



The University of the State of New York

The State Education Department

State Review Officer

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No. 24-557

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:

Liz Vladeck, General Counsel, attorneys for respondent, by Kashif Forbes, 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) reimburse her for the costs of her son's privately-obtained services delivered by Yes I Can for the 2024-25 school year. The appeal must be dismissed.

II. Overview—Administrative Procedures

When a 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 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, 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[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 reflects that, on January 9, 2023, a CSE convened to conduct the student's annual review, and having found that the student remained eligible for special education as a student with a speech or language impairment, developed an IEP for the student that included the following recommendations: a general education placement with integrated co-teaching (ICT) services for instruction in English language arts (ELA) (five periods per week in English), mathematics (five periods per week in Yiddish), social studies (three periods per week in Yiddish), and sciences (three periods per week in Yiddish); and related services consisting of one 30-minute session per week of counseling services in a group (Yiddish), three 30-minute sessions per week of individual occupational therapy (OT) (English), two 30-minute sessions per week of individual physical therapy (PT) (English), and three 30-minute sessions per week of

individual speech-language therapy (Yiddish) (see Parent Ex. C at pp. 1, 19, 24).¹ The CSE also recommended a district nonspecialized school to implement the January 2023 IEP (id. at p. 24). According to the IEP, if there was "no class available in the recommended language of instruction, [the student] w[ould] be placed in an interim monolingual class with an alternate placement paraprofessional until [the student] [wa]s placed in an appropriate bilingual class" (id. at p. 25). It was further noted in the IEP that an "alternate placement paraprofessional [wa]s bilingual in the recommended language of instruction" (id.). The January 2023 CSE noted in the IEP that the parent would be placing the student at a religious, nonpublic school for the "2022-2023 academic school year" (id. at p. 26).

On or about May 11, 2023, the parent executed a document from Yes I Can, which indicated that the parent had "chosen to work with [the] agency in providing" the student with "special education services" (Parent Ex. F at pp. 1, 3). On the final page of the document, the following services were check-marked: special education services, speech therapy, and OT (id. at p. 3). A representative from the Yes I Can agency signed the document on June 20, 2023 (id.).

Evidence in the hearing record reflects that the student received 10 hours per week of "special education services" during the 2023-24 school year (third grade) (Parent Ex. G at pp. 1, 5). Based on the progress report, dated June 2024, and drafted on a document with the Yes I Can agency logo, the provider indicated that she worked on academics (reading and mathematics) with the student, as well as his social skills and language skills (id. at pp. 1-5).

A. Due Process Complaint Notice

By due process complaint notice dated July 5, 2023, the parent alleged that the district denied the student a free appropriate public education (FAPE) for the 2024-25 school year (see Parent Ex. A at p. 1).² According to the due process complaint notice, the student attended a religious, nonpublic school (id.). In the due process complaint notice, the parent included a request for pendency services based on the special education program recommended in a June 2019 IEP, which, according to the parent, was "affirmed" by an IHO in a decision dated November 14, 2023 (November 2023 IHO decision) (id. at p. 2).³ As a result, the parent asserted that the June 2019

¹ The student's eligibility for special education as a student with a speech or language impairment is not in dispute (see 34 CFR 300.8[c][11]; 8 NYCRR 200.1[zz][11]). The January 2023 IEP noted a projected implementation date of January 24, 2023 and a projected annual review date of January 9, 2024 (see Parent Ex. C at p. 1). At the time of the January 2023 CSE meeting, the student was not receiving OT or PT services, but he was receiving speech-language therapy services (id.). As reflected in the January 2023 IEP, the student was also reportedly receiving 10 hours per week of "both pullout and push-in [special education itinerant teacher (SEIT)] services" (id. at p. 4). The parent shared that the student had not received OT or PT services for "almost three years" because she had had a "very difficult time finding providers who c[ould] coordinate with [the student's] schedule"; at that time, the parent also shared that she would "diligently seek providers" for the student because she understood the "importance" of the student receiving OT and PT (id. at p. 6).

² Notwithstanding the date on the due process complaint notice, the transcript reflects that the parent's due process complaint notice was dated July 5, 2024 (see Tr. pp. 2, 15). The hearing record does not explain this discrepancy (see generally Tr. pp. 1-61; Parent Exs. A-C; E-H; IHO Exs. I-V).

³ The hearing record does not include a copy of the June 2019 IEP (see generally Tr. pp. 1-61; Parent Exs. A-H; IHO Exs. I-V).

IEP was the student's last agreed-upon program, which consisted of the following services: a 12-month program consisting of 10 hours per week of individual special education itinerant teacher (SEIT) services (Yiddish), three 30-minute sessions per week of individual speech-language therapy (Yiddish), three 30-minute sessions per week of individual OT (English), and two 30-minute sessions per week of individual PT (English) (*id.*).^{4, 5}

Next, the parent indicated that a CSE had convened on January 9, 2023 and recommended the following special education program for the student: a general education placement with integrated co-teaching (ICT) services and related services (three 30-minute sessions per week of individual speech-language therapy delivered in Yiddish, three 30-minute sessions per week of individual OT delivered in English, and two 30-minute sessions per week of individual PT delivered in English) for the student (*see* Parent Ex. A at p. 2). The parent alleged that although the student's needs were "well documented, the CSE failed to recommend an appropriate placement" for the student, which, according to the parent, was a "bilingual Yiddish [ICT] program" (*id.*). The parent also alleged that she had "not received a suitable school location letter" for the 2024-25 school year (12-month program) and she had been "unable to locate such a program" in the public school system "on their own" (*id.*). In addition, the parent noted that the CSE failed to consider the student's need for a 12-month program (*id.*).

⁴ The hearing record includes a copy of the November 2023 IHO decision (*see generally* Parent Ex. D). In that matter, the parent alleged that the district failed to offer the student a FAPE for the 2023-24 school year and had filed a due process complaint notice, dated "July 5, 2023" (*id.* at p. 3). Notwithstanding that a CSE had convened in January 2023—as reflected in this decision as well as within the parent's due process complaint notice in this administrative proceeding—the November 2023 IHO decision did not mention the January 2023 CSE meeting or an IEP developed therein, but instead, noted that a CSE had convened in June 2019 and then in June 2021 (*id.* at pp. 3-7). According to the November 2023 IHO decision, the June 2021 CSE recommended an "ICT program in addition to" related services for the student and the parent disagreed with the recommendations (*id.* at p. 3). The district did not appear at the impartial hearing held with respect to the parent's allegations concerning the 2023-24 school year (*id.*).

⁵ Given the student's date of birth, it appears that he would have been considered, chronologically, as a preschool-aged student during the 2019-20 school year (*see* Parent Ex. A at p. 1). State law defines SEIT services (or, as referenced in State regulation, "Special Education Itinerant Services" [SEIS]) as "an approved program provided by a certified special education teacher . . . , at a site . . . , including but not limited to an approved or licensed prekindergarten or head start program; the child's home; . . . or a child care location" (Educ. Law § 4410[1][k]; 8 NYCRR 200.16[i][3][ii]; *see* "[SEIS] for Preschool Children with Disabilities," Office of Special Educ. Field Advisory [Oct. 2015], available at <https://www.nysed.gov/special-education/special-education-itinerant-services-preschool-children-disabilities>). SEIT services are "for the purpose of providing specialized individual or group instruction and/or indirect services to preschool students with disabilities" (8 NYCRR 200.16[i][3][ii] [emphasis added]; *see* Educ. Law § 4410[1][k]). Although a school district would generally not deliver a service designed exclusively for preschool students to a school-aged student, here, the services the student continued to receive as a school-aged student during the 2023-24 school year at the religious, nonpublic school are referred to in the hearing record as SEIT services, special education teacher support services (SETSS), or more generically as "special education services" that were delivered by a provider holding a New York State teaching certificate for students with disabilities (first grade through sixth grade) (Parent Exs. G at pp. 1, 5; H at p. 4; *see* Tr. pp. 26-27). Evidence in the hearing record reflects that the student attended third grade during the 2023-24 school year at a religious, nonpublic school, and therefore it would follow that, during the 2024-25 school year at issue, he would have been a fourth-grade student at the same religious, nonpublic school (*see* Parent Ex. G at pp. 1, 5; *see also* Parent Ex. A at p. 1).

As noted by the parent in the due process complaint notice, the student was "making progress" with SEIT services and required "either a continuation of the broader SEIT program or an appropriate placement in a hybrid special education/general education program" to address the student's needs within a "mainstream environment" (Parent Ex. A at p. 3). Based on the district's alleged failure to recommend a "proper placement" for the student, the parent advised that she was "left with no choice but to implement the SEIT program independently and seek reimbursement" from the district (id.).

As relief, the parent reserved her "right to ask for compensatory services" for services the student was entitled to receive under pendency or for those services not provided to the student during the 2024-25 school year (12-month program) (Parent Ex. A at p. 3). In addition, the parent requested an order directing the district to fund the costs of the student's special education program recommended in the June 2019 IEP for the 2024-25 school year (12-month program) at the "providers' contracted rate" (id.). The parent also requested an order directing the district to fund a bank of compensatory educational services for the "entire 12[-month] 2024-25 school year—or the parts of which were not serviced" (id.).

B. Impartial Hearing Officer Decision

On September 3, 2024, the parties proceeded to an impartial hearing before an IHO with the Office of Administrative Trials and Hearings (OATH) (see Tr. p. 1). The impartial hearing concluded on September 4, 2024, after two days of proceedings (see Tr. pp. 20-61). On September 5, 2024, the IHO issued an interim order on pendency, and found that the student's pendency services consisted of the following: a 12-month program consisting of 10 hours per week of SEIT services (Yiddish), three 30-minute sessions per week of individual speech-language therapy (Yiddish), three 30-minute sessions per week of individual OT (English), and two 30-minute sessions per week of individual PT (English) (IHO Ex. II at p. 1). The IHO noted that, pursuant to the parties' agreement, the unappealed, November 2023 IHO decision formed the basis for the student's pendency services (id.; see Tr. pp. 56-59; see generally Parent Ex. D).

In a decision dated October 17, 2024, the IHO found that the district failed to offer the student a FAPE for the 2024-25 school year and, contrary to the parent's assertion, the evidence in the hearing record did not support a determination that the student was eligible for 12-month programming (see IHO Decision at pp. 8-11). The IHO also found that the district failed to "establish that they implement[ed] services" for the student during the 2024-25 school year and had "conceded" a denial of a FAPE at the impartial hearing (id. at p. 11).

With regard to the parent's privately-obtained services for the student, the IHO concluded that the hearing record lacked sufficient evidence to establish that the SETSS delivered by Yes I Can were appropriate to meet the student's needs, and the IHO denied the parent's request to fund the SETSS (see IHO Decision at pp. 11-12). In addition, the IHO similarly concluded that the hearing record lacked sufficient evidence to award the parent funding for the student's speech-language therapy and OT services at a rate of \$245.00 per hour (id. at p. 13). To the extent that the district was not providing "those services recommended in the last IEP," the IHO ordered the district to issue related services authorizations (RSAs) for the parent to obtain the following services: three 30-minute sessions per week of individual speech-language therapy (Yiddish), three

30-minute sessions per week of individual OT (English), and two 30-minute sessions per week of individual PT (English) (id.).

In light of these determinations, the IHO did not address equitable considerations (see IHO Decision at p. 13). As relief, the IHO ordered the district to issue RSAs for the student's related services for the 2024-25 school year (10-month program) (id.).

IV. Appeal for State-Level Review

The parent appeals, alleging that she entered into a valid and binding contract with Yes I Can to deliver services to the student.⁶ The parent further alleges that she assumed financial liability for the delivery of services to the student. The parent notes that the contract entered into the hearing record as evidence did not indicate that it "expired or was limited to a specific period of time," and the IHO appeared to be persuaded by testimony from a witness who was not "directly involved in the preparation of the contract." The parent further notes that, despite the IHO's concerns, the signature on the contract was her own signature, and she was "aware that Yes I Can charge[d] \$200 for academic support and \$245/h[ou]r for all other related services." With regard to the contract's "missing terms," the parent argues that it would have been nearly "impossible to predict the precise number of hours to be delivered over the course of the entire year."⁷ In a footnote, the parent indicates that an "additional contract [was] signed prior to the [20]24-25 school year," which the parent submitted as additional evidence for consideration on appeal, "despite the fact that the contract in evidence [wa]s still binding."⁸

⁶ Despite proceeding pro se in this matter on appeal, the attorney who represented the parent at the impartial hearing signed and submitted the parent's Notice of Intention to Seek Review and Case Information Statement, and the parent's Request for Review was written on what appears to be the same attorney's letterhead (compare Tr. pp. 1, 20, with Notice of Intention to Seek Review, and Req. for Rev. at p. 1).

⁷ To be clear, the IHO made no findings with respect to whether the document entered into the hearing record as evidence constituted a valid contract with Yes I Can, whether the document financially obligated the parent for services delivered by the agency, or otherwise made any other findings with regard to the document (see IHO Decision at pp. 9-13). The IHO pointed to arguments raised in the district's closing brief related to the purported contract and noted that it was the "second 'wrong' document offered" by the parent (id. at p. 6).

⁸ The parent attaches additional documentary evidence to the request for review for consideration on appeal (see generally Req. for Rev. Exs. 1-2). The first document submitted is a "Rate Reference Sheet 2024-2025" (see Req. for Rev. Ex. 1). The second document submitted by the parent is a Yes I Can agreement to deliver services to the student for the "2024-2025 extended" school year, which appears to have been signed by the parent on May 7, 2024 and then signed by an agency representative on June 20, 2024 (see Req. for Rev. Ex. 2 at pp. 1, 3). In its answer, the district objects to the consideration of the additional evidence, arguing that both documents were available at the time of the impartial hearing (see Answer ¶ 8). The district further argues that the "new purported contract" is unreliable, as the signature dates on the contract do not align with the signature dates on the "Signature Certificate" page (id.). Generally, documentary evidence not presented at an impartial hearing is considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]). The factor specific to whether the additional evidence was available or could have been offered at the time of the impartial hearing

Next, the parent contends that the IHO erred by finding that the SETSS delivered by Yes I Can to the student were not appropriate to meet his needs. The parent further contends that the IHO did not appear to consider the information within the progress report in the hearing record and did not explain how she reached the conclusion that the recommendations from the providers were "without support." In addition, the parent notes that testimonial evidence established that the student experienced regression and thus, required "summer support." The parent asserts that the IHO improperly disregarded the information in the progress report because it pertained to the 2023-24 school year. According to the parent, Yes I Can created progress reports at the "end of June and December" and the progress report in evidence was an "accurate summation" of what the student worked on during summer 2024.⁹

As relief, the parent seeks an order directing the district to fund the costs of the student's SETSS from Yes I Can at the rate of \$200.00 per hour and speech-language therapy services at a the rate of \$245.00 per hour. In addition, the parent seeks RSAs from the district to obtain the student's OT and PT services.

In an answer, the district responds to the parent's allegations and generally argues to uphold the IHO's decision in its entirety. More specifically, the district contends that the parent failed to establish a contractual obligation with Yes I Can or that she made any payments for services delivered by Yes I Can during the 2024-25 school year. In addition, the district argues that the parent failed to establish the appropriateness of the SETSS delivered to the student by Yes I Can and that the student required 12-month programming.¹⁰

serves to encourage full development of an adequate hearing record at the first tier to enable the IHO to make a correct and well supported determination and to prevent the party submitting the additional evidence from withholding relevant evidence during the impartial hearing, thereby shielding the additional evidence from cross-examination and later springing it on the opposing party, effectively distorting the State-level administrative review and transforming it into a trial de novo (see M.B. v. New York City Dep't of Educ., 2015 WL 6472824, at *2-*3 [S.D.N.Y. Oct. 27, 2015]; A.W. v. Bd. of Educ. of the Wallkill Cent. Sch. Dist., 2015 WL 1579186, at *2-*4 [N.D.N.Y. Apr. 9, 2015]). On the other hand, both federal and State regulations authorize SROs to seek additional evidence if necessary, and SROs have accepted evidence available at the time of the impartial hearing when necessary (34 CFR 300.514[b][2][iii]; 8 NYCRR 279.10[b]; Application of a Student with a Disability, Appeal No. 08-030; Application of a Child with a Disability, Appeal No. 00-019 [finding it necessary to accept evidence available at the time of the impartial hearing to determine the student's pendency placement]). Having determined that both documents were available at the time of the impartial hearing, and the parent offers no explanation for the failure to proffer these documents at the impartial hearing, in an exercise of my discretion, I decline to consider the parent's additional documentary evidence submitted on appeal because the documents are not necessary to render a decision in this matter.

⁹ This assertion in the request for review contradicts the testimonial evidence elicited at the impartial hearing, wherein the educational supervisor (supervisor) from Yes I Can testified that any progress reported about the student's summer SETSS would be "rolled into the December report" (Tr. p. 45). In addition, the progress report in the hearing record is dated June 2024, which predates any summer services allegedly delivered to the student during July and August 2024 (see Parent Ex. G at p. 5).

¹⁰ Although adverse to the district, the district does not appeal or otherwise challenge the IHO's order directing the district to issue RSAs to the parent so that she could obtain OT, PT, and speech-language therapy services for the student (see generally Answer). Accordingly, the IHO's order directing the issuance of RSAs to the parent has become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. 386, 399 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The

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]).

adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 580 U.S. at 404). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 580 U.S. at 403 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).¹¹

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, 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 (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; 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., 554 F.3d at 252). 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, 489 F.3d at 111; Cerra, 427 F.3d at 192). "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).

¹¹ The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 580 U.S. at 402).

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., 694 F.3d at 184-85).

VI. Discussion

A. Unilateral Placement

In this matter, although the parent is not seeking reimbursement for the costs of the student's attendance at the religious, nonpublic school he attended during the 2024-25 school year, the same legal standard is applied to determine whether the services the parent privately obtained from Yes I Can during the 2024-25 school year were appropriate to meet the student's needs and whether the parent is entitled to be reimbursed for the costs of those services.

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

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

No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and

regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

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

1. Student Needs

While the student's needs are not in dispute, a brief discussion thereof provides context for the issue to be resolved on appeal, namely, whether the services the parent privately-obtained for the student during the 2024-25 school year were appropriate to meet his identified needs. Overall, the hearing record does not include any evaluations or other evaluative information upon which to discern the student's needs; however, the hearing record does include the student's January 2023 IEP, as well as information embedded within the June 2024 progress report generated by the Yes I Can provider (see generally Parent Exs. C; G). In addition, the January 2023 IEP reflects testing results obtained from evaluations administered to the student in November 2022, albeit, without reporting the actual standard scores or percentile scores achieved (see Parent Ex. C at pp. 1-3).

Turning first to the January 2023 IEP, results of November 2022 cognitive testing demonstrated the student's skills ranged from "Very Low" to "High Average" (Parent Ex. C at pp. 1-2).¹² The IEP stated that while "somewhat below that of many of his peers," the pattern of the student's subtest scores suggested that "his nonverbal reasoning skills [we]re better developed than his verbal skills"; his performance on the fluid reasoning index was characterized as "one of his strongest areas" and was "typical for his age" (id. at pp. 2-3). On the Wechsler Individual Achievement Test—Third Edition (WIAT-III), the student's score on a measure of word reading fell in the below average range and his score in reading comprehension fell in the very low range (id. at p. 2). However, when the student was "informally tested in Yiddish reading, . . . his skills appear[ed] to be on par with his peers" (id.). In mathematics, the student's score on the math problem solving and numerical operations measures fell in the average range, and he demonstrated the ability to "solve addition and subtraction problems on grade level" (id.).

¹² The January 2023 IEP is not clear as to whether the Wechsler Intelligence Scale for Children—Fifth Edition (WISC-V) or the Wechsler Preschool and Primary Scale of Intelligence-Fourth Edition (WPPSI-IV) was administered to the student (Parent Ex. C at p. 1); however, it appears that at the time of the testing the student was within the age range of either test. While the "evaluation results" section of the IEP indicated that the student's subtest scores ranged from very low to high average and his full scale IQ was in the low average range, the narrative section of the present levels of performance indicated that the student's scores on intellectual functioning testing fell in the "[v]ery [l]ow to [a]verage range, with a [f]ull [s]cale I.Q. score in the [v]ery [l]ow [r]ange" (compare Parent Ex. C at pp. 1-2, with Parent Ex. C at p. 2).

With regard to the student's reading strengths, the January 2023 IEP noted that, the student could "identify and name the sounds of all the uppercase and lowercase ABC[s]" (Parent Ex. C at p. 3). The IEP indicated the student's reading were his "difficulty with reading [consonant-vowel-consonant (CVC)] words fluently as well as recognizing the basic sight words" (id.). In writing, the IEP stated the student's strengths included his ability to "write all letters of the alphabet" as well as his "first name" (id.). His writing weaknesses included "struggling to write his last name" and his inability to write "most of the CVC or CVCe words" (id.).¹³ Turning to mathematics, the IEP identified the student's strengths as his ability to count to 20, "understand[ing] the relationship between numbers and quantities until the number [7], and [his ability to] write the numbers [0] until [12] correctly" (id.). However, as weaknesses, the IEP noted the student struggled with counting to 100, skip counting by 10s to 100 and solving addition and subtraction word problems within 10 (id.). With respect to his receptive language skills, the January 2023 IEP noted that the student was "well below average in his expressive and receptive skills" and had a "hard time conducting a proper conversation with his peers and adults" (id. at pp. 3-4). It was also noted that the student had a difficult time "communicating with adults and his peers when he need[ed] assistance" (id. at p. 4). With regard to his expressive language skills, the IEP noted that the student had a "hard time expressing himself fluently and w[ould] sometimes stumble over his words causing him to get very frustrated" (id.).

The January 2023 IEP also included information obtained from a "SEIT Report," which indicated that the student was "receiving 10 hours of both pullout and push-in SEIT services weekly" (Parent Ex. C at p. 4). According to the same report, although the student was "determined and hardworking," he was "delayed on (sic) the reading, math, comprehension, and social domains" and "display[ed] poor focusing skills," "deficient" language skills, and "struggle[d] to keep up with the class" (id.). The IEP further indicated that, based on the SEIT report, the "provider [wa]s enabling him to learn all the skills he need[ed] to know by using high levels of reinforcement such as the token economy to help him stay motivated" (id.). Additionally, the student "require[d] multiple sensory strategies to help him retain information and help him improve both his academics and social skills," noting further that, socially, the student "exhibit[ed] difficulty asking for help when needed and poor perspective-taking skills" (id.). Next, the IEP indicated that the student was "significantly delayed in the area of reading," and was then-currently "performing on level C" based on the Fountas & Pinnell assessment; and while he could "decode 15 words per minute with 95 percent accuracy," this was a "significant delay of one grade below level" (id.). With respect to the student's social development and social skills, the January 2023 IEP noted that his "provider [wa]s working on helping him with social skills by modeling requests or common phrases that students use[d], role-playing, and acting out social stories" (id. at p. 5).

According to the IEP, at the January 2023 CSE meeting, the parent expressed that the student was "delayed in both Yiddish and English," and he "benefit[ted] from 1:1 prompting in order to enhance learning and reading comprehension" (Parent Ex. C at p. 4). She also reported that the student "enjoy[ed] learning but d[id] so slower than his age-related peers" (id.). As final points, the parent indicated that the student did not "work well under pressure," he was a "slow thinker," and he "enjoy[ed] reading and love[d] retelling what he read" (id.). In the area of the

¹³ While not defined in the hearing record, CVCe words are words that follow the pattern consonant, vowel, consonant, silent e.

student's social development, the parent described the student as "shy" and noted he would not "voluntarily" interact in a "1:1 social setting" and needed "quite a bit of prompting and encouragement" (id. at p. 5). She also noted, however, that the student had a "social circle that he interact[ed] with" and "enjoy[ed] socializing with his siblings" (id.). In the area of physical development, the parent reported that, although the student had not been receiving OT or PT, he required those services to be "successful in his classroom" (id. at p. 6). The parent explained that the student demonstrated "poor" "coordination," and, therefore, it was "difficult for him to ride a bike" (id.). Additionally, the student transitioned "very slowly" between activities, which made "recess a challenge for him since he [wa]s not a good runner or good at playing ball games" (id.). The parent further reported that the student had "difficulty organizing information and ha[d] difficulty inferencing," often focusing on "details and missing the 'big picture'" (id.). In addition, the parent reported that the student had "poor" handwriting, wrote slowly, could not finish his homework in class, and could not cut with scissors (id.).

In addition to recommending ICT services and related services to address the student's needs, the January 2023 IEP included strategies to address his management needs, including the following: redirection when unfocused; repetition of material and directions; providing verbal and gestural prompts to enhance attention and focus; using positive reinforcements to enhance self-esteem; using a multisensory learning approach; providing extra time on assessments and assignments to address reading, mathematics, and writing delays; minimizing visual and auditory distractions, providing a quiet corner, or study carrel as needed; using a visual timer to promote timely completion of tasks; providing sensory motor deep pressure into hands prior to writing (therapy putty or chair push-ups); providing a sensory seat cushion for task attention; and providing a weighted writing tool (see Parent Ex. C at p. 7).

Next, as noted in the June 2024 progress report from the Yes I Can provider, it was reported that the student—during the 2023-24 school year in third grade—demonstrated difficulty in the "areas of reading multi-syllabic words, responding to all the wh questions, adding and subtracting multi-digit numbers, and expressing his emotions" (Parent Ex. G at p. 1). In addition, the provider indicated that it was "crucial" for the student to receive a 12-month program, as "he tend[ed] to fall back without support" during the summer, and then pointed to an example of what the provider characterized as a loss of skills after a "two week break" during the winter, which required "[three] months" for the student to regain after the break (id.).

In addition, the educational supervisor (supervisor) at Yes I Can testified at the impartial hearing. With respect to the student's needs, he described the student as having "significant academic delays" and as "approximately a grade and a half behind grade level" in the area of reading (Tr. p. 25). The supervisor also testified that the student had "poor" decoding skills, had a "very hard time . . . following along" with the class, and struggled with reading and responding to mathematics problems (id.). According to the supervisor, the student was "slow to pick up new concepts," and he required a "lot of repetition" and "support to really fully grasp" classwork (Tr. pp. 25-26). In the area of mathematics, the supervisor testified that the student was "also behind" and was then-currently working on "word problems, which [was] an issue due to decoding" (Tr. p. 26). He further testified that the student was also working on "multiplication and division" (id.).

2. Specially-Designed Instruction: SETSS from Yes I Can

On appeal, the parent asserts that the IHO disregarded information in the June 2024 progress report when reaching the determination that the special education services delivered by Yes I Can were not appropriate because the report related to the services delivered to the student during the previous school year, 2023-24, rather than the 2024-25 school year at issue.

Turning to the June 2024 progress report from Yes I Can, the provider indicated that, during the 2023-24 school year in third grade, the student had "demonstrated progress in his ability to read CVC words, comprehend a story or text with more clarity, count numbers by ones to 100, and interact healthily with his peers with support of his provider" (Parent Ex. G at p. 1). With respect to reading, the progress report indicated that the provider used the Fountas & Pinnell assessment to monitor progress, and noted that, "[a]t the start of service, the student scored at level C," and most recently, he scored "at level E," demonstrating progress (*id.*).

Next, the June 2024 progress report identified the "common core goals" the provider worked on with the student during the 2023-24 school year in reading and comprehension, such as decoding two-syllable words (by using "Read-Bright Curriculum and Phonics"); isolating and pronouncing initial, medial vowel, and final sounds (phonemes) in spoken single-syllable words" (by using "Read-Bright Curriculum and Phonics"); "compar[ing] and contrast[ing] the adventures and experiences of characters in stories" ("using 5-finger retelling and Think Aloud"); and "[d]escribing characters, settings, and major events in a story, using key details" ("using Think Aloud and Visualizing and Verbalizing Approach") (Parent Ex. G at pp. 2-3).

In mathematics, the June 2024 progress report reflected that, during the 2023-24 school year, the provider worked on the following goals with the student: thinking of "10 . . . as a bundle of [10] ones" ("using Ten frames and Graphic Organizers"); and adding within 100 ("using Step-by-step cue cards and Counters") (Parent Ex. G at p. 3).

In the area of social skills, the June 2024 progress report indicated that, during the 2023-24 school year, the provider worked on the following goals with the student: "[r]ecognizing and describ[ing] emotions and how they [we]re linked to behavior" ("using Floortime and Red/Green Behavior Systems"), and "[b]uilding on others' talk in conversations by responding to the comments of others through multiple exchanges" ("using Michelle Garcia Winner's Social Thinking Program and Red/Green Behavior Systems") (Parent Ex. G at pp. 3-4).

Finally, in the area of language, the June 2024 progress report indicated that, during the 2023-24 school year, the provider worked on the following goals with the student: "[c]apitaliz[ing] dates and names of people" ("using color coding and Worksheets"); and "[d]emonstrat[ing] command of the conventions of standard English capitalization, punctuation, and spelling when writing" ("using Handwriting without Tears and a Systematic approach to teaching spelling patterns") (Parent Ex. G at p. 4).

As a summary in the June 2024 progress report (i.e., "Intervention"), the provider noted that the student made progress with the amount of support delivered during the 2023-24 school year and that he required the "use of specialized methods and resources to develop his skills and

[to] work towards grade level" (Parent Ex. G at p. 5). The provider further noted the student's need for "services over an extended school year to have an educational benefit" (id.).

In addition to the foregoing evidence, the hearing record also included testimonial evidence elicited from the Yes I Can supervisor (see Tr. pp. 23-50). According to the supervisor, Yes I Can was providing 10 hours of SEIT services to the student during the summer (see Tr. p. 26). The supervisor noted, however, that the parent had also requested that the agency provide the student with OT and speech-language therapy, but due to the unavailability of providers, the agency could not deliver those services to the student during the summer (id.). The supervisor further noted that providers were generally more available during the "school year" and the agency would "try to have that filled" (Tr. pp. 26-27). At the time of the impartial hearing, in September 2024, the supervisor testified that he was "not sure exactly what [the agency's] plan [wa]s as far as the providers" for the "fall and spring" for the student (Tr. p. 40). He could not provide any details with respect to the anticipated provider for the student or the provider's qualifications at that time for the remainder of the 2024-25 school year (see Tr. pp. 40-41). The supervisor testified that school began in the next day or two, but if the agency did not have providers available, then services could not begin for the student (see Tr. p. 41). He clarified that the agency did not yet have providers with "contracts signed and assigned to the student" (Tr. pp. 41-42).

The supervisor explained that agency providers were "required to submit progress reports twice a year," and the supervisor clarified that, while not considered to be "hard date[s]," generally agency providers submitted progress reports in December and June (Tr. pp. 27, 45). The supervisor testified that any progress report from the student's summer SETSS provider would be "rolled into the December report" (Tr. p. 45). In addition to progress notes, agency providers also completed "session notes" (Tr. p. 31). Generally, the supervisor did not review the session notes unless he had a "specific concern" (id.).¹⁴ Instead, the supervisor usually just spoke with providers (id.).

The supervisor testified that Yes I Can delivered services to the student by "targeting" areas where the student was struggling (Tr. pp. 27-28). The supervisor indicated that the agency's "goal" was to "ensure that he [wa]s as close as possible, ideally on class level, but as close as possible to class level so that he [wa]s able to participate with the rest of his mainstream peers" (Tr. p. 28).

With regard to formal and informal assessments, the supervisor testified that "providers use[d] the Fountas & Pinnell running record for students in his age range," and this particular student was "last assessed . . . at the end of June" and "scored on Level E," which equated to his previous testimony describing the student as being approximately a "grade-and-a-half" behind in reading (Tr. p. 28). According to the supervisor, informal assessments were administered to the student in mathematics and "in his other skills" to make sure that the "goals" being worked on with the student were "appropriate" (Tr. pp. 28-29).

The supervisor testified that the agency's services were delivered to the student "in the school" and on a "pull-out" basis (Tr. pp. 29, 36). He also noted, however, that sometimes a provider would "push-in" to the classroom, but generally, the services were delivered in the pull-

¹⁴ There were no session notes included in the hearing record.

out model (Tr. p. 36). At his school, the student participated in a "mainstream classroom" (*id.*). The supervisor testified that, during the summer, the student received services in the morning, but he could not recall the "schedule" of services for "last year" (Tr. p. 37). He also could not provide any details about what comprised the student's "summer program" (*id.*).

With respect to whether the student required 12-month programming, the supervisor explained that, having spoken with a "provider and the parent," the student "definitely demonstrate[d] . . . [a] high risk for regression" (Tr. p. 29). The supervisor opined that an "eight-week break would lead to significant regression" and would require a "couple of months of the school year" to get the student "back to where he was in June" (*id.*). More specifically, the supervisor recalled a discussion about the student after returning from a "holiday break" in "April of last year"—which was approximately one week long—and the provider told the supervisor that the student required a "review of what they had done previously" in some decoding and writing work that had been done prior to the break (Tr. pp. 31-33). He could not recall the specific amount of time it took for the student to recoup skills following the April break (*see* Tr. pp. 33-34). The supervisor testified that regression would not likely be documented in a progress report, such as the one submitted into the hearing record as evidence, but would more likely be something that was documented within session notes (*see* Tr. pp. 34-35; *see generally* Parent Ex. G). However, the supervisor confirmed that he did not have any session notes or other notes documenting that "this regression [was] happening" (Tr. p. 35).

In the analysis of the parent's claims, the IHO pointed to the district's closing brief and the particular issues raised with regard to whether the parent sustained her burden to establish that Yes I Can delivered specially-designed instruction to meet the student's needs during the 2024-25 school year at issue (*see* IHO Decision at pp. 11-12). Based on the allegations in the closing brief—which refers to the insufficiency of the parent's evidence, including the June 2024 progress report, the Yes I Can supervisor's testimony, and the providers' certifications—the IHO found that the progress report lacked "detail and support" for the provider's recommendations to continue the frequency and duration of the special education services, as well as for 12-month programming (*compare* IHO Decision at pp. 11-12, *with* Parent Ex. G at p. 5). In addition, the IHO found the supervisor's testimony to be "vague" and providing "little clarity" about the student's needs for the 2024-25 school year, further noting that the supervisor had not worked with the student and that the student's provider during summer 2024 did not testify or produce any progress report for the services allegedly delivered in summer 2024 (IHO Decision at p. 12). As a result, the IHO agreed with the district that the hearing record lacked sufficient evidence demonstrating that the special education services, or SETSS, delivered by Yes I Can were appropriate to meet the student's educational needs (*id.*).

An independent review of the evidence in the hearing record supports the IHO's ultimate conclusion that the parent failed to sustain her burden to establish that the privately-obtained services she arranged for with Yes I Can were appropriate for the student during the 2024-2025 school year. Notably absent from the hearing record is any evidence that the student received services from Yes I Can during the 2024-25 school year, other than the supervisor's testimony that the student received 10 hours of SEIT services during the summer from the same provider who had delivered his services during the 2023-24 school year (*see* Tr. pp. 26-27; Parent Ex. G at p. 5; *see generally* Tr. pp. 1-25, 28-61; Parent Exs. A-F; H; IHO Exs. I-V). Moreover, the parent did not present any Yes I Can providers to testify at the impartial hearing; therefore, while the June

2024 progress report may have provided a glimpse into the student's needs through the progress he made during the 2023-24 school year, as well as the strategies or curriculums used to assist the student in making progress on the annual goals identified within the report, the June 2024 progress report provides no information concerning how the provider worked with the student or applied these strategies or curriculums during either the 2023-24 school year or summer 2024 (see generally Parent Ex. G). Perhaps most fatal to the parent's claim, however, is the supervisor's testimony at the impartial hearing that the agency had not yet assigned any providers to deliver services to the student during the 2024-25 school year (see Tr. pp. 40-42).

Compounding the fact that the Yes I Can agency had no providers to deliver services to the student during the 2024-25 school year, the hearing record lacked any progress reports, session notes, or other evidence describing the specially-designed instruction delivered to the student during the 2024-25 school year. Additionally, the hearing record is devoid of evidence regarding the curriculum at the nonpublic school, the student's non-SETSS instruction, and how SETSS would have been connected to the instruction provided by the nonpublic school during the 2024-25 school year.

In summary, taking into account the totality of the circumstances, the evidence in the hearing record does not sufficiently explain that any services were delivered to the student during the 2024-25 school year and to the extent that services were provided by Yes I Can, the hearing record does not identify how they addressed the student's identified needs in academics and language. Accordingly, there is no reason to disturb the IHO's finding that the parent did not sustain her burden to show that the special education or SETSS delivered by Yes I Can to the student constituted specially-designed instruction sufficient to meet the student's identified needs.

VII. Conclusion

As set forth above, the IHO's determination that the parent failed to sustain her burden to establish that the special education or SETSS delivered by Yes I Can to the student constituted specially-designed instruction sufficient to meet the student's identified needs is affirmed.

Based on the foregoing determination, I need not consider the parties remaining contentions.

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
February 12, 2025**

**STEVEN KROLAK
STATE REVIEW OFFICER**