The University of the State of New York

The State Education Department
State Review Officer
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No. 24-483

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

Appearances:
Bochner PLLC, attorneys for petitioner, by David Kahane, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Cynthia Sheps, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request that respondent (the district) fund the costs of her daughter's unilaterally-obtained services delivered by Little Mentchen, LLC (Little Mentchen) for the 2023-24 school year and which denied, in part, the parent's request for compensatory educational services. The district cross-appeals from those portions of the IHO's decision which found that the student was entitled to pendency services and which found that the parent's unilaterally-obtained services were appropriate for the 2023-24 school year. The appeal must be sustained in part. 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 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]). Similarly, when a preschool student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Preschool Special Education (CPSE) that includes, but is not limited to, parents, teachers, an individual who can interpret the instructional implications of evaluation results, and a chairperson that falls within statutory criteria (Educ. Law § 4410; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.1[mm], 200.3, 200.4[d][2], 200.16; see also 34 CFR 300.804).[1] 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]).

[1] State guidance explains that section 3602-c "pertains only to parental placements in nonpublic elementary and secondary schools. It does not apply to a child who is less than compulsory school age continuing in a preschool program, even if the preschool program is located in the same building as a kindergarten or other elementary grade classrooms. These students would continue to be the responsibility of the district of residence through the CSE" ("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 at p. 13, VESID Mem. [Sept. 2007], available at https://www.nysed.gov/special-education/guidance-parentally-placed-nonpublic-elementary-and-secondary-school-students).

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

III. Facts and Procedural History

The evidence in the hearing record regarding the student's educational history is sparse. Briefly, a CPSE convened on March 23, 2022, and finding the student eligible to receive special education as a preschool student with a disability, developed an IEP for the student with a projected implementation date of March 28, 2022 (see Parent Ex. B at pp. 1, 13). The March 2022 CPSE recommended that the student receive 12-month programming consisting of seven hours per week of individual special education itinerant teacher (SEIT) services, one hour per week of indirect SEIT services, two 30-minute sessions per week of individual speech-language therapy services, one 30-minute session per week of speech-language therapy in a group, and two 30-minute sessions per week of individual occupational therapy (OT) (id. at pp. 1, 13-14).[2] All of the recommended services were to be delivered at an early childhood program selected by the parent (id. at p. 1).

[2] 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 http://www.p12.nysed.gov/specialed/publications/2015-memos/documents/SpecialEducationItinerantServicesforPreschoolChildrenwithDisabilities.pdf; "Approved Preschool Special Education Programs Providing [SEIT] Services," Office of Special Educ. [June 2011], available at http://www.p12.nysed.gov/specialed/publications/SEITjointmemo.pdf). In addition, 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]). Thus, to the extent that the parent or her attorney refer to the individual special education teacher services the student continued to receive as a school-aged student during the 2023-24 school year at the religious, nonpublic school or thereafter as SEIT services, it is inconsistent with State regulation and policy for a school district to deliver a service designed exclusively for preschool students to a school-aged student. Additionally, as special education teacher support services—SETSS—are not defined by State regulations, the special education program identified in State regulation that the student received at the religious, nonpublic school most closely resembles direct consultant teacher services, which similar to SEIT services, is programming delivered by a certified special education teacher (see 8 NYCRR 200.1[m][1]; 200.6[d]).

On March 17, 2023, a CSE convened to conduct the student's "Turning 5" meeting in preparation for the student's receipt of school-age special education services during the 2023-24 school year (kindergarten) and developed an IESP for the student with a projected implementation date of September 7, 2023 and a projected annual review date of March 17, 2024 (Parent Ex. C at p. 1).[3] It was noted in the March 2023 IEP that the student was "currently attend[ing] preschool" and received SEIT services, OT, and speech-language therapy (id.). Finding that the student remained eligible for special education as a student with a speech or language impairment, the March 2023 CSE recommended that the student receive five periods per week of special education teacher support services (SETSS) in a group, one 30-minute session per week of individual speech-language therapy, one 30-minute session per week of speech-language therapy in a group, one 30-minute session per week of individual OT, and one 30-minute session per week of OT in a group (id. at pp. 1, 7-8).[4]

On May 10, 2023, the parent signed a district document, which indicated that the parent was placing the student in a nonpublic school at the parent's expense and the parent wanted the student to continue to receive special education at the nonpublic school (see Parent Ex. E at p. 2). In addition, the document indicated that the parent must "mail th[e] form or email the information" to the CSE office "no later than June 1, 2023" (id. [emphasis in original]).

On August 30, 2023, the parent executed a "Little Mentchen—Parent Contract" for the agency (i.e., Little Mentchen) to deliver five hours per week of SETSS to the student for the 2023-24 school year (Parent Ex. D at pp. 1-2).[5] According to the agreement, the agency charged $200.00 per hour for "SEIT" services (id. at p. 1).

Evidence in the hearing record demonstrates that Little Mentchen began delivering five hours per week of SETSS to the student on "October 25, 2023" at her nonpublic school (Parent Ex. G ¶¶ 8-9, 11-12).

By due process complaint notice dated June 4, 2024, the parent—through an advocate—requested an expedited pendency impartial hearing to address the student's pendency services and alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2023-24 school year, noting that the March 2023 IEP was "procedurally and substantively flawed" (Due Process Complaint Notice at pp. 1-2). As relief, the parent sought an order directing the district to fund seven hours per week of "SEIT or SETSS services at an enhanced rate" for the

[3] The attendance page of the March 2023 IESP reflected that the parent participated at the meeting via telephone (see Parent Ex. C at p. 10).

[4] Although the March 2023 IESP did not specify whether the CSE recommended a 12-month program or a 10-month program, State law provides that "[a] child shall be deemed a preschool child through the month of August of the school year in which the child first becomes eligible to attend" school as a school-aged student (see Educ. Law §§ 3202[1]; 4410[1][i]; 8 NYCRR 200.1[mm][2]). Thus, for July and August 2023, the student would have remained entitled to receive special education and related services under the CPSE (see Educ. Law §§ 3202[1]; 4410[1][i]; 8 NYCRR 200.1[mm][2]). It follows, therefore, that the student would initially become eligible for 12-month programming as a school-age student for the 2024-25 school year.

[5] It appears that an agency representative executed the "Little Mentchen—Parent Contract" on October 19, 2023 (Parent Ex. D at p. 2).

2023-24 school year and to similarly fund three 30-minute sessions per week of individual speech-language therapy (Yiddish) at an enhanced market rate; additionally, the parent sought an order to modify the student's OT services from a group to an individual service (id. at pp. 2-3). The parent noted that she had "located providers who c[ould] service the student for an enhanced rate" (id. at p. 2).

A. Impartial Hearing and Subsequent Events

On July 10, 2024, the impartial hearing proceeded before an IHO with the Office of Administrative Trials and Hearings (OATH) (see Tr. p. 1). However, while a district representative appeared on the district's behalf for the prehearing conference, no one appeared for the parent (see Tr. pp. 1-2). The IHO sent an email to the parent's advocate and waited for an appearance on the parent's behalf for approximately 10 minutes (see Tr. p. 2). When no one responded to the IHO's email, the IHO moved forward with the prehearing conference (id.). Initially, the IHO asked the district representative if the district had a position with regard to pendency (see Tr. p. 3). The district representative stated that the district disputed the student's right to pendency services in this matter based on the anticipated adoption of recently proposed State regulations (id.). The district representative also stated that, as a "services case," the matter did not "fall under the IDEA for purposes of pendency" (id.). Thereafter, the district representative made an application to the IHO to dismiss the parent's due process complaint notice based on "lack of prosecution," as the parent failed to appear at the prehearing conference (Tr. p. 4). The IHO declined to dismiss the parent's case at that time, finding the application a "bit premature"; however, the IHO advised that the district was free to renew its application if the parent continued to fail to appear (Tr. p. 5). The IHO then scheduled the next date for the impartial hearing on August 16, 2023 (see Tr. p. 6).

During the administrative proceedings, the parent, through her attorney, filed an amended due process complaint notice dated July 18, 2024, alleging that the district failed to offer the student a FAPE for the 2023-24 school year (see Parent Ex. A at p. 1). The parent indicated that the student's March 2022 IEP constituted the last agreed-upon program, consisting of seven hours per week of SEIT services in a group, one hour per week of indirect SEIT services, two 30-minute sessions per week of individual speech-language therapy, one 30-minute session per week of speech-language therapy in a group, and two 30-minute sessions per week of individual OT services (id. at p. 1). The parent further indicated that the student's last agreed-upon program was a 12-month school year program (id.).

Next, the parent indicated that on March 17, 2023, a CSE developed an IESP for the student, and alleged that the March 2023 IESP was "procedurally and substantively flawed" because the CSE reduced the special education services and recommended that the student receive SETSS in a group (Parent Ex. A at p. 2). In addition, the parent alleged that the district "failed to identify or assign providers to implement" the special education services recommended in the March 2023 IESP, and by "relying on the parent to identify a provider," the district improperly and impermissibly shifted the burden onto the parent (id.). As a result, the parent indicated that she had "no choice but to seek due process" to have the student's services "implemented by a private provider at an enhanced rate" (id.).

As relief, the parent requested an order directing the district to fund seven hours per week of SEIT services in a group and one hour per week of indirect SEIT services for the 2023-24 school year at the enhanced rates set by the providers (see Parent Ex. A at p. 2). The parent also requested that the district fund the "difference (if any) between the rate charged by the [s]tudent's SEIT/SETSS provider/agency and the pendency rate paid by the [district] pursuant to that order/agreement" and to provide a "bank of compensatory education services" for any mandated services not delivered to the student during the 2023-24 school year (id.).

Thereafter, the impartial hearing resumed on September 12, 2024, with both parties appearing (see Tr. p. 12). After entering the parent's documentary evidence into the hearing record, the IHO gave each party the opportunity to state their respective positions with regard to the issue of pendency in this matter (see Tr. pp. 17-23).[6] The remainder of the impartial hearing focused on the merits of the case and concluded on the same day (see Tr. pp. 23-58).

B. Impartial Hearing Officer Decision

In a decision dated September 18, 2024 (IHO decision), the IHO initially addressed the issue of pendency (see IHO Decision at pp. 6-10). Here, the IHO determined that, consistent with the parent's position, the student was entitled to pendency services and that the student's March 2022 CPSE IEP formed the basis for pendency services (id. at p. 10). More specifically, the IHO found that section 3602-c of the Education Law "expressly incorporate[d]" the due process procedures in section 4404 of the Education Law; consequently, the IHO determined that the district's argument that students who seek equitable services are not entitled to pendency was moot (id. at pp. 9-10).

Next, the IHO concluded that the district failed to offer the student a FAPE for the 2023-24 school year (see IHO Decision at pp. 10-11). The IHO determined that the district representative at the impartial hearing "took no position with respect to whether [the district] provided the [s]tudent with a FAPE for the 2023-24 school year," "provided no explanation as to whether the [s]tudent was provided with services recommended in the IESP," and failed to "explain how their evidence support[ed] whether the [district] provided a FAPE" for the 2023-24 school year (id. at p. 11). Therefore, since the district failed to explain whether the student received special education services—specifically, SETSS, OT, or speech-language therapy—the IHO found that the district failed to sustain its burden of proof and persuasion to establish that the district offered the student a FAPE for the 2023-24 school year (id.).

Turning to the parent's unilaterally-obtained services, the IHO began by describing the parties' arguments (see IHO Decision at pp. 11-12). More specifically, the IHO noted the district's argument that the parent failed to establish that the "program they want[ed], which [wa]s [seven] periods of SETSS, [wa]s appropriate" (id. at p. 12). The IHO also noted the district's argument that evidence in the hearing record demonstrated that the student had made progress receiving five periods per week of SETSS; however, the IHO indicated that the district had not presented any "evidence or witness testimony to support this position" (id.). With respect to the parent's arguments, the IHO noted her assertion that the program consisting of seven periods per week of

[6] The district did not proffer any documentary or testimonial evidence at the impartial hearing (see generally Tr. pp. 1-58). Neither party presented opening statements at the impartial hearing (see Tr. p. 23).

SETSS was "more appropriate, even though for the current school year, [the student] received only [five] periods" from the agency provider (id.). In addition, the IHO noted the parent's argument that the district failed to provide the student with any services in the March 2023 IESP, and the evidence supported a finding that the unilaterally-obtained services were appropriate (id.).

Ultimately, the IHO concluded that the parent sustained her burden to establish that the program consisting of seven periods per week of SETSS was appropriate (see IHO Decision at pp. 12-13). In support of this determination, the IHO pointed to testimonial evidence (id.). The IHO found both the parent and the special education director (director) at Little Mentchen credible, and noted that the parent testified about the student's "academic challenges," her need for "1:1 help," and her "struggles with reading and math, as well as behavior" (id. at p. 13). The IHO also found that the parent testified that she disagreed with the March 2023 CSE's recommendation for five periods per week of SETSS at the CSE meeting, "but the CSE did not modify the amount of SETSS recommended in the IESP" (id.). Next, the IHO pointed to the director's testimony, which indicated that the student "would have benefited from more hours of SETSS, as one hour per day was not enough" (id.). According to the IHO, the agency delivered SETSS to the student based on the recommendations in the March 2023 IESP (id.).

Having found that the evidence in the hearing record supported the appropriateness of the seven periods per week of SETSS, the IHO then examined the progress report the parent entered into the hearing record as evidence (see IHO Decision at p. 13). The IHO initially noted that the progress report described the student's present levels of performance (id.). More specifically, the IHO indicated that the student presented with "delays in the cognitive, academic, social-emotional, adaptive, and behavioral domains," which were "described throughout the progress report" (id.). Additionally, the IHO found that the progress report reflected "[v]arious methodologies that were used to address each area of delay" and "how the [s]tudent responded to these methods" (id.). The IHO further noted that, according to the progress report, the student "made progress in all areas" and that "[e]ach area of delay ha[d] numerous goals for continued areas of concern" (id.).

With respect to the parent's burden to establish that the unilaterally-obtained services provided the student with specially designed instruction, the IHO relied on the director's testimony regarding the services delivered to the student and the progress the student made as a result of receiving those services to reach her determination (see IHO Decision at p. 13). The IHO also relied on the progress report, which, according to the IHO, described the "services and modifications and interventions" the student received to address her delays and the student's progress (id. at pp. 13-14). While noting that evidence of progress was not determinative of the appropriateness of a unilateral placement, the IHO concluded that the evidence supported a finding that the parent's unilaterally-obtained services were "individualized and tailored" to meet the student's needs and allowed the student to make progress in the academic curriculum (id. at p. 14).

Having found the unilaterally-obtained SETSS was appropriate, the IHO examined equitable considerations (see IHO Decision at pp. 14-16). Here, the IHO found that the hearing record lacked evidence demonstrating that the parent acted unreasonably or interfered with district evaluations or prevented the district from offering the student a FAPE for the 2023-24 school year (id. at p. 15). Moreover, the IHO found that the parent timely provided the district with a June 1st notice; however, the IHO also found that the hearing record was devoid of evidence demonstrating that the parent provided the district with a 10-day notice (id.).

While the IHO concluded that the parent sustained her burden with regard to equitable considerations, the IHO nevertheless concluded that she, as the IHO, lacked subject matter jurisdiction "for disputes over rates in IESP cases and therefore c[ould not] issue an award of enhanced rates for services" in this matter (IHO Decision at p. 15). The IHO discussed the State regulation proposed by the Board of Regents, and relying on its plain language, dismissed the parent's request for enhanced rates for the unilaterally-obtained SETSS with prejudice (id. at pp. 15-16).

As a final issue, the IHO addressed the parent's request for compensatory educational services for the student's related services, namely, speech-language therapy and OT (see IHO Decision at p. 16). Here, the IHO found that the district failed to provide the student with speech-language therapy and OT during the 2023-24 school year, as mandated in the March 2023 IESP (id.). As a result, the IHO determined that the student was entitled to receive an award of compensatory educational services on a 10-month school year basis, and found that the student missed 36 hours of speech-language therapy services and 36 hours of OT services from September 7, 2023 through June 26, 2024 (id.).

In light of the IHO's findings, the IHO ordered the district to provide the student with pendency services consistent with the special education program and related services set forth in the student's March 2022 CPSE IEP; fund the costs of the parent's unilaterally-obtained SETSS at a rate of $200.00 per hour for five periods per week as delivered by Little Mentchen, upon the "receipt of an itemized bill, progress reports, and session log" for the 2023-24 school year; and to provide a bank of compensatory educational services consisting of 36 hours of speech-language therapy and 36 hours of OT services for the student (with the district to provide the OT and speech-language providers at a reasonable market rate) (IHO Decision at p. 18).

On September 19, 2024, the IHO issued a "Corrected" IHO decision (Corrected IHO decision) (Corrected IHO Decision at p. 1). A comparison of the two IHO decisions reflects that the IHO changed the date of the decision on the cover page and signature page, and with regard to the relief ordered, the IHO removed the directive for the district to fund the costs of the parent's unilaterally-obtained SETSS delivered by Little Mentchen and replaced that ordering clause with a statement indicating that the district failed to offer the student a FAPE for the 2023-24 school year (compare Sept. 19, 2024 IHO Decision at pp. 1, 18-19, with IHO Decision at pp. 1, 18-19).

IV. Appeal for State-Level Review

The parent appeals, alleging that the IHO erred by finding that she lacked subject matter jurisdiction to address or award enhanced rates for unilaterally-obtained services, and relatedly, by denying her request for the district to fund the costs of the unilaterally-obtained SETSS for the 2023-24 school year. In addition, the parent contends that the IHO erred by awarding compensatory educational services for OT and speech-language therapy services on a 10-month school year basis as opposed to a 12-month school year basis, and by denying the parent a bank of compensatory educational services consisting of an additional two hours per week of SETSS. As relief, the parent seeks an order directing the district to fund the costs of the student's unilaterally-obtained SETSS delivered by Little Mentchen during the 2023-24 school year at a rate of $200.00 per hour, for the district to provide compensatory educational services in speech-language therapy

and OT services on a 12-month school year basis, and for the district to provide compensatory educational services consisting of the outstanding SETSS on a 12-month school year basis.

In an answer, the district responds to the parent's allegations and generally argues to uphold the IHO's findings that she lacked subject matter jurisdiction to award enhanced rates for the parent's unilaterally-obtained SETSS during the 2023-24 school year and that the student was entitled to an award of compensatory educational services for OT and speech-language therapy services on a 10-month school year basis. The district interposes a cross-appeal, arguing that the IHO erred by finding that the student was entitled to pendency services and that such finding must be annulled. The district also argues that the IHO erred by finding that the parent sustained her burden to establish that the unilaterally-obtained SETSS were appropriate and that equitable considerations weighed in favor of the parent's requested relief.[7]

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

[7] The parent did not file an answer to the district's cross-appeal or a reply to the district's answer.

[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]).

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

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

VI. Discussion

A. Preliminary Matters

1. Corrected IHO Decision

Before addressing the merits of the parties' contentions, it does not go unnoticed that the IHO in this matter issued a corrected decision, dated September 19, 2024. As a caution and reminder, an IHO's jurisdiction is limited by statute and regulations and there is no authority for an IHO to reopen an impartial hearing, reconsider a prior decision, or retain jurisdiction to resolve future disputes between the parties (see, e.g., Application of a Student with a Disability, Appeal No. 17-021; Application of the Dep't of Educ., Appeal No. 16-065; Application of a Student with a Disability, Appeal No. 16-035; Application of the Dep't of Educ., Appeal No. 15-073; Application of a Student with a Disability, Appeal No. 15-026; Application of the Dep't of Educ., Appeal No. 12-096; Application of a Student with a Disability, Appeal No. 11-046; Application of the Dep't of Educ., Appeal No. 11-014; Application of the Dep't of Educ., Appeal No. 08-024; Application of the Bd. of Educ., Appeal No. 07-081; Application of the Dep't of Educ., Appeal No. 06-133; Application of a Child with a Disability, Appeal No. 06-021; Application of a Child with a Disability, Appeal No. 05-056; Application of the Bd. of Educ., Appeal No. 02-043; Application of the Bd. of Educ., Appeal No. 98-16; see also J.T. v. Dep't of Educ., Hawaii, 2014 WL 1213911, at *10 [D. Haw. Mar. 24, 2014]; Application of the Dep't of Educ., Appeal No. 08-041). Rather, the IDEA, the New York State Education Law, and federal and State regulations

[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-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.

provide that an IHO's decision is final unless appealed to an SRO (20 U.S.C. § 1415[i][1][A]; Educ. Law § 4404[1][c]; 34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]). Thus, reissuing a decision with an altered decision date can result in grave consequences because school districts and IHO's lack the authority to alter material provisions of a final decision (see Application of a Student with a Disability, Appeal No. 24-122; Application of a Student with a Disability, Appeal No. 19-018 at n.6).

Generally, while an IHO may issue a corrected or amended final decision on the merits to make ministerial, non-substantive clarifications to an original IHO decision, the IHO in this instance issued a corrected decision that wholly removed a portion of the relief ordered in the original decision (compare IHO Decision at p. 18, with Corrected IHO Decision at p. 18). Perhaps this was due to the fact that the original IHO decision was internally inconsistent, as it included a finding that the IHO lacked subject matter jurisdiction to award enhanced rates in this dispute, but thereafter ordered the district to fund the parent's unilaterally-obtained SETSS (see IHO Decision at pp. 15-16, 18).

On appeal, it is somewhat troubling that neither party addressed this violation; however, the alteration to the decision date did not appear to affect the parties' ability to timely initiate this appeal.[10] Nevertheless, due to the substantive changes made to the IHO's decision, rather than just correcting typographical errors or ministerial clarifications, the corrected IHO decision must be vacated on appeal due to violation of the finality requirements for IHO decisions.

2. Subject Matter Jurisdiction

As noted, the parent contends that the IHO erred by finding that she lacked subject matter jurisdiction to award funding or enhanced rates for the parent's unilaterally-obtained SETSS for the 2023-24 school year based on recently proposed State regulations by the Board of Regents. The district argues to uphold the IHO's determination.

Subject matter jurisdiction refers to "the courts' statutory or constitutional power to adjudicate the case" (Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 89 [1998]). Although the district did not raise the argument at the impartial hearing, it is permitted to raise subject matter jurisdiction at any time in proceedings, including on appeal (see U.S. v. Cotton, 535 U.S. 625, 630 [2002]). Indeed, a lack of jurisdiction "can never be forfeited or waived" (Cotton, 535 U.S. at 630).

In seeking to uphold the IHO's finding, the district argues, in part, that that there is no federal right to file a due process claim regarding services recommended in an IESP (Answer & Cr. App. ¶ 4).

In reviewing the district's argument, the differences between federal and State law must be acknowledged. Under federal law, all districts are required by the IDEA to participate in a consultation process with nonpublic schools located within the district and develop a services plan for the provision of special education and related services to students who are enrolled privately

[10] For appeal purposes, the parent was required to timely serve a request for review upon the district as calculated from the IHO's September 18, 2024 final decision and did so in this instance.

by their parents in nonpublic schools within the district equal to a proportionate amount of the district's federal funds made available under part B of the IDEA (20 U.S.C. § 1412[a][10][A]; 34 CFR 300.132[b], 300.134, 300.138[b]). However, the services plan provisions under federal law clarify that "[n]o parentally-placed private school child with a disability has an individual right to receive some or all of the special education and related services that the child would receive if enrolled in a public school" (34 CFR 300.137 [a]). Additionally, the due process procedures, other than child-find, are not applicable for complaints related to a services plan developed pursuant to federal law.

Accordingly, the district's argument under federal law is correct; however, the student did not merely have a services plan developed pursuant to federal law alone and the parent did not argue that the district failed in the federal consultation process or in the development of a services plan pursuant to federal regulations.

Separate from the services plan envisioned under the IDEA, the Education Law in New York has afforded parents of resident students with disabilities with a State law option that requires a district of location to review a parental request for dual enrollment 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]). For requests pursuant to § 3602-c, 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.). Thus, the State law dual enrollment option confers an individual right to have the CSE design a plan to address the student's individual needs who attends a nonpublic school (see Educ. Law § 3602-c[2][b][1]; Bd. of Educ. of Bay Shore Union Free Sch. Dist. v. Thomas K, 14 N.Y.3d 289, 293 [2010]). This provision is separate and distinct from the State's adoption of statutory language effectuating the federal requirement that the district of location "expend a proportionate amount of its federal funds made available under part B of the individuals with disabilities education act for the provision of services to students with disabilities attending such nonpublic schools" (Educ. Law § 3602-c[2-a]).

Education Law § 3602-c, concerning students who attend nonpublic schools, provides that "[r]eview of the recommendation of the committee on special education may be obtained by the parent, guardian or persons legally having custody of the pupil pursuant to the provisions of section forty-four hundred four of this chapter" (Educ. Law § 3602-c[2][b][1]). It further provides that "[d]ue process complaints relating to compliance of the school district of location with child find requirements, including evaluation requirements, may be brought by the parent or person in parental relation of the student pursuant to section forty-four hundred four of this chapter" (Educ. Law § 3602-c[2][c]).

However, the district asserts that neither Education Law § 3602-c nor Education Law § 4404 confers parents with due process rights for the purpose of implementation of IESP services and that the proposed State regulation relied upon by the IHO merely clarified existing State law for this purpose (see Answer & Cr. App. ¶¶ 4-6).

Initially, § 4404 of the Education Law concerning appeal procedures for students with disabilities, consistent with the IDEA, provides that a due process complaint may be presented with respect to "any matter relating to the identification, evaluation or educational placement of the student or the provision of a free appropriate public education to the student" (Educ. Law §4410[1][a]; see 20 U.S.C. § 1415[b][6]). State Review Officers have in the past, taking into account the legislative history of Education Law § 3602-c, concluded that the legislature did not intend to eliminate a parent's ability to challenge the district's implementation of equitable services under Education Law § 3602-c through the due process procedures set forth in Education Law § 4404 (see Application of a Student with a Disability, Appeal No. 23-121; Application of the Dep't of Educ., Appeal No. 23-069; Application of a Student with a Disability, Appeal No. 23-068). When faced with the question of the status of students attending nonpublic schools and seeking special education services under § 3602-c, the New York Court of Appeals has already explained that

> [w]e conclude that section 3602–c authorizes services to private school handicapped children and affords them an option of dual enrollment in public schools, so that they may enjoy equal access to the full array of specialized public school programs; if they become part-time public school students, for the purpose of receiving the special services, the statute directs that they be integrated with other public school students, not isolated from them. The statute does not limit the right and responsibility of educational authorities in the first instance to make placements appropriate to the educational needs of each child, whether the child attends public or private school. Such placements may well be in regular public school classes and programs, in the interests of mainstreaming or otherwise (see, Education Law § 4401–a), but that is not a matter of statutory compulsion under section 3602–c.

(Bd. of Educ. of Monroe-Woodbury Cent. Sch. Dist. v. Wieder, 72 N.Y.2d 174, 184 [1988] [emphasis added]). Thus, according to the New York Court of Appeals, the student in this proceeding, at least for the 2023-24 school year, was considered a part-time public school student under State law. It stands to reason then, that the part-time public school student is entitled to the same legal protections found in the due process procedures set forth in Education Law § 4404.

However, I am mindful that the number of due process cases involving the dual enrollment statute statewide, which were minuscule in number until only a handful of years ago, have now increased to tens of thousands of due process proceedings per year within certain regions of this school district in the last several years. That increase in due process cases almost entirely concerns services under the dual enrollment statute, and public agencies are attempting to grapple with how to address this colossal change in circumstances, which is a matter of great significance in terms of State policy. Policy makers have attempted to address the issue. Recently in July 2024, the Board of Regents adopted, by emergency rulemaking, an amendment of 8 NYCRR 200.5, which provides that a parent may not file a due process complaint notice in a dispute "over whether a rate charged by a licensed provider is consistent with the program in a student's IESP or aligned with the current market rate for such services" (8 NYCRR 200.5[i][1]). The amendment to the

regulation does not apply to the present circumstance for two reasons. First, the amendment to the regulation applies only to due process complaint notices filed on or after July 16, 2024 (id.).[11] Second, since its adoption, the amendment has been enjoined and suspended in an Order to Show Cause signed October 4, 2024 by the Honorable Kimberly A. O'Connor, J.S.C., in the matter of Agudath Israel of America v. New York State Board of Regents, (No. 909589-24 [Sup. Ct., Albany County, Oct. 4, 2024). Specifically, the Order provides that

> pending the hearing and determination of Petitioners' application for a preliminary injunction, the Revised Regulation is hereby stayed and suspended, and Respondents, their agents, servants, employees, officers, attorneys, and all other persons in active concert or participation with them, are temporarily enjoined and restrained from taking any steps to (a) implement the Revised Regulation, or (b) enforce it as against any person or entity

(Order to Show Cause, O'Connor, J.S.C., Agudath Israel of America, No. 909589).

While acknowledging the limitation on applicability of the amendments to the State regulation relating to the date of the due process complaint notice—which the district argues is irrelevant in this matter—the district contends that the emergency regulation clarified that, "under existing law, parents did not have a right to file [due process complaint notices] with respect to pure implementation claims" (Answer & Cr. App. ¶¶ 6, 8 [emphasis in original]). Consistent with the district's position, State guidance issued in August 2024 noted that

> parents have never had the right to file a due process complaint to request an enhanced rate for equitable services or dispute whether a rate charged by a licensed provider is consistent with the program in a student's IESP or aligned with the current market rate for such services. Therefore, such claims should be dismissed on jurisdictional grounds, whether they were filed before or after the date of the regulatory amendment.

("Special Education Due Process Hearings—Rate Disputes," Office of Special Educ. [Aug. 2024]).[12]

However, acknowledging that the question has publicly received new attention from State policymakers as well as at least one court at this juncture and appears to be an evolving situation, given the implementation date set forth in the text of the amendment to the regulation and the issuance of the temporary restraining order suspending application of the regulatory amendment,

[11] A statutory or regulatory amendment is generally presumed to have prospective application unless there is clear language indicating retroactive intent (see Ratha v. Rubicon Res., LLC, 111 F.4th 946, 963- [9th Cir. 2024]). The presence of a future effective date typically suggests that the amendment is intended to apply prospectively, not retroactively (People v. Galindo, 38 N.Y.3d 199, 203 [2022]).

[12] For reasons that are not apparent, the guidance document is no longer available on the State's website, so I have added a copy to the administrative hearing record on appeal in this matter.

the amendments to the regulation may not be deemed to apply to the present matter regardless of the guidance document. Additionally, the adopted emergency regulation has been stayed through a temporary restraining order issued by Supreme Court, Albany County, and since then the regulation has now lapsed. Therefore, the IHO's dismissal of the parent's request for an award of enhanced rates to fund the costs of the unilaterally-obtained SETSS for the student during the 2023-24 school year based on a lack of subject matter jurisdiction, at this juncture, must be vacated, and the district's jurisdictional argument is without merit.

3. Pendency

In its cross-appeal, the district argues that the IHO erred by finding that the student was entitled to pendency services because, as set forth above, the IHO also lacked subject matter jurisdiction to order the district to maintain the student's pendency services.

In addition to the discussion above concerning subject matter jurisdiction, in 2004, the State Legislature amended subdivision two of the Education Law Section 3602-c, to take effect June 1, 2005 (see L. 2004, ch. 474 § 2 [Sept. 21, 2004]). Prior to such date, the subdivision read in part:

> Review of the recommendation of the committee on special education may be obtained by the parent, guardian or persons legally having custody of the pupil pursuant to the provisions of section forty-four hundred four of this chapter. Such school district shall contract with the school district in which the nonpublic school attended by the pupil is located, for the provision of services pursuant to this section. The failure or refusal of a board of education to provide such services in accordance with a proper request shall be reviewable only by the commissioner upon an appeal brought pursuant to the provisions of section three hundred ten of this chapter.

(L. 1990, ch. 53 § 49 [June 6, 1990] [emphasis added]). The amendments that became effective on June 1, 2005, removed the last sentence of subdivision two relating to the review of a board of education's failure or refusal to provide equitable services by the Commissioner (L. 2004, ch. 474 § 2).

A review of the statute's history and the New York State Assembly Memorandum in Support of Legislation shows that the Legislature intended to remove the language that an appeal to the Commissioner of Education under Education Law § 310 was the exclusive vehicle for review of the refusal or failure of a board of education to provide services in accordance with Education Law § 3602-c, given that the earlier sentence in subdivision two of such section authorized review by an SRO from a CSE's determination in accordance with Education Law § 4404 (Sponsor's Memo., Bill Jacket, L. 2004, ch. 474). The Memorandum explains further:

> The language providing for review of a school district's failure or refusal to provide services ONLY in an appeal to the Commissioner of Education under Education Law § 310 is unnecessary, confusing

> and in conflict with the earlier language authorizing review by a State review officer pursuant to § 4404(2) of the Education Law of a committee on special education's determination on review of a request for services by the parent of a nonpublic school student. At the time it was enacted, the Commissioner of Education conducted State-level review of an impartial hearing officer's decision under § 4404(2) of the Education Law in an appeal brought under § 310 of the Education Law, but that is no longer the case. The Commissioner has jurisdiction under Education Law § 310 to review the actions or omissions of school district officials generally, so it is unnecessary to provide for such review in § 3602-c and, now that a State review officer conducts reviews under section 4404 (2), it is misleading to have the statute assert that an appeal to the Commissioner is the exclusive remedy.

(Sponsor's Memo., Bill Jacket, L. 2004, ch. 474).

Thus, the amendments made by the State Legislature were intended to clarify the forum where disputes could be brought, not to eliminate a parent's ability to challenge the district's implementation of equitable services under Education Law § 3602-c through the due process procedures set forth in Education Law § 4404.

Based on the above, I am unpersuaded by the district's argument that a student who has an IESP pursuant to New York State's dual enrollment statute has no right to due process—and thus pendency—when seeking to challenge the district's implementation of the plan. As indicated above, in 2004 the State Legislature removed the requirement that the Commissioner of Education had to review claims regarding the refusal or failure of a board of education to provide services in accordance with Education Law § 3602-c and, instead, left a cross-reference to Education Law § 4404 as the vessel for review for such claims (see L. 2004, ch. 474 § 2). Section 3602-c provides for review of IESPs pursuant to § 4404, and Education Law § 4404 provides that a student shall remain in his or her then-current educational placement "[d]uring the pendency of any proceedings conducted pursuant to" Education Law § 4404 (Educ. Law § 4404[4][a]; Application of a Student with a Disability, Appeal No. 17-034).

Accordingly, the student is entitled to pendency during the proceeding challenging the implementation of equitable services under Education Law § 3602-c. The IHO determined that the student's pendency placement was based on the March 2022 CPSE IEP (see IHO Decision at pp. 6-10). Since I have determined that the student is entitled to pendency and there are no additional disputes raised by either party which relate to the student's pendency program, the IHO's finding that the student's pendency program was based on the March 2022 CPSE IEP is final and binding on the parties (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]).

B. Unilateral Placement

Having found that the IHO erred by finding that she lacked subject matter jurisdiction to award the parent's requested relief, the inquiry now focuses on the arguments raised in the district's

cross-appeal, namely, whether the IHO erred by finding that the SETSS delivered to the student by Little Mentchen was appropriate.

In this matter, the student has been parentally placed in a nonpublic school and the parent does not seek tuition reimbursement from the district for the cost of the parental placement. Instead, the parent alleged that the district failed to implement the student's mandated public special education services under the State's dual enrollment statute for the 2023-24 school year and, as a self-help remedy, she unilaterally-obtained SETSS from Little Mentchen 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 unilaterally-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]).[13] 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

[13] 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 Little Mentchen (Educ. Law § 4404[1][c]).

student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak v. Florida 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; 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 the student's needs are not at issue in this matter, a brief description thereof facilitates the discussion of the issue to be resolved—namely, whether the unilaterally-obtained SETSS from Little Mentchen was appropriate—and relatedly, whether the parent is entitled to funding for the costs of the student's SETSS.

As reflected in the March 2023 IESP, the student's then-current SEIT provider reported that the student had been making gains socially since the beginning of the school year and was "beginning to play with others and be more expressive about her thoughts, needs and wants" (Parent Ex. C at p. 1). The SEIT provider indicated that the student engaged in "reciprocal conversations and respond[ed] when spoken to"; however, the student could also be "stubborn and w[ould] not always listen to instruction or follow directions," and she was "often self-directed and w[ould] not focus on the activity at hand" (id.). In addition, the SEIT noted that the student was "very distractible and w[ould] lose focus and not remain seated when distracted by external stimuli" (id.). The March 2023 IEP further noted that the student struggled to "maintain personal boundaries with others" (id.).

With respect to the student's academic readiness, the March 2023 IESP reflected that she could identify four out of the seven Hebrew letters of the alphabet and could label and identify the letters in her name (see Parent Ex. C at p. 1). At that time, the student was "working on shape recognition and recall"; "[w]ith prompting, she c[ould] identify square and rectangle" shapes, but could not yet identify a circle shape (id.). Additionally, the March 2023 IESP noted that the student could "label and identify basic colors," and she could count from one to four but required "prompting" when she reached five (id.). It was also noted in the March 2023 IESP that the student had a "difficult time with numerical concepts and struggle[d] to count groups of items or recognize numbers in groups" (id.). As a strength, the March 2023 IESP indicated that the student "enjoy[ed] hands-on activities" and "respond[ed] well to individualized teacher attention and small group support" (id. at pp. 1-2).

Socially, the March 2023 IESP reflected that the student had "made progress with regard to pro-social behavior," she enjoyed "playing with friends and engaging in pretend play" (Parent Ex. C at p. 2). According to the March 2023 IESP, the student, at times, exhibited "distractible behavior and struggle[d] to sustain attention for an extended amount of time" (id.). The March 2023 IESP also noted that the student would "often get[] up from her seat and require[d] teacher prompting and redirection for refocusing" (id.). In addition, it was noted that the student was "making progress with increasing peer interactions," but remained "shy" and in need of "support to join activities with others" (id.). When engaged in a preferred activity, however, it was sometimes difficult for the student to transition to "another activity or instruction" (id.). According to the student's teacher, the student "struggle[d] to communicate with adults and when she need[ed] something, she w[ould] often linger around her teachers rather than using language to express herself" (id.). The parent reported that the student "struggle[d] with classroom routine," transitioning to non-preferred activities both at home and at school, and sometimes "command[ed] others [regarding] what to do and how to act" when playing with others (id.).

In regard to her physical development, the March 2023 IESP noted that the student's "toileting accidents" had decreased since the beginning of the school year and she was currently

"on a bathroom schedule" (Parent Ex. C at p. 2). The student reportedly ate with her hands, she could dress herself but needed help with tying shoelaces, and was "working on asking for help independently for daily life skills such as shoe tying" (id.). With respect to fine motor skills, the student, at that time, could "cut and color" and "manipulate writing tools as well as scissors" (id. at pp. 2-3). With regard to gross motor skills, the student was "developing in an age-appropriate manner," and she could "walk, run, climb and jump," as well as "navigate the classroom with ease and ascend [and] descend stairs" (id. at p. 3).

Overall, the March 2023 IESP noted that the student was able to "access and progress within the general education curriculum with special education supports" (Parent Ex. C at p. 3). The IESP also noted that the student would "benefit from small group support to build foundational skills and [to] review new classroom instruction" (id.). In addition, it was noted that the student would "continue to benefit from the related services" of speech-language therapy and OT to "address communication and fine-motor [and] sensory needs" (id.).

To address the student's management needs, the March 2023 IESP recommended the following strategies and supports: extended time for verbal responses; sentence starters; speech models; repetition and review; rephrasing; redirection and prompting; frequent teacher check-ins; preferential seating; breaking down information and instruction into discrete, small chunks; and positive reinforcement and encouragement (see Parent Ex. C at p. 3). Moreover, the March 2023 CSE developed approximately eight annual goals targeting the student's identified needs in the areas of phonics and decoding skills, reading comprehension, mathematics concepts and readiness skills, pragmatic language, expressive language, fine motor skills, and sensory and attention skills (id. at pp. 4-6).

In addition to the student's needs as identified in the March 2023 IESP, the hearing record includes a SETSS progress report for the trimester from January to March 2024 (SETSS progress report), which was signed by the student's SETSS provider from Little Mentchen (see Parent Exs. F at p. 1; G ¶ 12; H at p. 1; J at pp. 1-2). According to the 2024 SETSS progress report, the student demonstrated "delays in her cognitive, academic, social-emotional, adaptive, and behavioral domains" (Parent Ex. F at p. 1).

In the area of mathematics, the SETSS progress report indicated that the student could "identify and label numbers [one] through [five]" and demonstrated the "ability to count using 1:1 correspondence for numbers [one through twelve]" (Parent Ex. F at p. 1). The student struggled with "addition and subtraction skills," and "require[d] support to complete basic equations, as well as for simple word problems" (id.). At that time, the SETSS progress report indicated that the student had a "foundational understanding of colors," and could "sort by color" and "complete basic color patterns"; however, "[c]lassifying shapes, and creating patterns using shapes [we]re more difficult for her" and she required "support in order to complete the tasks" (id.). The student demonstrated the ability to "compare items by long/short, light/heavy, [and] wide/narrow," but she needed "assistance with comparing sizes or weights" (id.). In addition, the SETSS progress report indicated that the student could "measure length using objects or cubes independently" (id.).

In reading, the SETSS progress report reflected that the student was "beginning to display early literacy skills," but at that time, she could not "identify or label any of the alphabet letters, by name or sound" (Parent Ex. F at p. 2). The student, through practice and memorization, had

learned to "identify and read her own name" (id.). She could not yet identify a "word in a sentence" or "read any sight words" (id.). In addition, the student "struggle[d] with phonemic awareness skills; she c[ould not] count syllables, or segment words by identifying first/middle/last sounds" (id.). However, the student demonstrated the "ability to complete a rhyme, and c[ould] choose a picture that rhyme[d] with a word"; but, she could not "identify which word d[id] not rhyme, with a given phrase/word" (id.). According to the SETSS progress report, the student could "successfully answer WH questions on a text read to her, make inferences based on pictures, and sequence events using images" (id.). At that time, the student had "attained a grade level vocabulary" and "demonstrate[d] the ability to accurately match synonyms although [she] still struggle[d] to match antonyms to pictures" (id.).

With regard to writing, the SETSS progress report indicated that the student was "developing her skills" to become a "successful writer" (Parent Ex. F at p. 2). She could write "numbers and letters, and was beginning to use drawing as a means of expression" (id.). At that time, the student could "retell a familiar story" and "initiate with [her] own thoughts and ideas as well" (id.). The student, however, lacked "basic punctuation skills" and did not demonstrate "proper line spacing and formation" or "identify a properly spaced sentence" (id.). The student also did not demonstrate an "awareness of capitalization, and additionally, c[ould not] differentiate between asking and telling sentences"; moreover, the student's "lack of knowledge of basic grammar skills impede[d] her writing abilities" (id. at pp. 2-3).

Turning to adaptive and social/emotional functioning, the SETSS progress report noted that her "primary struggle in her emotional functioning [wa]s her ability to regulate her emotions" (Parent Ex. F at p. 3). For example, the student tended to "cry when her desires [we]re not fulfilled immediately, and [she] require[d] external assistance to self-regulate" (id.). According to the SETSS progress report, the student's inability to self-regulate "create[d] a high level of disturbances to the structure of a classroom setting" (id.). The student had also not yet "acquired the skills to problem solve independently" and the student's "challenges directly impede[d] her ability to partake in regular classroom activities, without personal reminders and assistance" (id.). More generally, however, the student was "well-behaved, [and] display[ed] appropriate classroom behavior" and could follow "group instruction" (id.). She also "play[ed] cooperatively with peers and c[ould] wait her turn, though usually quite impatiently" (id.). The student had also "learned to express herself verbally, to communicate her thoughts with both peers and staff alike" (id.).

At the impartial hearing, the parent described the student's "challenges" as "struggling with academics," "behaviorally," and noted that the student was "stubborn" and resistant to working on "skills" (Tr. pp. 31-32).

According to the director's testimony, Little Mentchen had performed a "preliminary evaluation" of the student by administering "I-Excel," which revealed that the student was "below her average" and needed "support not just in academics," but also in the area of her social/emotional needs (Tr. p. 39).

2. SETSS Delivered by Little Mentchen

With respect to whether the SETSS delivered by Little Mentchen provided the student with specially designed instruction, the director initially explained that during the 2023-24 school year,

Little Mentchen delivered SETSS to the student five times per week on an individual basis at the student's school (see Tr. p. 38). When asked to describe how the SETSS provider addressed the student's "attention struggles during classes," the director testified that the student—who was eligible for special education as a student with a speech or language impairment—had "goals such as working on her comprehension and working on her focus" (Tr. pp. 39-40). According to the director, the SETSS provider "did many different things," such as "social stories," modifying worksheets, and sitting next to the student in the classroom and eventually fading back (Tr. p. 40). The director also noted that the SETSS provider would play games with the student to work on maintaining her focus (id.). The director confirmed that the student made progress with this assistance from the SETSS provider (see Tr. pp. 40-41).

In mathematics, the director testified that the SETSS provider worked on "number recognition" with the student, as well as "counting objects" and "differentiating the different numbers from each other" (Tr. p. 41). According to the director, the SETSS provider "worked off the IESP" (id.). The director testified that the student made progress in those skills (id.).

Turning to the area of writing, the director testified that she could not recall specifically what the SETSS provider worked on with the student (see Tr. p. 41).

In the area of reading, however, the director recalled that the SETSS provider worked on "letter recognition a lot" with the student by reading "a lot of stories" (Tr. pp. 41-42). In reading comprehension, the SETSS provider asked the student to "retell the stories in sequence," she checked on the student's understanding of the characters and helped the student to "thing about what would happen next," and the SETSS provider would have the student "use her imagination and creativity pulling out expressions from her" (Tr. p. 42). The director testified that the student improved in her reading comprehension skills (id.).

The director further testified that Little Mentchen used "[t]ools" with the student, including "role play, books, communication games, social stories and exercises, flashcards, math manipulatives, books, games, crafts, and software" (Parent Ex. G ¶ 17). The director also testified that Little Mentchen "follow[ed] the school curriculum and modif[ied] as [wa]s fit for the needs of the student" (id. ¶ 16). In addition, the agency worked with "software tools such as IXL workspace phonemic awareness and Math curriculums, and social emotional curriculums" (id.). The director noted that "IXL [included] measuring tools" the agency used to assess the student "weekly to see how they [we]re progressing with mastering their goals" (id. ¶ 18). According to the director, the SETSS provider used "paint by number sheets to work on letters, as well as puzzles and group games to work on patience and turn taking" (id. ¶ 20). Additionally, the SETSS provider worked "one on one with [the student], demonstrating and facilitating proper interactions between her and the teacher" and the student continued to need "one on one support to give her the tools necessary to help her solve these issues" (id. ¶ 21).

The SETSS progress report further identified how the SETSS provider worked to address the student's needs (see generally Parent Ex. F). For example, the progress report noted that in mathematics, the SETSS provider used "various strategies" to help the student develop her foundational skills, such as "[m]anipulatives" to create a "more concrete learning experience," "[s]caffolding" to "build new skills upon her previously acquired knowledge," and "repeat[ing] instructions" to "solidify [the student's] understanding and processing of new materials and

information taught" (id. at p. 1). The progress report also identified the goals the student was working on in mathematics (id. at pp. 1-2).

In reading, the SETSS progress report noted that the provider used "[m]anipulatives and visual aids" to create a "more concrete learning experience," and the student "practice[d] her skills within guided practice" along with "positive reinforcement" (Parent Ex. F at p. 2). The progress report also identified the goals the student was working on in reading (id.).

In writing, the SETSS progress report indicated that the provider used "various strategies to build upon [the student's] emerging writing skills," including "[m]anipulatives, guided practice and repeat[ing] instructions" (Parent Ex. F at pp. 2-3). The progress report also identified the goals the student was working on in writing (id. at p. 3).

Finally, in the area of adaptive and social/emotional functioning, the SETSS progress report noted that the provider used a "number of strategies" to address the student's challenges (Parent Ex. F at p. 3). For example, the provider used "social stories to aid [the student] in progressing with her social awareness skills"; the provider "taught [the student] self-regulating strategies, along with compromising and problem-solving skills"; and providing the student with "advance warnings to assist her to choose appropriate moves and reactions to daily struggles" (id.). The progress report identified the goals the student was working on in these areas (id.).

In addition to the strategies and interventions noted above, the SETSS progress report also noted that the provider used a "hands-on, multi-sensory approach" that "cater[ed] to [the student's] learning preferences and strengths" (Parent Ex. F at p. 4). According to the report, "[t]his approach help[ed] her visualize and comprehend information more effectively," and the student's ability to "actively participat[e] in hands-on activities and [to] manipulat[e] concrete materials" assisted the student in "grasp[ing] abstract concepts and [to] retain knowledge better" (id.).

Overall, it was noted in the SETSS progress report that the student had "shown progress in targeted skill areas," but she continued to display "weaknesses" in her skills (Parent Ex. 4 at p. 4). According to the progress report, "[i]n view of the continued concerns, it [wa]s recommended that [the student] continue to receive support as per her current mandate to allow her to progress towards reaching her IEP goals" (id.). Notably, the progress report indicated that the "current support g[ave] [the student] the ability to learn and build on her current capabilities enabling her to show progress and maintain new skills"; as a result, it was recommended that the student "continue in this environment in order to continuously improve in all domain areas" (id.).

With respect to whether the student required seven hours per week of SETSS, the director testified that she thought the student "could have used more," especially given the student's social/emotional needs (Tr. p. 46). The director explained that "she probably could have benefited" because one hour per day was "sometimes not enough to be able to address everything" (id.). According to the director, Little Mentchen determined it would deliver five periods per week of SETSS to the student based on the recommendation in the March 2023 IESP (id.). The director also testified that, "it could be that the parents were requesting seven hours, but we're the agency that help[ed] her find a provider and move forward in that end" (Tr. pp. 46-47).

At the impartial hearing, the parent confirmed in her testimony that the student was making progress, but it was with "consistent help" and reiterated that the student required "a lot of help" (Tr. p. 30). The parent further testified that the student required that "individual one-on-one help" to keep the student "afloat," especially in the "whole class setting" because the "teacher d[id]n't have time to, like, focus on the individuals" (Tr. p. 32). Therefore, the parent thought the student required seven hours per week of services (id.).

In light of the foregoing, the evidence demonstrates that the parent's unilaterally-obtained SETSS delivered to the student by Little Mentchen provided specially designed instruction to meet the student needs, and therefore, was appropriate. Given that the evidence establishes that the student made progress during the 2023-24 school year with five hours per week of individual SETSS, and the hearing record fails to contain sufficient evidence that the student required more SETSS—i.e., seven hours per week as sought by the parent—the parent is entitled to funding for the costs of five hours per week of SETSS from Little Mentchen for the 2023-24 school year, subject to any reductions due to equitable considerations.

C. Equitable Considerations—10-Day Notice of Placement

In its cross-appeal, the district contends that equitable considerations do not weigh in favor of the parent's requested relief because the parent did not provide the district with any notice of her intention to unilaterally obtain services for the student, contravening statutory and regulatory mandates.

The final criterion for a reimbursement award is that the parent's claim must be supported by equitable considerations. 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"]).

Reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to their removal of the student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their

concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger v. Medina City Sch. Dist., 348 F.3d 513, 523-24 [6th Cir. 2003]; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G., 459 F.3d at 376; Voluntown, 226 F.3d at 68).

Here, a review of the evidence in the hearing record reveals that, consistent with the district's contention and the IHO's finding, the parent did not provide the district with a 10-day notice of placement (see IHO Decision at p. 15; see generally Tr. pp. 1-58; Parent Exs. A-J). As it is undisputed that the parent did not provide the district with a 10-day notice of her intent to unilaterally-obtain SETSS from Little Mentchen for the student and to seek public funding for those services, a 10 percent reduction of the hourly rate awarded to the parent to fund the SETSS is warranted.

D. Compensatory Educational Services

The parent contends that the IHO erred by awarding compensatory OT and speech-language therapy services on a 10-month school year basis. According to the parent, the student's March 2022 CPSE IEP mandated 12-month programming for the student and the student was entitled to receive compensatory educational services for any services not provided during the 12-month, 2023-24 school year. The district argues to uphold the IHO's determination limiting the compensatory OT and speech-language therapy services to the 36 hours awarded for each, which represented one hour per week of missed services for each related service over a 10-month school year, as recommended in the student's March 2023 IEP. In addition, the district contends that the hearing record lacked any evidence that the student experienced substantial regression requiring a recommendation for 12-month programming, and the 12-month programming recommended in the student's preschool IEP bears little, if any, weight with regard to an appropriate school-age program for the student.

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., 758 F.3d at 451; P. v. Newington Bd. of Educ., 546 F.3d 111, 123 [2d Cir. 2008] [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"]).

Initially, it must be noted that in her amended due process complaint notice, the parent did not assert any challenges to the substantive adequacy of the student's March 2023 IESP based on the CSE's failure to recommend 12-month services for the 2023-24 school year (see Parent Ex. A at pp. 1-2). Additionally, the parent did not allege that the March 2023 IESP was substantively inadequate because the CSE failed to recommend appropriate frequencies and durations of OT and speech-language therapy services, or that the CSE failed to recommend the related services for the student on a 12-month basis (id.). Rather, the parent's allegations with regard to the substantive appropriateness of the student's March 2023 IESP focused on the CSE's failure to recommend a sufficient amount of SETSS, the CSE's failure to recommend individual SETSS for the student, and the CSE's failure to inform her regarding how the district would implement the services in the March 2023 IESP or otherwise assign providers to implement the IESP services (id.).

On appeal, the parent does not cite to any evidence establishing that the student was entitled to compensatory OT and speech-language therapy services on a 12-month basis, other than asserting that the student had been eligible for 12-month services in her March 2022 CPSE IEP. Based on this theory, the student would be entitled to receive pendency services on a 12-month school year basis—which the IHO concluded—but the district's failure to implement the OT and speech-language therapy services as recommended in the March 2023 IESP entitled the student to only receive those services as recommended in the IESP, to wit, on a 10-month school year basis. As there is no indication in the hearing record that the student was recommended for or required services on a 12-month basis, an appropriate compensatory education award should be based on a 36-week school year (see Educ. Law § 3604[7] [a 10-month school year consists of not less than 180 instructional days]). As a result, the parent's argument on appeal must be dismissed, and there is no reason to disturb the IHO's order directing the district to provide the student with a bank of compensatory educational services consisting of 36 hours of speech-language therapy and 36 hours of OT services for the student (with the district to provide the OT and speech-language providers at a reasonable market rate).

Next, with respect to the parent's request for compensatory educational services consisting of additional SETSS, for reasons already discussed, the evidence in the hearing record demonstrates that the student did not require seven hours per week of individual SETSS to make progress. Therefore, the student is not entitled to an additional award of compensatory educational services consisting of SETSS, and the parent's argument must be dismissed.

VII. Conclusion

Having determined that the evidence in the hearing record demonstrates that the SETSS delivered by Little Mentchen was appropriate, but that equitable considerations do not warrant full funding of the costs of the parent's unilaterally-obtained SETSS, the necessary inquiry is at an end.

I have considered the parties' remaining contentions and find it is not necessary to address them in light of the determinations herein.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's corrected decision, dated September 19, 2024, is vacated; and

IT IS FURTHER ORDERED, that the IHO's decision, dated September 18, 2024, is modified by reversing that portion which denied the parent's request for the district to fund the costs of the unilaterally-obtained SETSS based on a lack of subject matter jurisdiction; and,

IT IS FURTHER ORDERED that the district shall fund the costs of the parent's unilaterally-obtained SETSS from Little Mentchen at the rate of $180.00 per hour, which represents a 10 percent reduction of the contracted rate of $200.00 per hour on equitable grounds based on the parent's failure to provide the district with a 10-day notice of placement, after the presentation of proof of attendance and invoices thereto for services rendered during the 2023-24 school year.

Dated: **Albany, New York**
December 3, 2024

CAROL H. HAUGE
STATE REVIEW OFFICER