



The University of the State of New York

The State Education Department

State Review Officer

www.sro.nysed.gov

No. 24-493

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

Appearances:

Law Office of Philippe Gerschel, attorneys for petitioner, by Philippe Gerschel, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Toni L. Mincieli, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from a decision of an impartial hearing officer (IHO) which granted, in part, her request for the district to fund her son's private services delivered by AIM Educational Support Services ("AIM") for the 2023-24 school year.¹ The district cross-appeals alleging that neither the IHO nor a State Review Officer (SRO) has subject matter jurisdiction to adjudicate the parent's claims and further cross-appeals from that portion of the IHO's decision which found that equitable considerations favored the parent and granted relief. The appeal must be dismissed. 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

¹ Although the parent's contract identified the agency she contracted for services with as AIM Educational Support Services, the affidavits of the individual who signed the contract on behalf of AIM and the AIM quality assurance supervisor both described the provider agency as "Aim Further, Inc." (Parent Exs. F; L at ¶ 2; M at ¶ 3).

of an individualized education services program (IESP) under the State's so-called "dual enrollment" statute (see Educ. Law § 3602-c). The task of creating an IESP is assigned to the same committee that designs educational programming for students with disabilities under the IDEA (20 U.S.C. §§ 1400-1482), namely a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, State law provides that "[r]eview of the recommendation of the committee on special education may be obtained by the parent or person in parental relation of the pupil pursuant to the provisions of [Education Law § 4404]," which effectuates the due process provisions called for by the IDEA (Educ. Law § 3602-c[2][b][1]). Incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

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

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

the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

The parties' familiarity with this matter is presumed and, therefore, the facts and procedural history of the case and the IHO's decision will not be recited here in detail.

Briefly, a committee on preschool education (CPSE) convened on November 29, 2016 and found the student eligible for special education services as a preschool student with a disability (Parent Ex. B). The November 2016 CPSE recommended a program consisting of five 1-hour sessions per week of direct, individual special education itinerant teacher (SEIT) services delivered in Yiddish, two 30-minute sessions of individual speech-language therapy per week delivered in Yiddish, and two 30-minute sessions of individual occupational therapy (OT) per week (*id.* at p. 11).²

Subsequently, on November 30, 2021, a CSE convened at the parent's request to develop an IESP for the student with an implementation date of December 14, 2021 (Parent Ex. C at p. 1). According to the November 2021 IESP, at the time the IESP was developed, the student had an individualized education program (IEP) with a recommendation for integrated co-teaching (ICT) services, speech-language therapy, and OT and the parent was requesting an IESP (*id.*). The November 2021 CSE found that the student remained eligible for special education services as a student with a speech or language impairment and recommended that the student receive four periods of group special education teacher support services (SETSS) per week, two 30-minute sessions of individual speech-language therapy per week, and two 30-minute sessions of individual OT per week (*id.* at p. 7).³

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 <https://www.nysed.gov/special-education/special-education-itinerant-services-preschool-children-disabilities>). SEIT services are "for the purpose of providing specialized individual or group instruction and/or indirect services to preschool students with disabilities" (8 NYCRR 200.16[i][3][ii] [emphasis added]; see Educ. Law § 4410[1][k]).

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

On August 11, 2023, the parent executed a "Parent Service Contract" with AIM to provide the student with five hours of individual SEIT services per week, two 30-minute sessions of speech-language therapy per week, and two 30-minute sessions of OT per week (Parent Ex. F at p. 2).⁴ On September 5, 2023, the parent executed a "Parent Service Contract" with Special Touch by S&R Inc. (S&R) to provide OT to the student (Parent Ex. G).

On September 7, 2023, the parent, through her attorney, notified the district that she intended to place the student in a nonpublic school and requested the student continue to receive his recommended services at the private placement (Parent Ex. E at p. 2). The parent also notified the district she would be seeking reimbursement or direct payment from the district for the student's special education program and related services (id.).

On October 23, 2023 a CSE convened to review the student's educational programming, found that the student remained eligible for special education services as a student with a speech or language impairment, and developed an IESP for the student with an implementation date of November 6, 2023 (Parent Ex. D at pp. 1, 14).⁵ The October 2023 CSE recommended that the student receive four periods per week of direct, group SETSS in Yiddish, two 30-minute sessions per week of individual speech-language therapy, and two 30-minute sessions per week of individual OT (Parent Ex. D at p. 14).⁶ The district sent a prior written notice to the parent on October 24, 2023, which identified the recommendations made at the October 2023 CSE meeting and noted that the parent "agreed with the recommendation" (Dist. Ex. 2 at p. 1; see Dist. Ex. 3 at p. 2).

During the 2023-24 school year, the student received four hours of SETSS per week and two 30-minute sessions of OT per week in his "mainstream school" (see Parent Exs. I at p. 1, M at ¶¶ 7, 10; N at ¶ 10).⁷

A. Due Process Complaint Notice

In a due process complaint notice dated July 12, 2024, the parent alleged that the district denied the student a free appropriate public education (FAPE) for the 2023-24 school year (Parent Ex. A). As an initial matter, the parent alleged that pendency arose out of the November 2016

⁴ While the contract with AIM included OT and speech-language therapy, the hearing record indicates that AIM only provided the student with four hours per week of SETSS during the 2023-24 school year (Parent Exs. F; L at ¶¶ 3-4; M at ¶ 7). The hearing record also indicates that the student received OT services during the 2023-24 school year delivered by a different company (see Parent Ex. N at ¶¶ 9, 10). With respect to speech-language therapy, the parent testified that the student "did not get coverage for [the 2023-24 school year] because [she] could not find anyone to . . . cover him" (Tr. pp. 49-50; Parent Ex. F).

⁵ The student's eligibility for special education as a student with a speech-language impairment for the 2023-24 school year is not in dispute (see 34 CFR 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

⁶ District Exhibit 1 is a duplicate of Parent Exhibit D, for the purposes of this decision, Parent Exhibit D will be cited (compare Dist. Ex. 1, with Parent Ex. D).

⁷ The parent, in contrast, stated the student was receiving "5 hours of Special Education Services per week" from AIM for the 2023-24 school year (compare Parent Ex. M at ¶ 7; with Parent Ex. K at ¶ 11).

CPSE IEP (id. at p. 2). The parent summarized the recommendations made at the October 2023 CSE meeting, and, as a presenting problem, the parent alleged that "the CSE failed to recommend an appropriate placement for [the student] and reduced [the student's] recommendations from 5 periods of SEIT which were delivered on an individual basis to 4 periods of group SETSS" (id.). According to the parent, the student was making progress with SEIT services and required a continuation of those services or "a hybrid special education/general education program" in order to meet the student's needs (id.). The parent alleged that the district did not offer the student a proper placement and the parent was forced to find and implement the program unilaterally (id.).

For relief, the parent requested a finding that the November 2021 IESP, the district's failure to convene a timely CSE, the district's failure to continue SEIT services, and the district's failure to recommend an appropriate placement for the 2023-24 school year were all denials of a FAPE for the 2023-24 school year (Parent Ex. A at p. 3).⁸ The parent further requested that the services recommended in the November 29, 2016 CSE IEP "be funded at the contracted rate" for the 2023-24 school year and that the district be ordered to fund compensatory education equivalent to any services missed (id. at pp. 3-4).

B. Impartial Hearing Officer Decision

After a prehearing conference on August 20, 2024 (Tr. p. 1-10), an impartial hearing convened and concluded before the Office of Administrative Trials and Hearings (OATH) on September 5, 2024 (Tr. pp. 11-60). In a decision dated September 25, 2024, the IHO first summarized her findings of fact (IHO Decision p. 3). The IHO then held that the district "declined to defend its provision of a FAPE" to the student because, despite submitting documentary evidence into the hearing record, the district did not call any "witnesses to attest to the appropriateness of the IESP" (id. at p. 4). The IHO held that the district did not sustain its burden and denied the student a FAPE for the 2023-24 school year (id.).

On the issue of appropriateness of the parent's unilaterally obtained services, the IHO found that the parent rejected the district's recommendation of four periods per week of SETSS and then implemented the same program as the district recommended, noting, however, that the unilaterally obtained services were delivered 1:1 (IHO Decision at p. 5). The IHO held that the "parent created" program was more restrictive than the district's recommended program of services (id.). The IHO held that when she considered the totality of the circumstances, the parent's placement of the student in a general education setting was inappropriate "because it reli[ed] on the [s]tudent receiving the 1:1 support recommended for him in preschool" and the student still presented with significant delays (id.). The IHO held that the weight of the evidence established that the student's individual special education needs were not being addressed by the program the parent sought and it was, therefore, inappropriate (id.).

Next, the IHO noted that the parent first requested reimbursement for OT services at the hearing (IHO Decision at p. 6). The IHO held that the parent did not raise the request in the due process complaint notice and specifically disclaimed it at the prehearing conference; therefore,

⁸ As the parent initially appeared to challenge the recommendations set forth in the October 2023 IESP, it is unclear if the reference to the November 2021 IESP in the parent's request for findings was an error or if the parents intended to challenge both IESPs (see Parent Ex. A).

the IHO found the district was not provided an opportunity to address the issue at the hearing and denied the request (id.).

Lastly, the IHO held that equitable considerations favored an award of district funding of the SETSS arranged for by the parent (IHO Decision at pp. 6-7). The IHO considered evidence provided by the district and testimony from the parent's provider, particularly testimony that the provider earned a set hourly rate (id.). The IHO held that the district's evidence of a reasonable market rate was more persuasive than the testimony provided by parent's witness and that the "[district's] rate track[ed] the Provider's pay rate"; therefore, the IHO awarded reimbursement consistent with the provider's rate (id. at pp. 7-8).

IV. Appeal for State-Level Review

The parent appeals, alleging that the IHO erred in reducing the rate awarded for SETSS provided to the student. The parent argues that the IHO "wrongly determined" that the provider's rate was excessive. The parent also argues that the IHO erred in denying the parent's request for funding for OT. The parent contends that the IHO incorrectly determined that the parent's due process complaint notice did not include a request for OT as it specifically requested implementation of the November 2016 CPSE IEP and that the IHO further erred in finding the parent disclaimed any request for OT at the prehearing conference.

In an answer with cross-appeal, the district first cross-appeals on the basis that neither the IHO nor an SRO have subject matter jurisdiction over the parent's claims. The district also cross-appeals from the IHO's award of relief. According to the district, the IHO erred in awarding relief after finding that the unilaterally obtained services were not appropriate for the student. With respect to the IHO's reduction of the rate awarded for SETSS, the district contends that equitable considerations did not support awarding any relief, but, at a minimum, the IHO's reduced rate was justified. Finally, the district argues that the parent was not entitled to funding for OT and requests that the parent's appeal be dismissed and the cross-appeal be granted.

In a reply and answer to the cross-appeal, the parent argues that the IHO and SRO have subject matter jurisdiction, and that the SETSS services received by the student were appropriate, but that the IHO erred in denying reimbursement for OT.

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]).⁹ "Boards of education of all school districts of the state shall furnish services to students who are residents of this state and who attend nonpublic schools located in such school districts, upon the written request of the parent" (Educ. Law § 3602-c[2][a]). In such circumstances, the district of location's CSE must review the request for services and "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an [IEP]" (Educ. Law § 3602-c[2][b][1]). The CSE must "assure that special education programs and services are made available to students with disabilities attending nonpublic schools located within the school district on an equitable basis, as compared to special education programs and services provided to other students with disabilities attending public or nonpublic schools located within the school district (*id.*).¹⁰ 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. Scope of the Impartial Hearing and of Review and Subject Matter Jurisdiction

As a threshold matter, it is necessary to address the scope of the impartial hearing, as well as the issue of subject matter jurisdiction raised in the district's cross-appeal. Specifically, the district argues in its cross-appeal that there is no federal right to file a due process claim regarding services recommended in an IESP and New York law confers no right to file a due process

⁹ 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]).

¹⁰ 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.

complaint notice regarding IESP implementation. Thus, according to the district, IHOs and SROs lack subject matter jurisdiction with respect to pure IESP implementation claims.

Initially, although the district contends that the parent's due process complaint notice "indisputably seeks implementation" of the student's IESP, even a cursory review of the due process complaint notice shows that the parent objected to the program recommendations contained in the November 2021 and/or October 2023 IESPs and the district's failure to convene a CSE prior to the start of the 2023-24 school year (Parent Ex. A). In particular, the parent asserted that the district reduced the recommended SETSS from five to four periods per week and changed it from an individual service to a group service (*id.* at pp. 2, 3). Further, while the parent's due process complaint notice is, at times, lacking in clarity, the allegations contained therein do not allege specifically that the district failed to implement the November 2021 or the October 2023 IESPs (*id.*). To the extent that the due process complaint notice indicates the parent was "left with no choice but to implement the SEIT program independently and seek reimbursement from the [district]," this was more of a warning that the parent intended to engage in self-help in arranging for private services without the consent of the school district (*id.* at p. 3).

During the August 20, 2024 prehearing conference, counsel for the parent did indicate that the parent was objecting both to the reduction of the recommended SETSS and to the service not being implemented (Tr. p. 6). However, the IDEA and its implementing regulations provide that a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[i][7][i][a]; [j][1][ii]), or the original due process complaint notice is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]). In this case, the parent did not seek the district's agreement to expand the scope of the impartial hearing to include the issue of implementation nor did the parent file an amended due process complaint notice to add an additional dispute. Nor can it be said that the district "opened the door" to a claim for implementation by raising evidence as a defense to a claim that was identified in the due process complaint notice (*M.H. v. New York City Dep't of Educ.*, 685 F.3d 217, 250-51 [2d Cir. 2012]), as in this instance, the district did not reference implementation at any point in the hearing and it was only raised by the IHO during the prehearing conference as a question posed to counsel for the parent and then by counsel for the parent in her closing statement (Tr. pp. 6, 57-58).

Thus, any claim that the district failed to implement the student's recommended educational programs was not properly before the IHO.

Moreover, the IHO found that the district denied the student a FAPE because it declined to offer witnesses "to attest to the appropriateness of the IESP" (IHO Decision at pp. 3-4). Accordingly, the IHO did not make a finding regarding implementation and the finding of a denial of a FAPE in this matter is based on the parent's allegations that the student required five hours per week of individual SEIT services in order to receive a FAPE. The IHO's finding that the district failed to offer the student a FAPE for the 2023-24 school year has not been appealed and, therefore, has become 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]).

As the parent's claims were related to the design of the student's IESP(s), rather than to the implementation of equitable services, this is not an instance where the parent's claim was solely related to the implementation of an IESP. Accordingly, there can be no dispute that the IHO had jurisdiction to address the parent's claim.

In addition, even if this matter did involve implementation of the student's IESP during the 2023-24 school year, such a claim is subject to due process. Recently, in several decisions, the undersigned and other SROs have rejected the district's position that IHOs and SROs lack subject matter jurisdiction to address claims related to implementation of equitable services under State law (see, e.g., Application of a Student with a Disability, Appeal No. 24-615; Application of a Student with a Disability, Appeal No. 24-614; Application of a Student with a Disability, Appeal No. 24-612; Application of a Student with a Disability, Appeal No. 24-602; Application of a Student with a Disability, Appeal No. 24-595; Application of a Student with a Disability, Appeal No. 24-594; Application of a Student with a Disability, Appeal No. 24-589; Application of a Student with a Disability, Appeal No. 24-584; Application of a Student with a Disability, Appeal No. 24-572; Application of a Student with a Disability, Appeal No. 24-564; Application of a Student with a Disability, Appeal No. 24-558; Application of a Student with a Disability, Appeal No. 24-547; Application of a Student with a Disability, Appeal No. 24-528; Application of a Student with a Disability, Appeal No. 24-525; Application of a Student with a Disability, Appeal No. 24-512; Application of a Student with a Disability, Appeal No. 24-507; Application of a Student with a Disability, Appeal No. 24-501; Application of a Student with a Disability, Appeal No. 24-498; Application of a Student with a Disability, Appeal No. 24-464; Application of a Student with a Disability, Appeal No. 24-461; Application of a Student with a Disability, Appeal No. 24-460; Application of a Student with a Disability, Appeal No. 24-441; Application of a Student with a Disability, Appeal No. 24-436; Application of the Dep't of Educ., Appeal No. 24-435; Application of a Student with a Disability, Appeal No. 24-392; Application of a Student with a Disability, Appeal No. 24-391; Application of a Student with a Disability, Appeal No. 24-390; Application of a Student with a Disability, Appeal No. 24-388; Application of a Student with a Disability, Appeal No. 24-386).

Based on the foregoing, the district's jurisdictional argument is wholly without merit.

Finally, the parent argues that the IHO erred in denying her request for reimbursement for OT and in finding that the request was improperly raised for the first time at the impartial hearing (see IHO Decision at p. 6). As alleged in the due process complaint notice, the parent was seeking funding for the same educational program as recommended in the November 2016 IESP, which included OT as a related service (see Parent Ex. B at p. 11). Therefore, the IHO was incorrect and a request for OT was sufficiently raised in the due process complaint notice. Further, review of the hearing record does not reveal that the parent "specifically disclaimed" a request for funding of OT services at the prehearing conference, as the IHO found (see IHO Decision at p. 6).

The only remaining issue before me is whether the IHO properly awarded the parent funding for the unilaterally obtained services.

B. Unilaterally-Obtained Services

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 recommend an appropriate program of special education services under the State's dual enrollment statute for the 2023-24 school year and, as a self-help remedy, she unilaterally obtained private services from AIM and S&R for the student without the consent of the school district officials, and then commenced due process to obtain remuneration for the costs thereof.

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

The parent's request for district funding of privately-obtained services must be assessed under this framework. Thus, a board of education may be required to reimburse parents for their expenditures for private educational services they obtained for a student if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Carter, 510 U.S. 7; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 252 [2d Cir. 2009]).¹¹ In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

Turning to a review of the appropriateness of the unilaterally-obtained services, the federal standard for adjudicating these types of disputes is instructive. A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see

¹¹ 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 AIM and S&R (Educ. Law § 4404[1][c]).

Gagliardo, 489 F.3d at 112, 115; Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998]). Citing the Rowley standard, the Supreme Court has explained that "when a public school system has defaulted on its obligations under the Act, a private school placement is 'proper under the Act' if the education provided by the private school is 'reasonably calculated to enable the child to receive educational benefits'" (Carter, 510 U.S. at 11; see Rowley, 458 U.S. at 203-04; 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).

One of the factors to consider in determining if a private school is appropriate is whether the unilateral placement "at a minimum, provide[s] some element of special education services in

which the public school placement was deficient" (Berger, 348 F.3d at 523; see Frank G., 459 F.3d at 365 [describing how the unilateral placement provided services the district acknowledged that the student required, yet failed to provide]).

1. Student's Needs

While not in dispute on appeal, a discussion of the student's needs provides context for the discussion of whether the services provided by AIM and S&R were appropriate to address the student's needs, and the subsequent relief granted by the IHO.

The October 2023 IESP reflected that the most recent teacher progress report from December 2022 indicated that the student exhibited delays in language, reading comprehension problem solving, following directions, focus and attention, and social development skills (Parent Ex. D at p. 4).

Turning to reading, the IESP noted that the student had delays in all areas of reading specifically identifying delays in decoding, fluency, and comprehension (Parent Ex. D at p. 5). It was reported that the student could decode "cvc" words with 80 percent accuracy and had mastered "about" 50 basic sight words; however, his reading performance was "highly inconsistent and greatly affected by his impulsivity" (id.). The student could answer factual "wh" questions on a story he had read at his reading level or a story at a beginning third grade level that had been read to him, could sequence up to four story events, identify main characters, and make simple predictions (id.). He had difficulty answering "why" questions or questions that required higher order thinking skills, could not state the main idea of a story, did not understand point of view, could not identify cause/effect, fact/opinion, problem/solution, and could not draw conclusions (id.). When writing, the student had poor spelling, made careless mistakes, and even words that followed phonetic rules were difficult for him to spell (id.). Many of his spelling errors occurred because of his impulsivity and poor concentration skills (id.). The student had difficulty following capitalization and punctuation rules and had difficulty writing a simple sentence (id.).

In math, the October 2023 IESP reflected reports that the student could write numbers to 20, count 25 objects using one-to-one correspondence, and rote count to 100 (Parent Ex. D at p. 5). He had difficulty adding and subtracting, understanding the product of a math problem, and comprehending basic mathematical concepts (id.). The student did not know how to use a number line, identify the value of bills and coins, tell time, or use measurements (id.). He had difficulty identifying fractions, understanding place value, and comparing numbers and was working on these goals using visual, manipulatives, picture cue cards, and graphic organizers (id.). When solving word problems, the student needed assistance determining what operation to use and what steps were needed, and he needed the problem read to him multiple times before he understood what to do (id. at pp. 5-6).

The October 2023 IESP related that the student had delays in receptive and expressive language (Parent Ex. D at p. 6). He demonstrated moderate delays in receptive language and had difficulty processing directions due to poor attention and focus (id.). His verbal comprehension was "limited to the very literal," he did not understand idioms and had difficulty with abstract or figurative language (id.). The student struggled to define unknown words from context or expand the definition of a word he already knew (id.). He had difficulty generalizing information

previously learned, understanding positional and qualitative concepts, understanding nonverbal language, and listening to and accepting the opinions of others (id.). Expressively, the student answered simple "wh" question and used short sentences to express himself; however, he had difficulty answering "why" and "when" questions (id.). While the student's overall ability to communicate and express his wants and needs had improved, he used poor grammatical structure, and his vocabulary was below age expectations (id.). He did not always use spatial or qualitative words or pronouns correctly, had difficulty sharing his feelings verbally, especially when upset or frustrated, and had weak pragmatic language skills (id.).

In terms of the student's social/emotional skills, the October 2023 IESP reported that the student lacked social cues and did not understand body language, which was why he did not communicate on the level of his peers (Parent Ex. D at p. 8). The student's focus and attention were weak, and he could not refocus once his attention wandered (id.). The student had difficulty staying regulated at school and gave up easily when a task was challenging (id.). When frustrated, it took the student a long time to calm down and he required one-on-one intervention (id.). He did not have the skills needed to problem solve, compromise, or resolve conflicts with peers and often used aggressive behaviors to express himself in disagreements with peers (id.). The October 2023 IESP related that the student exhibited "significantly decreased sensory skills and poor auditory filtering skills" (id.). He was "constantly moving around and squishing or touching things with his fingers" (id.). The student had sensory behaviors, poor tolerance for sitting, was very disorganized, and had difficulty transitioning from one activity or place to another (id.).

Speaking to the student's physical abilities, the October 2023 IESP reported that the student had a good pencil grip and was able to write all letters of the alphabet (Parent Ex. D at p. 2). He did not have any physical limitations, was active, and enjoyed physical and outdoor activities (id. at p. 9). The student was recommended for OT services "to address attention/focus difficulties and sensory needs that stop[ped] him from doing well at school" (id.). He had difficulty transitioning between activities and classes, and with following directions and needed prompting even with one-step directions (id.). The October 2023 IESP further related that, according to the parent, the student's hearing and vision were within normal limits and he had recently been to the eye doctor (id.). He could ascend and descend stairs and complete age-appropriate daily living skills but could be sensitive to loud noises (id.). The October 2023 IESP noted the parent's concern regarding the student's focus and handwriting, which was not legible (id.).

To address the student's needs, the October 2023 CSE recommended the student receive four periods of group SETSS per week, two 30-minute sessions of individual speech-language therapy per week, and two 30-minute sessions of individual OT per week (Parent Ex. D at p. 14).¹² The October 2023 IEP noted that the student needed OT to "improve his sensory integration and fine motor skills" (id. at p. 9). The October 2023 IESP included annual goals focused on reading comprehension and analysis, phonics, solving multiplication and division problems using visual and addition and subtraction strategies, solving multistep word problems, writing on a topic, using grammatically correct sentences, sequencing a story, use of a sentence frame, increasing attention,

¹² The recommendations contained in the October 2023 IESP were the same as were made in the November 2021 IESP (compare Parent Ex. C at p. 7, with Parent Ex. D at p. 14).

and copying and writing a complete sentence using correct formation, orientation, spacing, sizing, capitals, and punctuation (*id.* at pp. 10-13).

2. SETSS from AIM and OT from S&R

Initially, the IHO explicitly found that the SETSS obtained by the parent were not appropriate for the student during the 2023-24 school year and the parent has not appealed from this finding (IHO Decision at pp. 5-6). Nevertheless, even if the parent had properly appealed from the IHO's determination, review of the hearing record does not support finding that the unilaterally obtained services were appropriate to meet the student's needs during the 2023-24 school year.

The parent alleged in her due process complaint notice that the district's reduction of SETSS from "5 periods of SEIT which were delivered on an individual basis to 4 periods of group SETSS" was the impetus of her complaint and the district's recommended program was inappropriate because SETSS were a "more limited service that d[id] not address the broader, organizational, executive functioning, social skills" that the student required and amounted to a "denial of FAPE" (Tr. pp. 4-5, 20-22; Parent Ex. A at pp. 2-3). While the parent indicated in the due process complaint that the student required five sessions of SEIT services per week with related services to receive an appropriate education, the parent implemented a program of four sessions per week of SETSS and two 30-minute sessions of OT (Tr. p. 33; Parent Exs. L at ¶ 3; M at ¶ 7, N at ¶ 10).

Although the parent testified that she obtained five sessions per week of SETSS for the student (Parent Ex. K at ¶¶10-11), the hearing record shows that AIM provided the student with four sessions per week of SETSS during the 2023-24 school year, a service that was similar to the four sessions per week of SETSS that the district had recommended for the student, which the parent rejected (Parent Exs. L at ¶ 3; M at ¶ 7; *see* Parent Ex. A). Additionally, although the parent objected to the recommendation for group SETSS, asserting the student required the service on an individual basis, review of the hearing record does not show that the SETSS the parent obtained for the student during the 2023-24 school year were provided on an individual basis rather than on a group basis. In particular, in all instances where the SETSS provided to the student were identified, it was never explained whether the services were delivered on an individual or group basis (Parent Exs. I; L at ¶ 3; M at ¶ 7). Nevertheless, in her reply, the parent explicitly stated that the SETSS the student received during the 2023-24 school year "were identical to the services mandated by the [district]," explaining that there would have been no difference for the student between having SETSS implemented as a group or individual service (Reply & Answer to Cr.-Appeal at pp. 6-7).

As noted above, in order to prove that the unilaterally obtained services were appropriate for the student, the parent was required to prove, at a minimum, that the unilaterally obtained services addressed a deficiency in the district's recommended programming (*see Berger*, 348 F.3d at 523 [finding that one of the factors to consider in determining if a private school is appropriate is whether the unilateral placement "at a minimum, provide[s] some element of special education services in which the public school placement was deficient"]; *see also Frank G.*, 459 F.3d at 365 [describing how the unilateral placement provided services the district acknowledged that the student required, yet failed to provide]; *Mason v. Carranza*, 2023 WL 6201407, at *13 [E.D.N.Y.

Sept. 22, 2023] [noting that if an IEP were deemed "substantively inadequate" based on the omission of assistive technology, then relief would be denied "based on the next Burlington/Carter prong—i.e., that 'the parents' alternative private placement was appropriate,'—because [the unilateral placement] lacked the required assistive technology devices and services . . . and thus was not an appropriate alternative placement"], quoting Ventura de Paulino, 959 F.3d at 526-27).

With respect to related services, the hearing record is not developed regarding why AIM only provided the student with SETSS. The parent's agreement with AIM initially identified that the student was entitled to SEIT, speech-language therapy, and OT services, and stated that the parent was requesting that AIM provide those services "to whatever extent possible for the 2023-24 school year" (Parent Ex. F at p. 1). The agreement further provided that AIM would "make every effort to implement the recommended services . . . with suitable qualified providers for the 2023-24 school year" (id. at p. 2). However, the agreement then limited the services and stated that the parent "underst[ood]" that AIM "intend[ed] to provide" only "SETSS/SEITS" to the student for the 203-24 school year (id.).

The parent testified that she could not find a provider to deliver speech-language therapy services during the 2023-24 school year (Tr. pp. 49-50). However, she obtained OT services for the student from S&R (see Parent Ex. G).

Turning to the appropriateness of the OT services provided to the student during the 2023-24 school year, the CEO/owner (CEO) of S&R testified that S&R provided the student with two 30-minute sessions of individual OT per week during the 2023-24 school year (Parent Ex. N ¶ 10). The CEO testified that she specialized in evaluating and treating children with visual processing delays and "conducted informal evaluations and created comprehensive goals and treatment plans" (Parent Ex. N ¶¶ 3-4). According to the CEO, evaluations were conducted using the Test of Visual Perceptual Skills (TVPS) and non-standardized oculomotor assessments (Tr. p. 40). The student's OT services were provided by an occupational therapist with whom the CEO met approximately once a month (Tr. p. 43).

Regarding the student's needs, the CEO testified that the student had delays in visual processing, visual focus, auditory focus, visual fixation, and oculomotor skills (Tr. p. 43). The CEO further testified that she developed the student's goals, which focused on "visual discrimination, visual memory, spatial relations, and figure-ground" (id.). The December 2023 OT progress report prepared by the student's occupational therapist at S&R related that the student demonstrated difficulty with ocular-motor skills, visual processing skills, and handwriting skills (Parent Ex. J at p. 1). The December 2023 OT progress report noted that the student had delays in visual processing skills, including discrimination, visual memory, visual figure ground, and visual discrimination (id.). The student's "visual pursuits, convergence, and fixation [were] significantly delayed" (id.). According to the December 2023 OT progress report, the student also had "significant" delays in visual motor and handwriting skills (id.). The OT provider used handwriting worksheets, forebrain, brain gym, visual motor worksheets, visual processing games, visual processing worksheets, and reflex integration to address the student's needs (id.).

Here, while not an area of need identified in the October 2023 IESP, OT provided by S&R appeared to focus on the ocular-motor and visual processing skills (see Parent Ex. D). However, the hearing record provides insufficient evidence regarding how S&R was addressing the attention

and sensory needs reported in the student's October 2023 IESP which were then noted to be "stop[ing] [the student] from doing well at school" (Parent Ex. D at p. 9).

Speaking to the student's progress with the OT services provided by S&R, the S&R CEO testified that the student had made progress with visual memory, visual spatial relations, visual figure-ground, visual discrimination, visual fixation, visual focus, visual motor integration, and visual memory, which was affecting his handwriting, which was "still behind" (Tr. pp. 37-39). The December 2023 OT progress report related that the student's visual memory had improved, and his visual spatial relations and visual sequential memory were age-appropriate (Parent Ex. J at p. 1). The student had also made "some progress" with visual motor skills and could copy an image when it was present (*id.*). He continued to demonstrate delays in handwriting, specifically with line, size, and space awareness, and letter formation (*id.*). The December 2023 OT progress report noted the student's progress toward previous goals, identifying that the student had age-appropriate visual sequential skills, age-appropriate visual spatial relations, and age-appropriate visual motor skills when not from memory (*id.*).

Under the circumstances presented, the parent has not submitted evidence to show that the program she obtained for the student addressed the identified deficiency with the November 2021 and October 2023 IESPs as the SETSS implemented by the parent is consistent with the recommendations contained in the IESPs (compare Parent Exs. C, D, with Parent Exs. M at ¶ 7, N at ¶ 10). Since the parent did not remedy the alleged deficiency of the district's recommended program she is not entitled to reimbursement (A.S. v. Bd. of Educ. Shenendehowa Cent. Sch. Dist., 2019 WL 719833, at *9 [N.D.N.Y. Feb. 20, 2019]; see also Mason, 2023 WL 6201407, at *13). Further, under totality of the circumstances, the evidence in the hearing record demonstrates that the unilaterally obtained SETSS and OT services provided by AIM and S&R were not specially designed to meet the student's needs, particularly given that the student had identified areas of need that the services did not address. In light of the above, it is not necessary to address the equitable considerations as the parent has not shown they are entitled to reimbursement under the Burlington/Carter test (see A.P. v. New York City Dep't of Educ., 2024 WL 763386 at *2 quoting Forest Grove Sch. Dist., 557 U.S. at 246-47 [2d Cir. Feb. 26, 2024]).

VII. Conclusion

Having determined that the parent failed to sustain her burden to establish the appropriateness of the student's unilaterally obtained services for the 2023-24 school year, the necessary inquiry is at an end and I need not reach the issue of whether equitable considerations support an award of funding for the unilaterally obtained services (see M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]).

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision dated September 25, 2024 is modified by reversing that portion which directed the district to fund four periods of SETSS delivered to the student by a provider of the parent's choosing during the 2023-24 school year.

Dated: **Albany, New York**
 March 14, 2025

SARAH L. HARRINGTON
STATE REVIEW OFFICER