The University of the State of New York

The State Education Department
State Review Officer
www.sro.nysed.gov

No. 23-140

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

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

Liz Vladeck, General Counsel, attorneys for respondent, by Ezra Zonana, 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, in part, her request for relief for respondent's (the district's) failure to provide education services to her daughter for the 2022-23 school year. The district cross-appeals from that portion of the IHO's decision that ordered it to fund the costs of private special education teacher support services (SETSS) delivered by WBT Learning is Fun (WBT) during the 2022-23 school year. The appeal must be dismissed. The cross-appeal must be sustained.

II. Overview—Administrative Procedures

When a student who resides in New York is eligible for special education services and attends a nonpublic school, Article 73 of the New York State Education Law allows for the creation of an individualized education services program (IESP) under the State's so-called "dual enrollment" statute (see Educ. Law §3602-c). The task of creating an IESP is assigned to the same committee that designs educational programing for students with disabilities under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482), namely a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school

psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts related to IESPs, State law provides that "[r]eview of the recommendation of the committee on special education may be obtained by the parent or person in parental relation of the pupil pursuant to the provisions of [Education Law § 4404]," which effectuates the due process provisions called for by the IDEA (Educ. Law § 3602-c[2][b][1]). Incorporated among the procedural protections of the IDEA and the analogous State law provisions is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

III. Facts and Procedural History

The parties' familiarity with this matter is presumed and, therefore, the facts and procedural history of the case and the IHO's decision will not be recited here in detail.[1] Briefly, the CSE convened on December 9, 2021 and, finding the student eligible for special education as a student with a speech or language impairment, developed an IESP for the student with implementation dates in December 2021 (Parent Ex. B at pp. 1, 9). The CSE recommended that the student receive seven periods per week of SETSS in Yiddish, along with two 30-minute sessions per week of individual speech-language therapy in Yiddish, one 30-minute session per week of group speech-language therapy in Yiddish, and one 30-minute session per week of individual counseling in Yiddish (id. at p. 9).

On August 26, 2022, the parent entered into an agreement with WBT for the provision of seven periods per week of SETSS to the student for the 2022-23 school year (Parent Ex. F).

On September 1, 2022, the parent notified the district indicating that she consented to all of the services recommended in the December 2021 IESP being implemented by the district; however, she did not have any way of implementing the recommendations (Parent Ex. A at p. 2). According to the parent, she was unable to locate providers for the recommended SETSS and related services at the district's "standard rate" and, therefore, had no choice but to implement the IESP herself and seek reimbursement or direct payment from the district (id.).

A. Due Process Complaint Notice

By due process complaint notice dated September 1, 2022, the parent alleged that she had concerns regarding implementation of the December 2021 IEP and had been unable to locate SETSS and related services providers (Parent Ex. A at p. 2). The parent asserted that without supports, the parental placement of the student at Bais Yaakov Dkhal Yereim (Bais Yaakov) was untenable (id. at pp. 1, 2). She further indicated that she "located appropriate services providers independently for the 2022-23 school year at their prevailing rate" (id. at p. 2). As relief, the parent requested compensatory SETSS and related services for any period during which those services were not provided during the 2022-23 school year as well as district funding for the providers obtained by the parent (id. at p. 3).

B. Impartial Hearing and Impartial Hearing Officer Decision

After a prehearing conference on October 7, 2022 and four status conferences that were held on November 8, 2022, December 8, 2022, January 19, 2023, and March 9, 2023, the parties proceeded to an impartial hearing on May 17, 2023 and for closing arguments on June 1, 2023 (Tr. pp. 1-98).[2] By decision dated June 8, 2023, the IHO found that the district did not meet its burden

[1] Any additional facts necessary to the disposition of the parties' arguments are set forth below to resolve the issues presented in this appeal.

[2] On September 7, 2022, the IHO declined to consolidate this matter with another proceeding for the same student related to the 2021-22 school year (September 7, 2022 Interim IHO Decision). At times during the hearing, the IHO indicated that this proceeding was commenced on January 6, 2022 and she was not appointed until April 29, 2022; however, it is apparent that the IHO was referencing her appointment in the proceeding related to the 2021-

and "approache[d] this court with unclean hands" (IHO Decision at p. 5). According to the IHO, the district's "failure to appoint an [IHO] in a timely manner" weighed against the district's claim the parent failed to request an IESP in a timely manner (id. at p. 3). The IHO further found that although the December 2021 IESP was current as of the filing of the parent's due process complaint notice, the hearing record did not include evidence "that a current IESP exists" for the student and the IHO, therefore, could not determine if the December 2021 IESP was appropriate for the student (id. at pp. 3-4). The IHO found that the district's failure to ensure the student received appropriate services was "a far greater injustice than the Parent's administrative failure to file for services by June 1" (id. at p. 4). Finally, the IHO found that the district only raised the issue of equitable services months after the parent filed the due process complaint notice in this matter (id. at p. 5). However, the IHO took judicial notice that the rate charged by WBT for SETSS was "excessive" and awarded payment to WBT for all "related service expenses" at a lower specified rate (id.).

IV. Appeal for State-Level Review

The parent appeals and asserts that the IHO improperly reduced the rate for services. The district answers and cross-appeals from the IHO's decision. According to the district, the parent failed to meet her burden of proving that the services provided by WBT were appropriate.[3] In addition, the district asserts that the parent failed to make a request for an IESP by June 1st preceding the 2022-23 school year and that the IHO, therefore, erred in finding a denial of equitable services to the student. The district also contends that the IHO made several factual and legal errors in rendering her decision. The parent submits an answer to the cross-appeal. According to the parent, she met her burden of showing that the five periods per week of SETSS was an appropriate service for the student and that the parent's alleged failure to send a notice by the June 1st deadline was not grounds for denying relief.

V. Applicable Standards

A board of education must offer a FAPE to each student with a disability residing in the school district who requires special education services or programs (20 U.S.C. § 1412[a][1][A]; Educ. Law § 4402[2][a], [b][2]). However, the IDEA confers no individual entitlement to special education or related services upon students who are enrolled by their parents in nonpublic schools (see 34 CFR 300.137[a]). Although districts are required by the IDEA to participate in a consultation process for making special education services available to students who are enrolled privately by their parents in nonpublic schools, such students are not individually entitled under the IDEA to receive some or all of the special education and related services they would receive if enrolled in a public school (see 34 CFR 300.134, 300.137[a], [c], 300.138[b]).

However, under State law, parents of a student with a disability who have privately enrolled their child in a nonpublic school may seek to obtain educational "services" for their child by filing a request for such services in the district of location where the nonpublic school is located on or

22 school year and not this matter (Tr. pp. 3, 9-10, 17, 22-23, 28-29, 38-39, 90; see September 7, 2022 IHO Interim Decision at p. 1; IHO Decision at p. 2).

[3] The district also contends that the parent's request for review should be dismissed for lack of proper verification and treated as a nullity; however, the parent corrected this error as part of the parent's answer to the cross-appeal.

before the first day of June preceding the school year for which the request for services is made (Educ. Law § 3602-c[2]).[4] "Boards of education of all school districts of the state shall furnish services to students who are residents of this state and who attend nonpublic schools located in such school districts, upon the written request of the parent" (Educ. Law § 3602-c[2][a]). In such circumstances, the district of location's CSE must review the request for services and "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an individualized education program" (IEP) (Educ. Law § 3602-c[2][b][1]). The CSE must "assure that special education programs and services are made available to students with disabilities attending nonpublic schools located within the school district on an equitable basis, as compared to special education programs and services provided to other students with disabilities attending public or nonpublic schools located within the school district (id.).[5]

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

VI. Discussion

Initially, it is noted that there is no dispute between the parties that the student is a student with a speech or language impairment who qualifies for services under the IDEA. The district has not claimed that the student would not remain eligible for special education services had the parent made a request for services for the 2022-23 school year.

Instead, the district asserts that because the parent did not request an IESP prior to June 1, 2022, the student is not entitled to equitable services pursuant to Education Law §3602-c. The district first raised this issue in its closing statement on the last day of the hearing, at which time the district argued that "parentally placed students are not automatically entitled to a continuation of equitable services from year to year" and that the parent was required to request equitable services from the district prior to the start of each school year (Tr. pp. 92-93). Counsel for the parent then had the opportunity to respond to the district's argument and asserted that the district waived the defense by not raising it until the closing statement and that the district was required to send a notice to the parent prior to the June 1st deadline (Tr. pp. 94-95). On appeal, the parties continue the same arguments and the parent adds that the district waived the June 1st deadline by

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

[5] State guidance explains that providing services on an "equitable basis" means that "special education services are provided to parentally placed nonpublic school students with disabilities in the same manner as compared to other students with disabilities attending public or nonpublic schools located within the school district" ("Chapter 378 of the Laws of 2007–Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the Individuals with Disabilities Education Act (IDEA) 2004 and New York State (NYS) Education Law Section 3602-c," Attachment 1 at p. 11, VESID Mem. [Sept. 2007], available at http://www.p12.nysed.gov/specialed/publications/policy/nonpublic907.pdf). The guidance document further provides that "parentally placed nonpublic students must be provided services based on need and the same range of services provided by the district of location to its public school students must be made available to nonpublic students, taking into account the student's placement in the nonpublic school program" (id.).

paying for related services during the 2022-23 school year, that the district cannot use the defense because it has unclean hands for not convening a CSE for the 2021 school year, and that the due process complaint cannot be dismissed based on the June 1st deadline because it was facially sufficient (Req. for Rev. at pp. 5-10).

As noted in prior SRO decisions, the issue of the June 1st deadline fits with other affirmative defenses, such as the defense of the statute of limitations, which are required to be raised at the initial hearing (see M.G. v. New York City Dep't of Educ., 15 F. Supp. 3d 296, 304, 306 [S.D.N.Y. 2014] [holding that the limitations defense is "subject to the doctrine of waiver if not raised at the initial administrative hearing" and that where a district does "not raise the statute of limitations at the initial due process hearing, the argument has been waived"]; see also R.B. v. Dep't of Educ. of the City of New York, 2011 WL 4375694, at *4-*6 [S.D.N.Y. Sept. 16, 2011] [noting that the IDEA "requir[es] parties to raise all issues at the lowest administrative level" and holding that a district had not waived the limitations defense by failing to raise it in a response to the due process complaint notice where the district articulated its position prior to the impartial hearing]; Vultaggio v. Bd. of Educ., Smithtown Cent. Sch. Dist., 216 F. Supp. 2d 96, 103 [E.D.N.Y. 2002] [noting that "any argument that could be raised in an administrative setting, should be raised in that setting"]). As further noted in prior SRO decisions, the June 1st deadline may be waived; however, the mere failure to raise it in a response to the parent's due process complaint notice is not a waiver (see e.g., Application of a Student with a Disability, Appeal No. 23-032). While it would have been preferable for the district to have raised the issue at the prehearing conference or one of the status conferences, the district did raise it at the initial hearing level and the parent had the opportunity to respond to the defense. However, the parent, rather than asserting that she sent a letter to the district requesting equitable services prior to the June 1st deadline, has raised a number of reasons why the lack of such a letter should not result in dismissal of her due process complaint notice. Upon review, the parent's arguments are without merit and the hearing record, including the parties' arguments at the hearing which they continue to pursue on appeal, supports overturing the IHO's determination that the parent's failure to request equitable services prior to the June 1st deadline was outweighed as an equitable consideration by what she construed as the district's failure "to ensure that the child's related service mandate remained appropriate" (IHO Decision at p. 4).

As noted above, the district did not waive the June 1st deadline by failing to raise the issue until its closing statement. In addition, the hearing record does not support the parent's assertion that the district waived the defense by providing services to the student during the 2022-23 school year. A district may through its actions waive a procedural defense (Application of the Bd. of Educ., Appeal No. 18-088). The Second Circuit has held that a waiver will not be implied unless "it is clear that the parties were aware of their rights and made the conscious choice, for whatever reason, to waive them" and that "a clear and unmistakable waiver may be found . . . in the parties' course of conduct" (N.L.R.B. v. N.Y. Tele. Co., 930 F.2d 1009, 1011 [2d Cir. 1991]). In this instance, the December 2021 IESP was the last IESP developed for the student (see Parent Ex. B). In the due process complaint notice, the parent requested the December 2021 IESP as the student's placement for the pendency of the proceeding (Parent Ex. A at p. 2). Although there is no pendency agreement included with the hearing record, the parties indicated that they agreed to the student's pendency program and that the district was providing the student with pendency services (Tr. pp. 5-6, 10, 17-18, 23). Accordingly, as the district was providing services to the student

pursuant to pendency, the provision of those services should not constitute a waiver of its procedural defenses in this matter.

Turning to the IHO's finding that the district came to the proceeding with unclean hands, the IHO's determination in this regard appears to have been based on factual and legal errors. First, the IHO found that the district failed to appoint her to hear this matter within the requisite time period. However, the IHO's finding on this point appears to be factually incorrect as the due process complaint notice is dated September 1, 2022 and the IHO was appointed by September 7, 2022 (see Parent Ex. A; IHO Decision at p. 1). It appears that some confusion may have been due to the IHO repeatedly referencing her appointment in the proceeding related to the student's 2021-22 school year at the start of the proceedings in this matter as noted above (see Tr. pp. 3, 9-10, 17, 22-23, 28-29, 38-39, 90). Next, although the IHO correctly determined that the December 2021 IESP would have been "current" as of the start of the 2022-23 school year, the IHO found that the district did not submit a "current" IESP for the remainder of the 2022-23 school year (IHO Decision at pp. 3-4). However, the parent has not challenged the appropriateness of the December 2021 IESP and has not challenged any failure on the part of the district to convene the CSE for an annual review (see Parent Ex. A). Further, had the district convened the CSE to develop an IESP for the student during the 2022-23 school year, such an action would have constituted a waiver of the June 1st deadline (see Application of a Student with a Disability, Appeal No. 23-033). Accordingly, the IHO's findings regarding the development of a "current" IESP for the student were in error as any failure to develop an IESP after the June 1st deadline cannot equitably weigh against the district's assertion that it was not required to develop an IESP for the student because the parent did not make a timely request for equitable services.

Finally, the parent asserts that the district failed to provide her with notice of the June 1st deadline in compliance with its standard operating procedures manual. The thrust of the parent's argument is that the lack of notice would excuse the parent's compliance with the June 1st deadline due to a lack of knowledge of the requirement; however, this is not a valid argument as a lack of knowledge would not relieve the parent of the notice obligation under the statute. The Commissioner of Education has previously addressed this issue and determined that a parent's lack of awareness of the June 1st statutory deadline does not invalidate the parent's obligation to submit a request for dual enrollment by the June 1st deadline (Appeal of Austin, 44 Ed. Dep't Rep. 352, Decision No. 15,195, available at https://www.counsel.nysed.gov/ Decisions/volume44/d15195; Appeal of Beauman, 43 Ed Dep't Rep 212, Decision No. 14,974 available at https://www.counsel.nysed.gov/Decisions/volume43/d14974). Specifically, the Commissioner stated that Education Law § "3602-c(2) does not require [the district] to post a notice of the deadline" and that a parent being "unaware of the deadline does not provide a legal basis" for the waiver of the statutory deadline for dual enrollment applications (Appeal of Austin). Accordingly, the parent's argument and the IHO's weighing of the lack of a notice were without merit.

Thus, the hearing record contains no evidence satisfying the requirement under Education Law § 3602-c, namely, that the parent made a written request for IESP services by June 1st preceding the 2022-23 school year (see generally Apr. 3, 2023 Tr. pp. 1-9; Apr. 27, 2023 Tr. pp. 1-24; May 9, 2023 Tr. pp. 1-29; Parent Exs. A-E).[6] Additionally, the parent has not asserted either

[6] As noted in prior matters, the statute supports a policy of excluding resident students from receiving services

at the hearing or on appeal that the parent did send such a request to the district. Accordingly, the hearing record supports the district's cross-appeal.

As a final matter the IHO does not appear to have addressed whether the services provided by WBT to the student during the 2022-23 school year were appropriate (see IHO Decision). The parent testified that WBT provided the student with five hours per week of SETSS during the 2022-23 school year (Parent Ex. D at ¶ 7). Accordingly, although not necessary in light of my determination above, the issue in this matter is whether the parent is entitled to public funding of the costs of the private SETSS. "Parents who are dissatisfied with their child's education can unilaterally change their child's placement . . . and can, for example, pay for private services, including private schooling. They do so, however, at their own financial risk. They can obtain retroactive reimbursement from the school district after the [IESP] dispute is resolved, if they satisfy a three-part test that has come to be known as the Burlington-Carter test" (Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 526 [2d Cir. 2020] [internal quotations and citations omitted]; see Carter, 510 U.S. at 14 [finding that the "Parents' failure to select a program known to be approved by the State in favor of an unapproved option is not itself a bar to reimbursement"]).

The parent's request for privately-obtained SETSS must be assessed under this framework; namely, if it had been determined that the district did not provide the student with equitable services during the 2022-23 school year, the issue would be whether the SETSS obtained by the parent from WBT constituted appropriate unilaterally obtained services for the student such that the cost of the SETSS would be reimbursable to the parent upon presentation of proof that the parent has paid for the services or, alternatively, payable directly by the district to the provider upon proof that the parent is legally obligated to pay.

Turning to the standard to apply in assessing the appropriateness of the unilaterally-obtained services, the federal standard is instructive. A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998]). 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

---

under an IESP if parents miss the June 1st deadline, but read as a whole, does not clearly indicate that school districts are required to bar resident students whose parents have missed the deadline (see Application of a Student with a Disability, Appeal No. 23-032). For example, the statute indicates that "[b]oards of education are authorized to determine by resolution which courses of instruction shall be offered, the eligibility of pupils to participate in specific courses, and the admission of pupils. All pupils in like circumstances shall be treated similarly" (Educ. Law § 3602-c[6] [emphasis added]). The statute suggests that a Board could elect to admit students who have missed the deadline for dual enrollment or refuse to admit such students but should not act in a discriminatory manner by admitting some while rejecting others in similar circumstances. Consistent with this reading, there is State guidance indicating that "[i]f a parent does not file a written request by June 1, nothing prohibits a school district from exercising its discretion to provide services subsequently requested for a student, provided that such discretion is exercised equally among all students with disabilities who file after the June 1 deadline" ("Frequently Asked Questions About Legislation Removing Non-Medical Exemptions from School Vaccination Requirements" Follow-Up, at p. 4 [DOH/OCFS/SED Aug. 2019], available at https://www.health.ny.gov/prevention/immunization/schools/school_vaccines/docs/2019-08_vaccination_requirements_faq.pdf).

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 at 364; 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). When determining whether a unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether the 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; 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 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, 773 F.3d at 386; C.L., 744 F.3d at 836; 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).

According to the testimony of the special education director of WBT (director), as of January 2023, WBT was providing the student with five hours per week of SETSS during the 2022-23 school year, two hours less than the seven hours of SETSS recommended for the student in the December 2021 IESP (Parent Ex. E at ¶¶ 5, 12). According to the director, the SETSS provider who was providing services to the student was certified by the State to teach students with disabilities and was trained "to teach literacy and comprehension" (id. at ¶ 13). According to the director, goals were created for the student and reviewed quarterly, and the student's progress was measured through quarterly assessments, meetings with staff, observations of the student, and

daily session notes (id. at ¶¶ 17, 19). The director testified that the student showed progress, but due to her academic and social delays, required continued services (id. at ¶ 20). The director then testified that the student required seven hours per week of 1:1 SETSS for the 2022-23 school year (id. at ¶ 21). Lacking from the director's testimony was any explanation as to how the delivery of five hours per week of SETSS was an appropriate program to meet the student's special education needs, or an explanation as to how five hours was sufficient when she testified that the student required seven hours per week. Additionally, nothing in the hearing record explains how the student received related services during the 2022-23 school year or how the parent's unilaterally obtained services may have met the student's needs with respect to speech-language therapy or counseling, which were identified as need areas in the December 2021 IEP and for which the district recommended related services.

Other than the director's general testimony, the hearing record does not include any information regarding the special education services delivered to the student during the 2022-23 school year, despite the reference to quarterly assessments, staff meetings, classroom observations, and daily session notes. Accordingly, even if I were to find that the parent requested equitable services from the district prior to the June 1st preceding the 2022-23 school year, it does not appear that the hearing record included sufficient information to support the parent's burden of proving that the unilateral services she obtained were appropriate to address the student's special education needs. The parent appears to argue that she was simply attempting, albeit partially successfully, to implement the program recommended for the student in the December 2021 IESP; however, the parent must still come forward with evidence that describes the services and the delivery thereof. As discussed above, the hearing record lacks sufficient information about the services being provided to the student, particularly the level of services the student received and how the services addressed the student's needs (see L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 491 [S.D.N.Y. 2013] [in reviewing the appropriateness of a unilateral placement, courts prefer objective evidence over anecdotal evidence]; L.Q. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 490 [S.D.N.Y. 2013] [rejecting parents' argument that counseling services met student's social/emotional needs where "[t]here was no evidence . . . presented to establish [the counselor's] qualifications, the focus of her therapy, or the type of services provided" and, further, where "[the counselor] did not testify at the hearing and no records were introduced as to the nature of her services or how those services related to [the student's] unique needs"]; R.S. v. Lakeland Cent. Sch. Dist., 2011 WL 1198458, at *5 [S.D.N.Y. Mar. 30, 2011] [rejecting the parents' argument that speech-language therapy services met student's needs where parents "did not offer any evidence as to the qualifications of the provider of the therapy, the focus of the therapy, or when and how much therapy was provided"], aff'd sub nom, 471 Fed. App'x 77 [2d Cir. June 18, 2012]).

VII. Conclusion

Having found that the hearing record contains no evidence that the parent made a written request to the district for IESP services by June 1st preceding the 2022-23 school year as required under Education Law § 3602-c, the necessary inquiry is at an end.

I have considered the parties' remaining contentions and find that I need not address them in light of my determinations herein.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision, dated June 8, 2023, is modified by reversing those portions which found the district denied the student equitable services for the 2022-23 school year and which awarded the parent funding for unilaterally obtained SETSS for the 2022-23 school year.

Dated: **Albany, New York**
September 21, 2023

CAROL H. HAUGE
STATE REVIEW OFFICER