



The University of the State of New York

The State Education Department

State Review Officer

www.sro.nysed.gov

No. 24-396

Application of a STUDENT WITH A DISABILITY, by his parents, 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:

The Law Offices of Regina Skyer and Associates, LLP, attorneys for petitioners, by Ricki Parks, Esq.

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

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from a decision of an impartial hearing officer (IHO) which denied their request that respondent (the district) fund the costs of their son's private special education services delivered by Yes I Can for the 2023-24 school year. The district cross-appeals from that portion of the IHO's decision which ordered funding for speech-language therapy services. The appeal must be sustained. The cross-appeal must be sustained in part.

II. Overview—Administrative Procedures

When a student who resides in New York is eligible for special education services and attends a nonpublic school, Article 73 of the New York State Education Law allows for the creation of an individualized education services program (IESP) under the State's so-called "dual enrollment" statute (*see* Educ. Law § 3602-c). The task of creating an IESP is assigned to the same committee that designs educational 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 Committee on Preschool Special Education (CPSE) convened on January 12, 2022 and created an individualized education program (IEP) having found the student eligible for special education as a preschool student with a disability (see Parent Ex. B). The CPSE recommended five hours per week of special education itinerant teacher (SEIT) services in a group of two in Yiddish, with related services of two 30-minute sessions per week of group speech-language therapy in Yiddish and two 30-minute sessions per week of group occupational therapy (OT) (id. at p. 14).¹ The CPSE did not recommend that the student receive services on a 12-month basis in July and August 2022 (id. at p. 15).

The CSE convened on March 31, 2023 and created an IESP having found the student eligible for special education as a student with a speech or language impairment (see Dist. Ex. 2).² The parent did not participate in the CSE meeting, and the IESP noted that the CSE made numerous attempts to contact the parent and that all attempts were unsuccessful (id. at pp. 1-2, 10). The CSE recommended that the IESP be implemented beginning September 8, 2023, and that the student receive three periods per week of direct group special education teacher support services (SETSS), with three 30-minute sessions per week of individual speech-language therapy in Yiddish and two 30-minute sessions per week of individual physical therapy (PT) (id. at pp. 1, 7).³

¹ State law defines SEIT services (or, as referenced in State regulation, "Special Education Itinerant Services" [SEIS]) as "an approved program provided by a certified special education teacher . . . , at a site . . . , including but not limited to an approved or licensed prekindergarten or head start program; the child's home; . . . or a child care location" (Educ. Law § 4410[1][k]; 8 NYCRR 200.16[i][3][ii]; see "[SEIS] for Preschool Children with Disabilities," Office of Special Educ. Field Advisory [Oct. 2015], available at <https://www.nysed.gov/special-education/special-education-itinerant-services-preschool-children-disabilities>). SEIT services are "for the purpose of providing specialized individual or group instruction and/or indirect services to preschool students with disabilities" (8 NYCRR 200.16[i][3][ii] [emphasis added]; see Educ. Law § 4410[1][k]). Although a school district would generally not deliver a service designed exclusively for preschool students to a school-aged student, here, the individual special education services the student continued to receive as a school-aged student during the 2023-24 school year at the religious, nonpublic school are referred to SEIT services in some parts of the hearing record.

² The student's eligibility for special education as a student with a speech or language impairment is not in dispute (see 34 CFR 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

³ The term SETSS is not defined in the State continuum of special education services (see NYCRR 200.6), and it went largely undefined in the hearing record in this case. As has been laid out in prior administrative proceedings, the term is not used anywhere other than within this school district and a static and reliable definition of "SETSS" does not exist within the district, and unless the parties and the hearing officer take the time to develop a record on the topic in each proceeding it becomes problematic (see Application of the Dep't of Educ., Appeal No. 20-125). For example, SETSS has been described in a prior proceeding as "a flexible hybrid service combining Consultant Teacher and Resource Room Service" that was instituted under a temporary innovative program waiver to support a student "in the general education classroom" (Application of a Student with a Disability, Appeal No. 16-056), and in another proceeding it was suggested that SETSS was more of an a la carte service that is completely disconnected from supporting the student in a general education classroom setting (Application of a Student with a Disability, Appeal No. 19-047). SETSS is not defined in the State continuum of special education services (see 8 NYCRR 200.6).

The parent electronically signed an agreement with Yes I Can on June 12, 2023 (Parent Ex. C).⁴ The agreement indicated that the parent was seeking special education and speech-language therapy services (id. at p. 3). The rate for these services were listed as \$200 per hour and \$245 per hour respectively (id. at p. 4).

A. Due Process Complaint Notice

In a due process complaint notice dated June 28, 2024, the parents alleged that the district denied the student a free appropriate public education (FAPE) for the 2023-24 school year (see Parent Ex. A). The parents contended that the student's pendency was the last agreed upon program in the January 12, 2022 IEP, which consisted on five periods of SEIT services per week in Yiddish, three 30-minute sessions per week of group speech-language therapy, and two 30-minute sessions per week of group PT (id. at pp. 1-2).⁵

The parents argued that the district failed to convene a CSE meeting for the 2023-24 school year, failed to conduct or update any evaluations of the student, and failed to implement the student's services (Parent Ex. A at pp. 2-3). The parents contended that they notified the district of their intent to seek equitable services (id. at p. 3).

As relief, the parents requested an order that the district fund the costs for five hours of SEIT services per week to be delivered by a provider of the parents' choosing at that provider's stated rate, and for the costs of speech-language therapy and PT to be delivered by a provider of the parents' choosing at that provider's stated rate (Parent Ex. A at p. 3).

B. Impartial Hearing Officer Decision

An impartial hearing convened before the Office of Administrative Trials and Hearings (OATH) on August 8, 2024 (see Tr. pp. 1-11). In a decision dated August 8, 2024, the IHO found that the district failed to implement the student's most recent IESP, denying the student equitable services for the 2023-24 school year (IHO Decision at p. 3).⁶ According to the IHO, the district did not allege or submit any evidence to prove that the services recommended in the March 31, 2023 IESP were implemented during the 2023-24 school year (id. at p. 4). The IHO also found that the parents obtained a provider for 1.5 hours of speech-language therapy at the rate of \$245 per hour and that the student was receiving SEIT services at the rate of \$200 per hour; both services began on September 7, 2023, and concluded on June 30, 2024 (id. at pp. 4-5). The IHO noted that the district entered a rate study completed by the American Institutes for Research in October 2023

⁴ The Commissioner of Education has not approved Yes I Can as a school or agency with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d]; 200.7). Yes I Can electronically signed the document on August 22, 2023 (Parent Ex. C at p. 3).

⁵ It is noted that the January 2022 IEP did not recommend PT, but recommended OT services (see Parent Ex. B at p. 14). However, the March 2023 IESP recommended PT services (see Dist. Ex. 2 at p. 7).

⁶ The hearing record contains two IHO decisions. The coversheet of the first decision is dated August 8, 2024, while page eight of the decision is dated August 7, 2024 (see IHO Decision at pp. 1, 8). A "CORRECTED" IHO decision reflects an August 8, 2024 date of decision on both the cover page and on page eight (see Corrected IHO Decision at pp. 1, 8).

(AIR Report) into the hearing record, however the IHO found that the study was not credible due to the district's failure to present any witnesses to substantiate the study (id. at p. 5).

Additionally, the IHO noted that when reviewing rate cases, SROs have applied either the Burlington/Carter standard for tuition reimbursement cases or the compensatory education analysis (IHO Decision at p. 5). The IHO found the "compensatory education standard more analogous as it appropriately place[d] the burden of proof for all issues on the district in non-tuition cases as per the plain language of Education Law § 4044" (id.). According to the IHO, applying the Burlington/Carter standard "would force the parent[s] into a predicament contrary to the purposes of the IDEA and New York [S]tate law" as the result shifted the district's obligations in the first instance and then shifted the burden to the parent[s] during administrative hearings (id. at p. 6). The IHO determined that the effect of this rendered "Education Law § 3602-c and § 4404 meaningless" as the "district cannot just 'do nothing' at all times causing an educational detriment to the student, and then do an 'end run' around its obligation under the State and Federal Law" (id.).

The IHO then addressed the parents' claim for relief. The parents requested five hours of SEIT services based on the recommendation in the student's January 12, 2022 preschool IEP (IHO Decision at p. 7).⁷ The IHO found that SEIT services were not an appropriate form of relief and denied the parents' request, noting that the student was no longer in preschool (id.). The IHO held that:

[r]egardless of the standard that I apply, whether Burlington/Carter, or compensatory education, the [district] has failed to properly put forth a legal defense or factual claim. I hereby make the following findings: (1) the [district has] failed to implement equitable services mandated by the 03/31/2023 IESP for the 2023-2024 school year; and (2) Parent is entitled to direct funding for the [speech-language therapy], not SEIT

(IHO Decision at p. 7).

However, in a footnote, the IHO determined that if she did apply the Burlington/Carter standard, she would have found the speech-language therapy services appropriate and that equitable considerations were in favor of the parents (IHO Decision at p. 6 n.10).

The IHO ordered the district to fund three 30-minute sessions of individual speech-language therapy per week in Yiddish for the 2023-24 school year (IHO Decision at pp. 7-8). The IHO ordered the district to directly pay the speech-language provider selected by the parents, an amount not to exceed \$245 per hour, for a total of \$14,700, for the cost of equitable services as described, within 35 days of receipt of an invoice and an accompanying affidavit attesting that the services billed were provided (id. at p. 8).

⁷ It is noted that there was a typographical error in the IHO decision regarding the date of the preschool IEP, the IEP is in the hearing record and is dated as January 12, 2022 (see Parent Ex. B).

IV. Appeal for State-Level Review

The parents appeal and assert that they were unaware of any CSE meeting held after the January 2022 CPSE IEP was developed and that other than a few general notations in the March 2023 IESP, there was no evidence regarding what attempts the district made to notify them of the March 2023 CSE meeting. The parents contend that the IHO erred in denying funding for the "much needed" special education teacher services simply because they referenced the term SEIT rather than SETSS. The parents argue that the district did not allege that the special education services were not appropriate or that the student did not benefit from those services. Moreover, the hearing record supports that the student made progress from the special education teacher services. The parents contend that the IHO raised the issue of SEIT vs. SETSS on her own, which prejudiced them. The parents assert that the IHO erred as there was no legitimate basis for her to have excluded funding for the special education services obtained.

The parents also argue that the IHO erred by not finding the student was denied a FAPE for the district's failure to create an IEP for the student for the 2023-24 school year. The parents contend that the district was aware that the student was eligible for services and failed to develop an IEP and therefore, the request for special education services should be fully funded by the district. Additionally, the parents assert that the IHO erred by not finding that the hearing record supports that the student continues to require five hours of special education teacher services per week. The parents argue that the March 2023 IESP was entered into the hearing record without any explanation or justification as to why the district reduced the recommendation from five to three hours of special education teacher instruction per week or what documents it reviewed. Further, the parents contend that based on the evidence in the 2022 progress report, it was appropriate for them to continue daily special education teacher services for the 2023-24 school year.

The parents assert that the IHO should have found that the student was legally and equitably entitled to funding for the five hours per week of special education teacher services that were provided to the student and request the IHO's decision be overturned to the extent that she denied funding for special education teacher services for the 2023-24 school year.

In an answer with cross-appeal, the district argues that the IHO erred in failing to apply a Burlington/Carter analysis to the parents' claims. The district argues that the IHO concluded that the speech-language therapy services were appropriate without any analysis and instead made an affirmative statement without detail. The district argues that there are no session notes or progress notes and contends that the "purported progress report" does not show that the student is progressing. Further, the district asserts that there is no evidence of specially designed instruction. As such, the IHO erred in finding that speech-language therapy services were appropriate.

The district argues that the IHO correctly denied the parents' request for SEIT services as the student was not a preschool student and that the parents have the burden of proof that the services were appropriate. Moreover, any contention from the parents that the student was not specifically receiving SEIT services is incorrect because the parents requested SEIT in the due process complaint notice, and the provider affidavit stated that the student was receiving SEIT. The district notes that there is no pendency agreement in this case and that the case law cited by the parents is inapposite. Additionally, the district argues that there is nothing in the hearing record

to support that SEIT services were appropriate as there is no evidence of progress or appropriateness of those services.

In an answer to the district's cross-appeal, the parents assert that the IHO did apply Burlington/Carter when evaluating the appropriateness of the speech-language therapy. The parents contend that there is sufficient evidence to support the IHO's decision that the services were appropriate under that analysis and that the student received speech-language therapy services. The parents reiterate their assertion that the IHO erred in denying funding for the student's special education teacher services for the 2023-24 school year.

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

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

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

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

The district has not cross-appealed from the IHO's determination that it failed to implement the equitable services recommended in the March 2023 IESP for the 2023-24 school year (IHO Decision at pp. 3, 7).¹⁰ 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]). Nevertheless, the district correctly asserted that the IHO erred by failing to apply a Burlington/Carter analysis to the parents' claims.¹¹

A. Unilaterally Obtained Services

The crux of the dispute between the parties relates to the appropriateness of the parents' unilaterally obtained speech-language therapy and special education services delivered to the student by Yes I Can during the 2023-24 school year and whether equitable considerations favor direct funding of the parents' unilaterally obtained services. Prior to reaching the substance of the parties' arguments, some consideration must be given to the appropriate legal standard to be applied. In this matter, the student has been parentally placed in a nonpublic school and the parents do not seek tuition reimbursement from the district for the cost of the parental placement. Instead, the parents alleged that the district failed to implement the student's mandated public special education services under the State's dual enrollment statute for the 2023-24 school year and, as a self-help remedy, they unilaterally obtained private services from Yes I Can for the student without

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.

¹⁰ Although the parents assert that the IHO failed to make a determination that the student was not offered a FAPE for the 2023-24 school year, the IHO found that the district did not meet its burden of proof and further found that the parents were entitled to part of their requested relief (IHO Decision at pp. 3, 4, 7).

¹¹ While the IHO declined to apply a Burlington/Carter analysis, she did indicate in a footnote, that even under a Burlington/Carter standard, she would have found the speech-language services were appropriate based on the progress and session notes and that equitable considerations favored reimbursement of speech-language therapy (IHO Decision at p. 3 n.10).

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]).¹² In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

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

¹² 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 Yes I Can (Educ. Law § 4404[1][c]).

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. The Student's Needs

While not in dispute, a discussion of the student's needs provides context for the issue to be decided, namely whether the services delivered by Yes I Can were appropriate to address the student's needs.

According to the January 2022 CPSE IEP, developed when the student was three years old, standardized cognitive assessments of the student administered yielded a full scale IQ in the low average range (Parent Ex. B at p. 3). The student's adaptive behavior, including communication, daily living, and socialization skills, were in the moderately low range, with motor skills in the low range (id.). Administration of the "K-SEALS" to the student yielded scores in the below

average range on measures of vocabulary, numbers, letters, words, expressive, receptive, social/emotional, and adaptive behavior subtest, with a score in the poor range on the physical development (gross and fine motor) subtest (*id.*). Additionally, the student exhibited moderate delays in receptive language skills described as difficulty following directions, and understanding stories read to him and basic concepts (*id.* at p. 4). Further, the student demonstrated significant expressive language delays characterized by difficulty expressing basic wants and needs, engaging in conversation, and exhibiting "unclear" speech and speech sound distortions (*id.*). Socially, the student demonstrated parallel play skills with peers but generally did not verbalize or interact with them (*id.* at p. 5). The student's gross motor skills were described as "[w]eak" and characterized by poor strength and delayed balance, running, jumping, kicking, and throwing skills, and he had difficulty with fine motor tasks such as turning pages in a book, unwrapping objects, holding a crayon properly (*id.* at pp. 6-7).

On March 31, 2023 a CSE convened and developed an IESP that indicated the student, who was almost five years old, matched shapes and body parts and sorted objects by color, but did not label shapes, sort objects by category, rote count to 20 or use 1:1 correspondence, ask questions and answer questions about a book, or sequence three to four pictures (Dist. Ex. 2 at p. 1). The student played symbolically with toys, transitioned easily between activities, and participated in group activities, but did not carry out a three part sequence during play, build a structure and develop a story about it, greet peers, wait his turn, choose a preferred friend, focus on a task, or maintain eye contact (*id.* at pp. 1, 2). According to the IESP, the student's gross motor skills were strengths, in that he ran smoothly and jumped from a step and in place; however, he did not walk upstairs with alternating feet, or catch and throw a ball (*id.* at p. 2). Regarding fine motor skills, the student drew horizontal and vertical lines; however, he did not cut with scissors or string beads, and he exhibited poor eye/hand coordination (*id.*). Identified supports and strategies to address the student's management needs included small group instruction, highly structured environment, praise and encouragement, prompts for refocusing and redirection, rewards and incentives paired with praise, visual schedules and transition cues, multisensory instruction with hands-on activities, extended wait time, proximal seating next to an adult, fidget items to improve attention, movement breaks, and repetition of directions, questions, and verbal information (*id.* at p. 3). The CSE recommended that the student receive three periods per week of group SETSS in Yiddish, three 30-minute sessions per week of individual speech-language therapy, and two 30-minute sessions per week of individual PT (*id.* at p. 7).

2. Appropriateness of Services from Yes I Can

The parents assert that the IHO erred in finding that their "SEIT" services were not an appropriate form of relief because the student was no longer in preschool and that it was "inconsistent with State regulation for a school district to deliver a service designed exclusively for preschool students to a school-aged student" (IHO Decision at p. 7). The IHO also found that the district had "failed to implement the most recent IESP, not the IEP" and in a footnote found that the parents "did not allege a dispute with the [March 2023] IESP" (IHO Decision at pp. 3, 4 n.3) However, the parents asserted in their due process complaint notice and in their request for review that they were unaware of the March 2023 IESP and that the last agreed upon program was set forth in a January 2022 CPSE IEP, which had recommended five hours per week of SEIT services and three 30-minute sessions per week of speech-language therapy in a group of two (*see* Parent Ex. A at p. 3; Req. for Rev. ¶ 4).

In addition, the district cross-appeals from the IHO's finding that the speech-language therapy delivered by Yes I Can was appropriate to address the student's needs. Specifically, the district points to another footnote in the IHO's decision, wherein the IHO determined that the student worked with a licensed speech-language therapist who provided detailed progress notes and session notes that showed the student was progressing. However, the district argues that the IHO failed to cite to the evidence supporting her conclusion, and the hearing record does not otherwise include the notes referred to, nor does the speech-language progress report reflect that the student had made progress. The district also argues that the evidence did not include the quarterly assessments, information from meetings with providers and support staff, and observations of the student in the classroom referenced by the educational director. Additionally, the district asserts that there was a lack of evidence regarding how the speech-language therapy "was implemented, what deficits [it] addressed, when and where [it was] provided, or how [it] was specially designed to address the student's needs" (Answer with Cr.-appeal ¶ 8). Further, the district argues that the evidence failed to show that Yes I Can actually provided the student with speech-language therapy.

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

With regard to the services delivered by Yes I Can, the IHO correctly found that the parent was entitled to funding for speech-language therapy services, however, the IHO failed to grapple with the parents' evidence of specially designed instruction, which was detailed in the progress reports from the student's providers and further erred in finding that the parents were not entitled to funding for their unilaterally obtained special education services (IHO Decision at pp. 3-6). A unilateral placement is not mandated by the IDEA or State law to provide services in compliance with a plan such as an IEP or IESP. Rather, it is well settled that parents need not show that their unilateral placement provides every service necessary to maximize the student's potential, but rather, must demonstrate that the placement provides education instruction specially designed to meet the unique needs of the student (M.H., 685 F.3d at 252; Gagliardo, 489 F.3d at 112; Frank G., 459 F.3d at 365; Stevens v. New York City Dep't of Educ., 2010 WL 1005165, at *9 [S.D.N.Y. Mar. 18, 2010]). "The test for the private placement 'is that it is appropriate, and not that it is perfect'" (T.K. v. New York City Dep't of Educ., 810 F.3d 869, 877-78 [2d Cir. 2016] [citations omitted]).

In testimony by affidavit, the educational director stated that during the 2023-24 school year, Yes I Can delivered five 60-minute sessions of individual SEIT services and three 30-minute individual speech-language therapy sessions to the student at his "mainstream school" (Parent Ex. G ¶¶ 13, 16-17, 23, 29). The student's services were "typically provided both inside the classroom as push-in sessions and 1:1 in a separate location," and that the sessions were "individualized" and "include[d] a great deal of specialized instruction" (id. ¶ 26). The educational director testified that the SEIT services were delivered by a provider who is certified by New York to teach students with disabilities, and the speech-language pathologist is licensed and registered in New York State

(id. ¶¶ 15, 18; see Parent Ex. F).¹³ According to the educational director, "[a]side from providing direct 1:1 service to [the student], the providers prepare[d] for sessions, create[d] goals, wr[ote] progress reports, and me[t] with teachers and parents" (Parent Ex. G ¶ 21). Additionally, the educational director testified that goals were developed for the student, which were reviewed quarterly, and that the progress reports were "an accurate representation of what the providers ha[d] been working on with [the student], including goals, over the course of the 2023-2024 school year" (id. ¶¶ 24, 25). The student's progress was "measured through quarterly assessments, consistent meetings with the providers and support staff, observation of [the student] in the classroom, and daily session notes" (id. ¶ 27). Further, the educational director testified that the student "ha[d] already shown signs of progress with his SEIT and [speech-language therapy]" although the student's "academic and social delays warrant[ed] the need for continued services" (id. ¶ 28).

a. Speech-Language Therapy

The parents' evidence in support of the appropriateness of the speech-language therapy services included the speech-language pathologist's New York State license, the affidavit testimony from the educational director discussed above, and a May 2024 progress report (Parent Exs. E; F; G). The student was six years old at the time of the progress report, attending a general education classroom at a nonpublic school, and receiving three 30-minute sessions per week of speech-language therapy (Parent Ex. E at p. 1). The speech-language pathologist reported that the student presented with receptive and expressive language, phonemic awareness, attention, and articulation delays (id.). Regarding receptive language, the speech-language pathologist indicated that the student did not identify time concepts or body parts, show understanding of quantitative concepts, passive voice sentences, expanded sentences, and qualitative concepts, or follow two-step directions (id. at pp. 1-2). Expressively, the student did not use or had difficulty using qualitative concepts, past tense, and irregular plurals, describing similarities, completing similes and analogies, counting, and naming categories and their items (id. at p. 2). With regard to phonemic awareness skills, the speech-language pathologist reported that the student had difficulty identifying initial sounds of words, blending and segmenting sounds, and manipulating sounds in words (id.). The student's articulation delays included lingual protrusion and interdental lisp during the production of specific phonemes, which affected the clarity of his speech (id.). The speech-language pathologist reported that the student's executive functioning skills were characterized by appearing 'spaced out,' missing lessons taught in the class, being easily distracted, and having difficulty attending to and completing tasks (id.). Further, the student needed "constant redirection" often needed lessons to be retaught individually, and had difficulty following classroom directions and routines (id.).

To improve the student's receptive and expressive language skills, the speech-language pathologist developed annual goals for the student to follow multistep directions and comprehend expanded sentences, name categories and their items, and use past tense and irregular plurals correctly through the use of "worksheets, models, and expansions," "wh" questions, and storybooks (Parent Ex. E at pp. 1, 2-3). Regarding phonemic awareness, the progress report

¹³ The special education teacher holds a Students with Disabilities (Birth – Grade 2) Internship Certificate (Parent Ex. F at p. 2).

indicated that the student had been working on a goal to improve his ability to blend sounds, that he had made progress, and at the time of the report, could blend three sounds presented verbally to form CVC words (id. at pp. 1, 2-3). New goals to improve the student's phonemic awareness skills included increasing the ability to blend sounds into words, segment CVC words into sounds, and manipulate sounds in words using phonemic awareness and reading exercises that targeted delays in these areas (id. at p. 4). According to the progress report, the student demonstrated progress toward his articulation goal during therapy sessions, but had difficulty carrying over correct lingual position to spontaneous speech (id. at p. 3). New articulation goals for the student included to produce identified phonemes in sentences, using strategies such as modeling, verbal and visual prompts, and articulation drills (id. at pp. 1, 2, 3). Additionally, the speech-language pathologist provided kinesthetic input and redirection throughout sessions to improve the student's focus and attention (id. at pp. 1, 2).

b. Special Education Services

In a progress report dated June 25, 2024, the special education teacher related that the student had received five hours per week of special education services to address his needs in the areas of visual discrimination, auditory learning and comprehension, and academic skills (Parent Ex. D). Regarding reading, the progress report indicated that the student was working on goals to recognize that spoken words are represented in written language by using phonemic awareness activities and Orton Gillingham, and to understand that words are separated by spaces in print, using whole language and guided reading approaches (id. at p. 2). Reading comprehension goals included for the student to develop and answer questions about characters, major events, and text information using prior knowledge and graphic/semantic organizers (id.). A vocabulary goal for the student to exhibit interest in new words required pre-teaching, review, and metacognition techniques (id. at pp. 2-3). In math, the student's goals were to count to 20 using step by step cue cards and counters, and to count with 1:1 correspondence using manipulatives and visuals (id. at p. 3).

Regarding social development, the progress report indicated that the student was working on goals to engage in pretend and imaginative play, and express feelings, needs, opinions, and desires in a way that was appropriate to the situation using role play, modeling, and social stories (Parent Ex. D at pp. 3-4). To address language needs, the special education teacher developed a goal for the student to participate in small and large group activities, using modeling and visual cues (id. at p. 4).

The special education teacher reported that the student had "demonstrated progress in his ability to please adults and behave in the classroom setting and work well with his peers" (Parent Ex. D at p. 1). Additionally, the student progressed from a Fountas and Pinnell level A to a level C, which "demonstrate[d] progress in the area of literacy" (id.). Review of the progress report shows that the student exhibited emerging skills, but that he continued to need "more instruction to master" the goals (id. at pp. 2-4). The special education teacher reported that although the student had made academic progress, he "require[d] the use of specialized methods and resources

to develop his skills and work towards grade level," and "special education support" to master his goals (id. at p. 5).¹⁴

Based on the totality of the circumstances, the parents' unilaterally obtained speech-language therapy and special education services were similar in frequency and duration to the speech-language therapy services and the SEIT services recommended for the student in the January 2022 CPSE IEP. The progress reports and affidavit testimony in the hearing record indicated that the student received five hours per week of 1:1 special education services and three 30-minute sessions per week of individual speech-language therapy (Parent Exs. D at p. 1; E at p. 1; G at ¶¶ 13, 21, 26). Thus, the hearing record supports a finding that the parents established that the individual speech-language therapy and 1:1 special education services provided by Yes I Can were appropriate for the student for the 2023-24 school year.¹⁵

VII. Conclusion

In summary, the district failed to meet its burden that it offered the student equitable services for the 2023-24 school year, which resulted in a denial of a FAPE to the student for the 2023-24 school year, the parents met their burden of demonstrating the appropriateness of their unilaterally obtained speech-language therapy services and special education services, and no equitable considerations warrant a reduction in the parents' requested relief. In light of these determinations, the IHO erred in finding that the parents were not entitled to funding for their unilaterally obtained special education services.

¹⁴ The lack of OT and/or PT in the unilateral program does not prevent the parents from meeting their burden to show that the services obtained were appropriate as the hearing record establishes that the student benefitted from the services delivered.

¹⁵ The final criterion for a reimbursement award pursuant to the federal standard for adjudicating these types of disputes is instructive. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]; L.K. v. New York City Dep't of Educ., 674 Fed. App'x 100, 101 [2d Cir. Jan. 19, 2017]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014] [identifying factors relevant to equitable considerations, including whether the withdrawal of the student from public school was justified, whether the parent provided adequate notice, whether the amount of the private school tuition was reasonable, possible scholarships or other financial aid from the private school, and any fraud or collusion on the part of the parent or private school]; C.L., 744 F.3d at 840 [noting that "[i]mportant to the equitable consideration is whether the parents obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA"]). In a footnote, the IHO found that the district "did not allege any affirmative defenses, therefore equities [we]re in favor of [the p]arent[s]" (IHO Decision at p. 6 n.10). The district did not cross-appeal from that aspect of the IHO's decision, nor has the district raised any equitable factors that would warrant a reduction in the amounts of funding the parents requested. Therefore, there is no basis in the hearing record to reduce the amounts of the parents' requested funding.

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

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision dated August 8, 2024, is modified by reversing that portion which found that the parents did not have a burden to establish the appropriateness of their unilaterally obtained services for the 2023-24 school year; and

IT IS FURTHER ORDERED that the district shall directly fund the special education services delivered to the student by Yes I Can during the 2023-24 school year at a rate not to exceed \$200 per hour, upon proof of provision of services and proof of the student's attendance.

Dated: Albany, New York
November 29, 2024

JUSTYN P. BATES
STATE REVIEW OFFICER