



The University of the State of New York

The State Education Department

State Review Officer

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No. 12-002

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:

Michael Best, Special Assistant Corporation Counsel, attorneys for petitioner, G. Christopher Harriss, Esq., of counsel

Stroock & Stroock & Lavan LLP, attorneys for respondent, Kevin J. Curnin, Esq. and David V. Simunovich, Esq., of counsel

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 district) appeals from the decision of an impartial hearing officer (IHO) which found that Seton Foundation for Learning (Seton) was an appropriate placement for respondent's (the parent's) daughter and ordered it to fund the student's tuition costs and provide related services and an FM unit for the 2011-12 school year. The appeal must be sustained.

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, at least one psychologist, and school district representatives (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]; 34 CFR 300.151-300.152, 300.506, 300.511; Educ. Law § 4404[1]; 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 300.514[c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

At the time of the impartial hearing, the student was attending Seton, which has not been approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities (Parent Ex. X; see 8 NYCRR 200.1[d], 200.7). The student's eligibility for special education and related services as a student with an intellectual disability is

not in dispute in this proceeding (Parent Ex. B at p. 1; see 34 CFR 300.8[c][6]; 8 NYCRR 200.1[zz][7]).¹

The student's educational history was previously discussed in Application of the Dep't of Educ., Appeal No. 11-130 (2011 Decision). The parties' familiarity with her history is presumed, therefore it is unnecessary to repeat it here in detail.

Briefly, the parent obtained a private psychological evaluation of the student on January 18, 2011 "as part of the three year re-evaluation" (Parent Ex. M). On March 3, 2011, the CSE met for a "Triennial" review of the student (Parent Ex. A at pp. 1-2). The CSE recommended that the student attend a special class in a special school with a 12:1+1 staffing ratio and receive related services of hearing education services (HES), occupational therapy (OT), physical therapy (PT), and speech-language therapy (id. at pp. 1, 20). The CSE also recommended that the student receive a full-time 1:1 behavior management paraprofessional (id. at p. 20). All programs and services were recommended on a 12-month basis (id. at p. 1). The CSE also recommended that the student receive special education transportation, adapted physical education, and assistive technology (id. at pp. 1, 6-7).

On April 28, 2011, the district sent the parent a final notice of recommendation (FNR) summarizing the CSE's recommendations pursuant to the March 2011 CSE meeting and advising the parent of the particular school to which the district had assigned the student (Parent Ex. I).

The CSE reconvened on May 5, 2011 for a requested review of the student (Parent Ex. B). The CSE again recommended that the student attend, on a 12-month basis, a special class in a special school with at 12:1+1 staffing ratio (id. at p. 1). The May 2011 CSE recommended related services in the same frequency and duration as in the March 2011 IEP, except that the frequency of OT was increased and counseling services were added (id. at pp. 2, 24). The CSE also continued the recommendations for special education transportation and adapted physical education, and specified the provision of an FM unit as assistive technology (id. at pp. 1, 6).

The parent reported that she visited the assigned school on May 19, 2011 and, by letter dated June 2, 2011, she notified the district that she believed the assigned school was not appropriate for the student (Tr. pp. 137-38, 141-42; Parent Ex. S at p. 1; see also Parent Exs. DD; EE). In her June 2011 letter, the parent also notified the district that she would be placing the student at Seton for the 2011-12 school year and would be seeking direct payment of the tuition, transportation, and payment for all related services from the district (Parent Ex. S at p. 2).

The parent signed a tuition agreement with Seton dated August 31, 2011, agreeing to pay the annual tuition for a 10-month school year (Parent Ex. O). As of the date of the impartial hearing, November 15, 2011, the parent reportedly had not paid any of the tuition owed to Seton for the 2011-12 school year (Tr. pp. 142-43; see Parent Ex. W).

¹ I note that the student was classified as a student with mental retardation on a prior IEP, a term that has been revised in an October 2011 change in State Regulations (8 NYCRR 200.1[zz][7]; see Parent. Ex. A at p. 1).

A. Due Process Complaint Notice

The parent filed a due process complaint notice dated October 5, 2011 requesting an impartial hearing relating to the student's 2011-12 school year (IHO Ex. I). The parent alleged that for reasons stated in her June 2011 letter, the assigned school offered by the district was inappropriate and that the student had not received the related services and FM unit mandated in her IEP (*id.* at pp. 2-4). Specifically, the parent alleged that with the exception of a behavior management paraprofessional, the district had failed to provide the student with any of the related services mandated on her IEP, namely five 30-minute sessions of OT, two 30-minute sessions of PT, five 30-minute sessions of speech-language therapy, one 30-minute session of HES, and one 45-minute session of counseling (*id.* at p 4).

The parent stated that the student was then enrolled at Seton for the 2011-12 school year and that although the parent was "unable to afford it," she was "personally liable" for the cost of the student's tuition (IHO Ex. I at p. 4). The parent requested that the district pay the cost of the student's tuition directly to Seton for the 2011-12 school year, provide the student with the related services mandated on her IEP, provide the student with compensatory services, and provide the student with an FM unit (*id.* at pp. 1-2, 5).

B. IHO Decision

An impartial hearing convened on November 15, 2011 (Tr. pp. 1-183). At the impartial hearing, the district conceded that it did not offer the student a free appropriate public education (FAPE) for the 2011-12 school year (Tr. pp. 6, 172). The district did not enter any documentary evidence into the record, nor did it call any witnesses to testify (see Tr. pp. 1-183).

The IHO issued an interim decision dated November 16, 2011, in which she determined that the student's pendency (stay put) placement was Seton with a behavior management paraprofessional and related services of OT, PT, speech-language therapy, and HES (Interim IHO Decision at p. 4). The IHO determined that the last agreed upon placement was established in a June 2008 resolution agreement between the parties that was subsequently modified by the provision of a behavior management paraprofessional and related services to the student by the district, which services the parent accepted (*id.* at pp. 3-4).²

Regarding the merits of the parent's claims, the IHO issued a decision dated November 30, 2011, in which she noted the district's concession that it did not offer the student a FAPE and determined that the evidence at the impartial hearing supported a finding that Seton was appropriate for the student (IHO Decision at pp. 9, 12). With regard to the appropriateness of Seton, the IHO specifically found that Seton personnel addressed the student's special education needs in that the school provided her with a small class in which she could receive sufficient teacher support and attention "to keep her behaviors in check" and an environment in which she could learn (*id.* at p. 10). The IHO determined that the student received individualized instruction, particularly in math, and that the student's teacher at Seton worked with her on phonics and

² I note that the decision in Application of the Dep't of Educ., Appeal No. 11-130, an appeal of a prior impartial hearing involving this student, was issued on November 15, 2011; the same day that the impartial hearing which is the subject of this appeal convened and the day before the IHO's pendency order in this matter was issued.

letter/sound recognition, an area of difficulty for the student given her hearing and speech impairments (*id.*). The IHO also determined that the student's teacher worked with her on verbalizing ideas and formulating answers because expressive language was a weakness for the student, and that Seton personnel worked with her on play skills and interacting appropriately with her classmates (*id.* at pp. 10-11). The IHO also determined that Seton's reading and math curricula were appropriate for the student and noted the Seton teacher's testimony that the student had made progress during the 2011-12 school year in handwriting, math, understanding science and social studies concepts, following directions, sight words, phonics, and listening comprehension (*id.* at p. 11).

Regarding the district's argument that Seton was not appropriate for the student because it did not provide any related services, the IHO found, citing Education Law § 3602-c, that the absence of all related services for a student such as the one in this case who requires such services "could render a placement inappropriate;" however, there was "no good reason" why the district could not provide the services to the student in this matter since it provides related services to other students at Seton (IHO Decision at p. 11). The IHO determined, therefore, that the district should have been providing the student with the related services and an FM unit consistent with her most recent IEP since September 2011 (*id.*).

Regarding the district's additional argument that Seton was not appropriate because the student needed a 12-month program instead of the 10-month program provided at Seton, the IHO determined that the student required a 12-month program, but that the parent "did her best to provide activities for [the student] during the summer months and utilized related services provided by the [district]" (IHO Decision at pp. 11-12). As such, the IHO determined that the deficiency of the student being placed in a 10-month program instead of a 12-month program did not render Seton inappropriate (*id.* at p. 12).

The IHO further determined that equitable considerations favored an award of relief to the parent (IHO Decision at p. 12). The IHO ordered that the district pay the student's tuition at Seton for the 2011-12 school year; provide the student with related services for the 2011-12 school year; provide "make-up sessions" of related services missed from September 6, 2011 through the date of implementation of the IHO decision; and provide the student with an FM unit for use at Seton (*id.* at pp. 12-13).

IV. Appeal for State-Level Review

This appeal by the district ensued. The district alleges, among other things, that the IHO erred in awarding relief to the parent for the 2011-12 school year because: (1) the parent failed to demonstrate that Seton was appropriate for the student; (2) the parent failed to show that she had any legal obligation to pay tuition at Seton; (3) the parent failed to show that she was entitled to direct payment of tuition to Seton as opposed to tuition reimbursement; and (4) the district was not required to pay for any related services or other costs at the unilateral placement because the parent rejected the district's recommended placement for the student prior to the start of the 2011-12 school year.

Regarding the appropriateness of Seton for the student, the district alleges that the parent did not establish that the program at Seton was specially designed to meet the student's unique

needs because Seton does not provide the student with any related services; it provides educational services to the student only on a 10-month basis as opposed to the 12-month basis that the student needs; and the hearing record is "unclear" as to whether the student's program at Seton provides her with an education in the least restrictive environment (LRE). The district further alleges that the IHO's analysis of the issues regarding related services and the 10-month programming reflects a lack of understanding as to relevant legal principles relating to the appropriateness of Seton for the student, specifically that she erred in relying on Education Law § 3602-c in making her determinations. The district further alleges that the IHO failed to cite to "applicable and appropriate legal authorities" in her decision, which "borders on – if not crosses the line into – incompetence."

With regard to the district's allegation that the IHO erred in awarding related services and an FM unit to the student, the district specifically contends that the IHO did not cite any controlling authority requiring the district to provide related services and/or an FM unit to the student at Seton on a going-forward basis, but instead ordered the district to "rehabilitate a deficient unilaterally-selected program." The district also contends that since the parent rejected its recommended placement and informed it prior to the start of the 2011-12 school year that she was reenrolling the student at Seton and would seek tuition and other relief, the district is not responsible for the provision of any related services and/or FM unit for the 2011-12 school year.

The district requests, among other things, annulment of the portions of the IHO decision which determined that the parent met her burden in demonstrating that Seton was appropriate for the student and a finding that the IHO erred in ordering the provision of related services and an FM unit on either a going-forward and/or a make-up or compensatory basis.

In an answer, the parent responds to the district's allegations and contends that the district made new arguments in its petition that were not raised below; therefore, such arguments should not be considered for the first time on appeal.

The district submitted a reply to the parent's procedural defenses in the answer, alleging that the parent's argument that the district improperly interposed arguments for the first time on appeal is without merit. Specifically, the district alleges that although a party initiating a due process complaint notice under the IDEA must raise all issues to be addressed in the due process complaint notice, no such obligation exists for the responding party. It also alleges that the parent had a "full and fair opportunity" to respond to all of the district's arguments contained in the petition, and that she in fact did so in her answer and accompanying memorandum of law. The district requests that all the of the district's arguments asserted in its petition be considered, regardless of whether they were raised at the impartial hearing or otherwise.³

³ In response, the parent submitted a letter requesting that the reply by the district be rejected as prohibited by 8 NYCRR 279.6 because the parent alleges that the answer did not include any procedural defenses or offer any new evidence and, as such, there is no basis for a reply. While the district's reply addressed procedural defenses arising on appeal, I note that the parent's response thereto is not permitted by State regulations (8 NYCRR 279.6).

V. Applicable Standards – Unilateral Placement

Because the district conceded that it did not offer the student a FAPE for the 2011-12 school year, I need not address this issue and I will discuss whether the parent's unilateral placement of the student at Seton was appropriate.

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]). 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; 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).

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 M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]). 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 (Carter, 510 U.S. 7; Application of the Bd. of Educ., Appeal No. 08-085; Application of the Dep't of Educ., Appeal No. 08-025; Application of the Bd. of Educ., Appeal No. 08-016; Application of the Bd. of Educ., Appeal No. 07-097; Application of a Child with a Disability, Appeal No. 07-038; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-105). 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., 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; Frank G. v. Bd. of Educ., 459 F.3d at 364 [2d Cir. 2006] [quoting Bd. of Educ. v. Rowley, 458 U.S. 176, 207 [1982]) and identifying exceptions]). 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). When determining whether the parents' unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether that placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see

Gagliardo, 489 F.3d at 115 [citing Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [stating "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 private placement is only appropriate if it provides education instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; 34 CFR 300.39[a][1]; Educ. Law § 4401[1]; 8 NYCRR 200.1[ww]; Rowley, 458 U.S. at 188-89; Gagliardo, 489 F.3d at 114-15 [noting that even though the unilateral placement provided special education, the evidence did not show that it provided special education services specifically needed by the student]; Frank G., 459 F.3d at 365; Stevens v. New York City Dep't of Educ., 2010 WL 1005165, *9 [S.D.N.Y. Mar. 18, 2010]).

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; see Frank G., 459 F.3d at 364-65).

VI. Discussion

Turning to the district's arguments that Seton was not appropriate because the school could not provide the student with the necessary related services and did not provide a 12-month program to the student, I note that information contained in the hearing record indicates that at the time of the May 2011 CSE meeting, the student was diagnosed with Down Syndrome and demonstrated delays in gross motor skills, fine motor skills, speech-language skills, and sensory integration (Parent Ex. B at pp. 4, 7). The student has poor impulse control and has a problem communicating "most of the time" due to hearing and speech deficits (*id.*). The student's delays were noted to have resulted in problems with the student's activities of daily living (ADL) skills and writing (*id.*). Assessments of the student's overall cognitive functioning placed her in the "moderately delayed range of abilities," and her academic skills were "consistent with her intellectual level" and placed her within a kindergarten level in all measured areas (*id.* at p. 3; see Parent Ex. M). The student's full-scale IQ was reported to be 42 (moderate intellectual disability) (Parent Ex. M at pp. 2, 5). The May 2011 IEP reflects that the student needs frequent refocusing and redirection to the task at hand, and 1:1 supervision to ensure her safety (Parent Ex. B at pp. 5, 8). The student also has a history of hearing difficulties (*id.* at p. 6). The private psychological evaluation report reflected

that the student did not exhibit "emotional concerns," although the parent reported that the student has difficulty making and maintaining friendships as she has difficulty controlling her anger when she does not get her way and is unable to keep secrets (Parent Ex. M at p. 4).

The student's teacher at Seton testified that the student was placed in a 12:1+1 classroom (Tr. pp. 29, 67). The classroom is comprised of the teacher, one teacher assistant, and four paraprofessionals that are assigned to individual students, including one assigned to this student (Tr. pp. 61-62).⁴

A. Related Services / FM Unit

From September 2011 until the impartial hearing convened on November 15, 2011, the student had a behavior management paraprofessional at Seton that was provided by the district (Tr. pp. 16, 117, 130, 149). She did not receive any other related services at Seton, nor did she have an FM unit (Tr. pp. 52, 72-73, 130, 137, 147-49; Parent Ex H).⁵ The director of Seton testified that students are able to receive related services at Seton, but that the providers are from agencies that the district contracts with or other outside providers, rather than employees of Seton (Tr. pp. 107-08, 119).⁶

As noted previously, in addition to a behavior management paraprofessional, the student's May 2011 IEP recommended related services of HES, OT, PT, speech-language therapy, and counseling in order to address the student's needs (Parent Ex. B at p. 24). The parties do not dispute that the student needs related services or an FM unit to address her educational needs. Under the IDEA, related services are the supportive services required to assist a student with a disability to benefit from the special education services (20 U.S.C. § 1401[26]; see 34 CFR 300.34). Considering the complete absence of the related services provided to the student by Seton and the student's undisputed need for such services during the 2011-12 school year, the hearing record lacks sufficient support for a finding that the student's program at Seton was specially designed to meet her needs in the areas that would be addressed by related services.

With respect to whether the district should have provided the student with related services despite the parent's placement of the student at Seton for the 2011-12 school year, I note that in 2007, New York State amended Education Law § 3602-c to comply with the reauthorization of 20 U.S.C. § 1412(a)(10) ("Children in Private Schools") and its implementing regulations, 34 CFR 300.130-300.147 (see Educ. Law § 3602-c as amended by Ch. 378 of the Laws of 2007). In September 2007, the State Education Department's Office of Vocational and Educational Services for Individuals with Disabilities (VESID) published a guidance memorandum—"Chapter 378 of the Laws of 2007—Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the [IDEA] 2004 and New York State (NYS) Education

⁴ The student's teacher testified that the paraprofessionals in the classroom are not Seton staff members (Tr. p. 61).

⁵ I note that the student received related services from the district at Seton in prior school years (Tr. pp. 149, 164-65).

⁶ Regarding other students at Seton who receive related services, the director testified that she believed the students received the services because they were mandated on the students' IEPs (Tr. p. 119).

Law Section 3602-c"—to "inform school districts of their responsibilities to provide special education services to students with disabilities who are enrolled in nonpublic elementary or secondary schools by their parents."⁷ Education Law § 3602-c—commonly referred to as the dual-enrollment statute—requires parents who seek to obtain educational services for students with disabilities placed in nonpublic schools to file a request for such services in the 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]). The district of location's CSE must review the request for services and develop an individualized education service program (IESP) based upon the student's individual needs and "in the same manner and with the same contents" as an IEP (Educ. Law § 3602-c[2][b][1]). In addition, the district of location's CSE "shall 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.*).

The following question and answer in the Office of Special Education guidance memorandum is relevant to the issue on appeal:

12. Must the district of residence develop an IEP for a student who is parentally placed and conduct annual reviews of this IEP? U[nited] S[tates] E[ducation] D[epartment] has provided guidance that states: "If a determination is made through the child find process by the LEA (local educational agency) where the private school is located that a child needs special education and related services and a parent makes clear his or her intent to keep the child enrolled in the private . . . school located in another LEA, the LEA where the child resides need not make FAPE available to the child." Therefore, if the parents make clear their intention to keep their child enrolled in the nonpublic . . . school, the district of residence need not develop or annually review an IEP for the student.

(Office of Special Education guidance memorandum dated September 2007 titled "Chapter 378 of the Laws of 2007 - Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the [IDEA] 2004 and New York State Education Law Section 3602-c").

Upon review of the hearing record, there is no evidence that the parent attempted to dually enroll the student pursuant to Education Law § 3602-c, or that the parent was requesting dual enrollment special education services from the district. The evidence shows that the parent

⁷ Available at <http://www.p12.nysesd.gov/specialed/publications/policy/nonpublic907.pdf>. United States Education Department guidance can be found in the Federal Register at: Child Find for Parentally-Placed Private School Children with Disabilities (300.131) 71 Fed. Reg. 46593 (August 14, 2006): "If a determination is made by the LEA [local educational agency] where the private school is located that a child needs special education and related services, the LEA where the child resides is responsible for making FAPE available to the child. If the parent makes clear his or her intention to keep the child enrolled in the private [school] located in another LEA, the LEA where the child resides need not make FAPE available to the child" (See Maine School Administrative District #40, 108 LRP 40513 [ME SEA, Oct. 23, 2007] [interpreting and applying the federal guidance and concluding that a district of location was not required to create an IEP for a student given the parent's intention to keep a student in a private boarding school]).

participated in the CSE process with the district to develop the student's IEP and recommended services in the public school for the school year at issue. There is no dispute that the district was required to develop an IEP for the student for the 2011-12 school year, and there is no evidence in the hearing record that the parent made a written request prior to June 1, 2011, or that there was a permissible extension of the applicable deadline, for the student to receive special education services on an equitable basis (see Educ. Law § 3602-c[2]). The hearing record does not support the impartial hearing officer's determination that student should receive services pursuant to an IESP under the State dual enrollment statute and that Seton was therefore appropriate.

With regard to the provision of equitable services under the proportional funding provisions of federal law, the IDEA confers no individual entitlement to special education or related services upon students who are enrolled by their parents in nonpublic schools (see Memorandum to Chief State School Officers, 34 IDELR 263 [OSEP 2000]). Although districts are required by the IDEA to participate in a consultation process to develop a services plan for making special education services available to students who are enrolled privately by their parents in nonpublic schools, no such students are individually entitled under the IDEA to receive some or all of the special education and related services from the district that they would receive if enrolled in a publicly funded program designed by the district (see 34 CFR 300.134, 300.137[a], [c], 300.138[b]; Application of the Dep't of Educ., Appeal No. 11-130; Application of the Bd. of Educ., Appeal No. 03-059). If FAPE is at issue and the student has been unilaterally placed by his or her parents in a nonpublic school, the student is not precluded from equitable participation in the special education services under the proportionate share provisions.⁸ However, when seeking tuition reimbursement, parents must nevertheless show that the student has been provided services that are specially designed to address the student's unique needs supported by such services as are necessary to permit the student to benefit from instruction, regardless of whether the services were obtained privately at the parents' expense or from the district though the proportionate share provisions.

In this case, there is no indication that the student actually received related services from the district for the 2011-12 school year, however, as described above, the record shows that the district provided the student with a behavior management paraprofessional for the 10 month portion of the school year beginning in September 2011. Based on the foregoing, I find that the parents unilaterally placed the student at Seton and that the district was not responsible to provide individual entitlements to the student for her related services while enrolled at Seton.

B. 12-month Services

In May 2011, the CSE determined that the student was eligible for 12-month services and recommended the student attend a 12:1+1 special class in a special school with related services (Parent Ex. B; see 8 NYCRR 200.1[eee], 200.4[d][2][x]; see also 34 CFR 300.106[a][1], [a][2] [requiring districts to "ensure that extended school year services are available as necessary to provide FAPE," and further requiring that extended school year services "must be provided" to a student if the CSE determines "that the services are necessary for the provision of a FAPE"], 34 CFR 300.106[b] [defining extended school year services as both "special education and related

⁸ In this decision, I express no opinion regarding the extent to which the provision of publicly funded services at a unilateral placement may or may not affect a claim for reimbursement.

services" that are provided to a student with a disability beyond the "normal school year," in accordance with the student's IEP, and at no cost to the parents]). The hearing record does not reflect that the parent disagreed with the recommendation for 12-month services and, in fact, reflects that she sent the student to summer camp and the student received all of her related services during the summer (Tr. pp. 144-45).⁹

Upon review of the hearing record, I find that the evidence does not support the conclusion that Seton provided or that the student otherwise received instruction specially designed to meet the unique needs of the student. Specifically, the student did not receive 12-month services from Seton for the 2011-12 school year, and the parties do not contest that the student required such services for the 2011-12 school year (Tr. pp. 79; Parent Ex. O).¹⁰ Additionally, the hearing record is devoid of information regarding the district-funded 12-month related services that the student received during the summer and how those services provided her with specially designed instruction to meet her unique needs. Not unlike a district and its IEP, the services obtained by a parent should be designed to produce "progress, not regression" (see Cerra, 427 F.3d at 195; see also Gagliardo, 489 F.3d at 112 [noting that the same considerations and criteria that apply in determining whether a school district's placement is appropriate should be considered in determining the appropriateness of the parents' placement]), and under the circumstances here I cannot conclude that the parent met that standard.¹¹

Based on the foregoing evidence, I find that the parent did not establish that Seton was appropriate for the student for the 2011-12 school year. Accordingly, I will annul the IHO's award of tuition for the 2011-12 school year and the award of related services and an FM unit.

C. IHO Misconduct/Incompetence

Lastly, I note that the district alleges that the IHO failed to cite to "applicable and appropriate legal authorities" in her decision, which "borders on – if not crosses the line into – incompetence." (see 8 NYCRR 200.21[4][iii]). After reviewing the hearing record in this matter, I find that the impartial hearing was conducted in a manner consistent with the requirements of due process and, although I disagree with her determinations as stated above, I find that the record on appeal does not support a finding of incompetence.

VII. Conclusion

Having determined that the parent did not establish the appropriateness of Seton for the 2011-12 school year, it is not necessary to determine the issue of whether equitable considerations

⁹ The parent testified that the related services the student received over the summer were provided to the student at district expense (Tr. p. 145).

¹⁰ The director of Seton testified that Seton offers both a 10-month and a 12-month program, and that the student had been approved for a 12-month program (Tr. pp. 123-24).

¹¹ I also note that the district argues that the hearing record is "unclear" as to whether the parent demonstrated that Seton is providing the student with an education in the LRE (Pet. ¶¶ 20, 37). However, the district does not further specify the basis for its argument and it is unnecessary for me to address the issue in light of the other findings herein.

support the parent's claim, and the necessary inquiry is at an end (M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134; Application of the Dep't of Educ., Appeal No. 11-130; Application of the Bd. of Educ., Appeal No. 11-078).

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

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the portions of the IHO's November 30, 2011 decision determining that Seton was appropriate for the student for the 2011-12 school year and directing the district to pay for the student's tuition, and provide related services and an FM unit is hereby annulled.

Dated: **Albany, New York**
February 6, 2011

JUSTYN P. BATES
STATE REVIEW OFFICER