statute requires parents of a New York State resident student with a disability who is parentally placed in a nonpublic school and for whom the parents seek to obtain educational services to file a request for such services in the district 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]).

The issue of the June 1 deadline fits with other affirmative defenses, such as the defense of the statute of limitations, which are required to be raised at the initial hearing (see M.G. v. New York City Dep't of Educ., 15 F. Supp. 3d 296, 304, 306 [S.D.N.Y. 2014] [holding that the limitations defense is "subject to the doctrine of waiver if not raised at the initial administrative hearing" and that where a district does "not raise the statute of limitations at the initial due process hearing, the argument has been waived"]; see also R.B. v. Dep't of Educ. of the City of New York, 2011 WL 4375694, at *4-*6 [S.D.N.Y. Sept. 16, 2011] [noting that the IDEA "requir[es] parties to raise all issues at the lowest administrative level" and holding that a district had not waived the limitations defense by failing to raise it in a response to the due process complaint notice where the district articulated its position prior to the impartial hearing]; Vultaggio v. Bd. of Educ., Smithtown Cent. Sch. Dist., 216 F. Supp. 2d 96, 103 [E.D.N.Y. 2002] [noting that "any argument that could be raised in an administrative setting, should be raised in that setting"]). "By requiring parties to raise all issues at the lowest administrative level, IDEA 'affords full exploration of technical educational issues, furthers development of a complete factual record and promotes judicial efficiency by giving these agencies the first opportunity to correct shortcomings in their educational programs for disabled children.'" (R.B. v. Dep't of Educ. of the City of New York, 2011 WL 4375694, at *6 [S.D.N.Y. Sept. 16, 2011], quoting Hope v. Cortines, 872 F. Supp. 14, 19 [E.D.N.Y. 1995] and Hoeft v. Tucson Unified Sch. Dist., 967 F.2d 1298, 1303 [9th Cir. 1992]; see C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at *12 [S.D.N.Y. Sept. 22, 2011]).

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secondary-school-students). The guidance document further provides that "parentally placed nonpublic students must be provided services based on need and the same range of services provided by the district of location to its public school students must be made available to nonpublic students, taking into account the student's placement in the nonpublic school program" (id.). The guidance has recently been reorganized on the State's web site and the paginated pdf versions of the documents previously available do not currently appear there, having been updated with web based versions.

The hearing record reflects that the district raised the June 1 defense during the March 29, 2024 status conference, well before the start of the impartial hearing (Tr. p. 45). Furthermore, the IHO did not issue any prehearing orders or directives regarding management of the impartial hearing, clarification of issues, or timeframes within which to assert defenses, which might have provided a basis for precluding the district's defense based on when it was raised.

The parent concedes in her appeal that "she did not submit a June First request on time" for equitable services for the 2023-24 school year (Req. for Rev. at p. 7). However, the parent argues that the district waived the June 1 requirement, either by failing to provide the parent with a request for special education services form or by virtue of the district having provided the student with counseling services during a portion of the 2023-24 school year (Req. for Rev. at pp. 6-8).[5]

The parent argues that the district failed to provide the parent with the request for special education services form as contemplated by the district's standard operation procedure manual (SOPM). More specifically, according to the district's SOPM, the CSE sends a request for special education services form to the parents of parentally placed students every school year (Parent Ex. H at p. 27). The parent alleges she never received such a form from the district. The parent also claims that, per the instructions in the SOPM, parents are to look out for the district form "and only then to send in their request for services" (Req. for Rev. at pp. 7-8). However, the SOPM also states that, if a parent believes he or she "should have received this letter and did not," he or she should "contact [the] CSE" (Parent Ex. H at p. 27). There is no evidence in the hearing record that the parent contacted the CSE after not receiving the form. Moreover, as identified by the district in its answer, there is no similar requirement set forth in State or federal regulations mandating the district to send a request for special education services form to the parents of students with IESPs every year and, generally, defects arising out of the SOPM that do not also constitute a violation of State or federal laws and policy do not constitute a deprivation of a FAPE or a denial of equitable services (see, e.g., M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *9-*10 [S.D.N.Y. Aug. 27, 2010]). Additionally, the Commissioner of Education has previously determined that a parent's lack of awareness of the June 1 statutory deadline does not invalidate the parent's obligation to submit a request for dual enrollment by the June 1 deadline (Appeal of Austin, 44 Ed. Dep't Rep. 352, Decision No. 15,195, available at https://www.counsel.nysed.gov/Decisions/volume44/d15195; Appeal of Beauman, 43 Ed Dep't Rep 212, Decision No. 14,974 available at https://www.counsel.nysed.gov/Decisions/volume43/d14974). Specifically, the Commissioner stated that Education Law § "3602-c(2) does not require [the district] to post a notice of the deadline" and that a parent being "unaware of the deadline does not provide a legal basis" for the waiver of the statutory deadline for dual enrollment applications (Appeal of Austin, 44 Ed. Dep't Rep. 352). Accordingly, the parent's argument that the district failed to notify her of the June 1 requirement by sending a particular form is without merit.

Regarding the district's provision of counseling services to the student, a district may, through its actions, waive a procedural defense (Application of the Bd. of Educ., Appeal No. 18-088). The Second Circuit has held that a waiver will not be implied unless "it is clear that the parties were aware of their rights and made the conscious choice, for whatever reason, to waive

[5] In the parent's closing statement, the parent's advocate noted that the district implemented "the counseling services" and argued that this was "a waiver for the June 1st letter, as can be seen in SRO decisions 18-088 as well as 23-114" (Tr. p. 66).

them" and that "a clear and unmistakable waiver may be found . . . in the parties' course of conduct" (N.L.R.B. v. N.Y. Tele. Co., 930 F.2d 1009, 1011 [2d Cir. 1991]). The parent's reliance on Application of the Board of Education, Appeal No. 18-088 is not misplaced. In that appeal, after the June 1 deadline, the CSE decided to create an IESP for the student and began providing services at the student's nonpublic school, which constituted an implied waiver of the deadline (see Application of the Bd. of Educ., Appeal No. 18-088).

In this matter, the district failed to create any IEP or IESP for the student for the 2023-24 school year, yet the parent provided unrebutted evidence that a provider delivered counseling services to the student for the district for the majority of the 2023-24 school year (Tr. pp. 102-03). The counseling provider testified that she worked in the student's school to provide counseling services for the district (Tr. p. 102). She indicated that she started providing the student with three 30-minute sessions per week of counseling services "close to the beginning of the year, maybe October" (id.). Although the district argues on appeal that it provided the counseling as part of the student's pendency program, the district did not present any evidence to that effect and did not take advantage of the opportunity to cross-examine the counseling provider to elicit testimony on that point (see Tr. p. 103). Further, the district did not make that argument during the impartial hearing and instead asserted without elaboration that, even if the district provided some services to the student, it did "not absolve the parent of [her] obligation, and [the district's] doing so cannot be read as any such waiver" (Tr. p. 107). Weighing against the district's position that the counseling services were delivered pursuant to pendency is the discussion of pendency at the November 29, 2023 prehearing conference. The parent's advocate stated that "[t]here ha[d] not been a pendency put in place yet" at that time (Tr. p. 2), and the district's attorney did not dispute this but instead noted that the district had not received a pendency form from the parent (Tr. pp. 3-4). At the January 9, 2025 status conference, the advocate again stated that there was still no pendency, and the district's attorney represented that the district's "pendency team" had to the review the pendency request (Tr. pp. 10-12). At no point during these discussions did the district represent that it was providing the student counseling services pursuant to pendency. The district signed the pendency agreement on January 10, 2024, around three months after the counseling provider began delivering services to the student (Pendency Implementation Form; see Tr. p. 102).

Based on the foregoing, there is support in the hearing record for the parent's position that the district's provision of counseling services to the student constituted a waiver of the requirement for the parent to request equitable services by June 1, and the district has not offered evidentiary support for its position that, on the contrary, the delivery of counseling services was pursuant to pendency. Accordingly, I find sufficient basis to overturn the IHO's decision that the district was not obligated to provide the student with equitable services for the 2023-24 school year.

B. Appropriateness of Unilaterally-Obtained Services

Taking the foregoing into account, 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 provide the student with 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 Kinship for the student without the consent of the school district officials, and then commenced due process to obtain remuneration for the costs thereof. Generally, districts that fail to comply with their

statutory mandates to provide special education can be made to pay for special education services privately obtained for which a parent paid or became legally obligated to pay, a process that is essentially the same as the federal process under IDEA. Accordingly, the issue in this matter is whether the parent is entitled to public funding of the costs of the private services. "Parents who are dissatisfied with their child's education can unilaterally change their child's placement . . . and can, for example, pay for private services, including private schooling. They do so, however, at their own financial risk. They can obtain retroactive reimbursement from the school district after the [IESP] dispute is resolved, if they satisfy a three-part test that has come to be known as the Burlington-Carter test" (Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 526 [2d Cir. 2020] [internal quotations and citations omitted]; see Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 14 [1993] [finding that the "Parents' failure to select a program known to be approved by the State in favor of an unapproved option is not itself a bar to reimbursement."]).

The parent's request for district funding of privately-obtained services must be assessed under this framework. Thus, a board of education may be required to reimburse parents for their expenditures for private educational services they obtained for a student if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Carter, 510 U.S. 7; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 252 [2d Cir. 2009]).[6] In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

Having determined that the student was entitled to equitable services from the district for the 2023-24 school year and there being no dispute that the district did not convene a CSE to develop an IESP and that, aside from counseling, the district did not provide the student with special education services, the next issue is whether the parent met her burden of proving that the SETSS provided by Kinship were appropriate to meet the student's unique needs.

Turning to a review of the appropriateness of the unilaterally-obtained services, the federal standard for adjudicating these types of disputes is instructive. A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998]). Citing the Rowley standard, the Supreme Court has explained that "when a public school system has defaulted on its obligations under the Act, a private school placement is 'proper under the Act' if the education provided by the private school is 'reasonably calculated to enable the child to receive educational benefits'" (Carter, 510 U.S. at 11; see Rowley, 458 U.S. at 203-04;

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

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

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

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

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

1. Student Needs

Although not in dispute on appeal, a brief discussion of the student's needs is necessary to resolve the issue of whether the SETSS delivered by Kinship were appropriate for the student for the 2023-24 school year.

The evidence in the hearing record concerning the student's educational history is sparse. At the time the student's February 2017 IESP was developed, the student was in third grade and attending a private school for girls (Parent Ex. B at p. 2). According to the IESP, a psychoeducational evaluation of the student was conducted on December 20, 2016 (id.). At that time, the student's overall level of cognitive functioning as measured by the Wechsler Intelligence Scale for Children–Fifth Edition (WISC-V) appeared within the average range (id.). The IESP indicated the student's performance related to measures of verbal comprehension, visual spatial abilities, fluid reasoning, and processing speed were all in the average range (id.). With regard to working memory, the IESP indicated the student's auditory working memory appeared to be within the average range but her visual working memory was in the low average (id.).

The February 2017 IESP stated that the student's academic skills were assessed using the Wechsler Individual Achievement Test, Third Edition (WIAT-III), which revealed unevenly developed skills that were below grade level in all areas (Parent Ex. B at p. 3). With regard to reading, the student was able to read word lists at an early second grade level, demonstrated reading comprehension skills at a mid-second grade level, and performed spelling skills at an upper first grade level (id.). In terms of mathematics, the IESP indicated the student presented with problem solving skills at a mid-second grade level, described the student's numerical operations as a relative strength at a beginning fourth grade level, and explained that the student's math fluency was variable based on operation and ranged from mid-first to a mid-third grade level (id.). The February 2017 IESP identified the student's multiplication skills as an area of relative strength (id.). The IESP reflected parent concerns related to the student's "unevenly developed" academic skills (id. at p. 4).

In terms of physical development, the February 2017 IESP stated that the student was right hand dominant and printed with unevenly formed letters, mixing upper- and lower-case letters (Parent Ex. B at p. 4). The IESP noted parent concerns related to the student's "poor graphomotor skills" (id.).

Concerning social development, the February 2017 IESP characterized the student as pleasant and respectful and noted that she responded well to verbal praise (Parent Ex. B at p. 4). The IESP stated the student "want[ed] to learn, but she [was] reported to be impulsive, and to have difficulty transitioning between activities" (id.). According to the IESP, the student called out in class, and touched things that did not belong to her (id.). The IESP noted concerns regarding the student's "impulsivity, which negatively impact[ed her] academic and social performance in school" (id.).

The February 2017 IESP identified modifications and resources needed to address the student's management needs including review and repetition, praise and encouragement, verbal praise, modeling of appropriate behavior, token economy, and small group instruction on a part-time basis (Parent Ex. B at p. 5). In addition to the CSE's recommendation that the student receive SETSS, OT, and counseling services, the IESP reflected a committee recommendation for full time group paraprofessional services for behavior management as the student was "extremely impulsive and has difficulty following school rules" (id. at p. 15).

An updated description of the student's needs was provided in a February 2024 progress report from the student's SETSS provider, which is summarized further below (Parent Ex. E).

2. Unilaterally-Obtained SETTS

According to the affidavit of the Kinship administrator (administrator), the agency began providing the student with SETSS on September 6, 2023 and had the capacity to continue providing the services to the student for the remainder of the 2023-24 school year (Parent Ex G ¶¶ C-D). The administrator stated that the student's SETSS were provided by a New York State Education Department (NYSED)-certified special education teacher for students with disabilities (Parent Exs. D; G ¶ E). During the impartial hearing, the administrator testified that Kinship was implementing "the latest IESP that [it] ha[d]" for the student for the 2023-24 school year (Tr. pp. 74, 78). The administrator reported that Kinship providers, along with their supervisors, conducted "informal" evaluations of students to make sure that Kinship "provid[ed] them the best services that they need" (Tr. pp. 75-76). Although the administrator testified that he believed the student was evaluated prior to the start of services, he could not confirm that she had been evaluated without checking with the supervisors and provider (Tr. p. 76). According to the administrator, the Kinship evaluation process entailed "seeing what the student needs" and making sure that the provider could provide those services (Tr. p. 77). With regard to the student's IESP "expiring" six years earlier, the administrator testified that "[i]f an IEP [sic] is not closed by the [district], then it's still valid" and Kinship worked "based off of that" (Tr. p. 78). He explained that the supervisors and providers would evaluate the student to see if she had progressed "from that old IESP, and see what they still need and go from there" (Tr. pp. 78-80).

According to a Kinship February 2024 SETSS progress report, the student was in tenth grade and presented with delays in cognition and language, which affected her reading and math skills (Parent Ex. E at p. 1). With respect to the student's learning style, the Kinship progress report indicated that she enjoyed cooperative learning, visual aids and kinesthetic movement and needed praise and encouragement to work hard and attain success (id.).

In math, the February 2024 SETSS progress report indicated the student could add, subtract, and multiply, including regrouping double-digit numbers (Parent Ex. E at p. 1). The SETSS provider noted that the student needed prompts to remind her how to multiply using double digits and had difficulty dividing a multi-digit divisor and computing fractions (id.). The student also had difficulty with word problems and needed visual aids and prompts to help her comprehend and calculate a word problem correctly (id.). The SETSS provider noted that when a word problem was read aloud to the student, she had a better understanding of it (id.). The SETSS provider noted that the student was aided in developing her foundational math skills by explicit instruction, breaking down complex problems into smaller steps, and offering additional practice opportunities to assist the student's understanding (id.).

Turning to reading, the SETSS provider reported that as measured by a Fountas and Pinnell assessment the student was "up to level Z" and reading with 80 percent accuracy (Parent Ex. E at p. 1). The student could read multi-syllabic words with some errors and corrected some of her mistakes (id.). The SETSS provider noted that she was working on the student's reading accuracy and fluency using modeling and timers (id.). As related to reading comprehension, the SETSS provider reported that the student could understand single sentences and concise passages but needed prompting and reminders every few sentences to stop and think about what she read (id.). After reading a passage, the student could state the main idea, but could not answer high-level inferencing questions (id.). Overall, the progress report stated that the student had difficulty

keeping up with the class in reading, reading comprehension, and answering inferencing questions (id.). The provider noted that she used visual aids and was working on reading goals using explicit phonics instruction and kinesthetic movement methodologies (id.).

In writing, the SETSS progress report noted that the student had difficulty formulating her ideas into a story or a composition (Parent Ex. E at p. 1). The student had basic writing skills but struggled with spelling and needed reassurance and prompting to complete the task (id.). When comparing two texts or answering questions based on a text, the student reportedly needed encouragement, modeling, prodding, and assistance (id.).

According to the SETSS provider, based on informal classroom observations, the student was "doing well socially" (Parent Ex. E at p. 2). She noted that, although the student understood concepts and ideas she lacked a "healthy self-image," which caused her to give up quickly (id.). The SETSS provider reported using a variety of tools to assist the student with gaining self-esteem including social skills training, role playing, encouragement and praise (id.).

According to the progress report, the student's physical health and handwriting were "up to par" and there were no concerns with regard to the student's physical development (Parent Ex. E at p. 2).

The student's February 2024 progress report listed nine goals deemed necessary for the student to meet by the end of the year (Parent Ex. E at p. 2). These included three reading goals that focused on improving the student's reading comprehension through text-based questions; ability to analyze and evaluate text for content and structure; and ability to independently identify and describe themes of literacy work (id.). The progress report also included four math goals that addressed the student's ability to employ effective strategies to solve word problems; accurately apply the four basic operations to single- and double-digit numbers; compute fractions; and solve ten problems involving scale such as maps, graphs and diagrams (id.). In addition, the progress report included two writing goals centered on the student's ability to formulate ideas into a story and improve her spelling (id.).

In addition to the materials and strategies noted above, the SETSS progress report indicated that the provider employed the following to address the student's needs: positive reinforcement, manipulatives, cues, picture clues, leveled texts, flash cards, behavioral plans, repeated directions, visualizing/verbalizing, and verbal prompts (Parent Ex. E at p. 1).

Based on the above, the hearing record contains sufficient evidence demonstrating that the SETSS delivered to the student by Kinship constituted instruction that was specially designed to address her identified needs (see generally Parent Ex. E). Consequently, the parent met her burden of proving that the SETSS services provided by Kinship were appropriate to meet the student's unique needs, and that the district should fund Kinship for the SETSS provided to the student for the 2023-24 school year.

C. Compensatory Education

Having dismissed the case on the grounds of the June 1 affirmative defense, the IHO never examined the merits of the parent's request for a bank of compensatory OT services.[7]

Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). The purpose of an award of compensatory education is to provide an appropriate remedy for a denial of a FAPE (see E.M. v. New York City Dep't of Educ., 758 F.3d 442, 451 [2d Cir. 2014]; Newington, 546 F.3d at 123 [holding that compensatory education is a remedy designed to "make up for" a denial of a FAPE]; see also Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 456 [2d Cir. 2015]; Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005] [holding that, in fashioning an appropriate compensatory education remedy, "the inquiry must be fact-specific, and to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"]; Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1497 [9th Cir. 1994]). Accordingly, an award of compensatory education should aim to place the student in the position he or she would have been in had the district complied with its obligations under the IDEA (see Newington, 546 F.3d at 123 [holding that compensatory education awards should be designed so as to "appropriately address[] the problems with the IEP"]; see also Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1289 [11th Cir. 2008] [holding that "[c]ompensatory awards should place children in the position they would have been in but for the violation of the Act"]; Bd. of Educ. of Fayette County v. L.M., 478 F.3d 307, 316 [6th Cir. 2007] [holding that "a flexible approach, rather than a rote hour-by-hour compensation award, is more likely to address [the student's] educational problems successfully"]; Reid, 401 F.3d at 518 [holding that compensatory education is a "replacement of educational services the child should have received in the first place" and that compensatory education awards "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA"]).

Here, the physical development section of the 2017 IESP, from which the student's OT needs were determined, was very sparse and included little information regarding the student's graphomotor needs (Parent Ex. B at p. 4). The IESP noted that the parent reported the student was in "good health" (id.). It stated that the student "printed with unevenly formed letters, mixing upper and lower case letters" but provided no other information regarding the student's fine motor needs (id.). The IESP identified "[p]oor graphomotor skills" as the physical development needs of the student including needs that were of concern to the parent (id.). The IESP included an annual goal that stated the student would improve her graphomotor skills and write with proper letter formation and spacing at an age-appropriate rate (id. at p. 9). Thus, it would appear that the February 2017 CSE recommended OT services, at least in part, to address the student's handwriting.

[7] In her due process complaint notice, the parent requested as proposed relief "[a]n order . . . compelling the [district] to provide banks of compensatory services for the hours missed by the [s]tudent due to the failure of implementation by the [district] . . . at enhanced market rates" (Parent Ex. A at p. 2).

The February 2024 progress report makes only one note regarding the student's physical development, stating that "the student's physical health and handwriting are up to par" (Parent Ex. E at p. 2). Therefore, it appears that as of the 2023-24 school year, there were no concerns regarding the student's handwriting (id.). There is no other information in the 2017 IESP or the Kinship progress report from 2024 that signifies that the student requires OT three times a week for 30 minutes (Parent Exs. B; E).

As set forth above, an award of compensatory education should aim to place the student in the position he or she would have been in had the district complied with its obligations under the IDEA (see Newington, 546 F.3d at 123; see also Draper, 518 F.3d at 1289; Bd. of Educ. of Fayette County, 478 F.3d at 316; Reid, 401 F.3d at 518). Although the hearing record does not reflect what OT services the student received between her 2017 IESP and the 2023-24 school year, the February 2024 progress report illustrates that the student's handwriting has improved to the extent that it is no longer a concern (Parent Ex. E at p. 2). Because the 2017 IESP's OT recommendation was based on concerns regarding the student's handwriting, which is now reported to be "up to par," there is no longer a need for the student to continue to receive OT services (id.).

Accordingly, as a substantive remedy for the failure to offer or provide equitable services for the student, the parent's request for a bank of compensatory OT services is denied as there is insufficient support in the hearing record to demonstrate that the services were warranted to place the student in the place she would have been but for the district's failures.[8]

VII. Conclusion

As discussed above, the evidence in the hearing record reflects that by delivering counseling services to the student during the 2023-24 school year, the district waived the requirement for a request from the parent before June 1 for equitable services and was obligated to provide the student with equitable services for the 2023-24 school year. Furthermore, the hearing record reflects that the parent met her burden of proving that the unilateral SETSS provided by Kinship were appropriate to meet the student's unique needs. The district has not raised any equitable considerations that would warrant a reduction or denial of the relief sought. Accordingly, as relief for the district's failure to provide equitable services, the hearing record supports an award of district funding for SETSS delivered by Kinship; however, the hearing record does not support the parent's request for compensatory OT services.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision, dated July 11, 2024, is modified by reversing those portions of the IHO's decision which found that the district had no obligation to provide the student with equitable services for the 2023-24 school year; and

[8] Although on appeal the parent claims that the district should provide compensatory education for the failure to provide the student's pendency services, at no point during the impartial hearing after the district signed the pendency implementation form did the parent inform the IHO that the district should have been implementing pendency but had failed to do so. Accordingly, I decline to consider this alternative basis for relief for the first time on appeal.

IT IS FURTHER ORDERED that the district shall fund the costs of up to five hours per week of SETSS delivered to the student by Kinship during the 2023-24 school year at a rate not to exceed $185 per hour, upon submission of proof of delivery.

Dated: **Albany, New York**
September 27, 2024

SARAH L. HARRINGTON
STATE REVIEW OFFICER