



The University of the State of New York

The State Education Department

State Review Officer

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No. 24-060

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 Cynthia Sheps, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from a portion of a decision of an impartial hearing officer (IHO) which included a "clerical mistake" in the relief ordered relating to the 2022-23 school year. Respondent (the district) cross-appeals from the IHO's determination that directed the district to fund/reimburse the parent for the costs of the unilaterally-obtained services delivered to the student for 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 programming for students with disabilities under the IDEA (20 U.S.C. §§ 1400-1482), namely a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3,

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

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

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

III. Facts and Procedural History

The parties' familiarity with this matter is presumed and, therefore, the facts and procedural history of the case and the IHO's decision will not be recited here in detail. Briefly, the student has a moderate to severe hearing loss bilaterally and has a cochlear implant (Parent Exs. B at p. 1; E at pp. 1, 4, 5; G at ¶ 2).

On May 7, 2021, a CSE convened to develop an IESP for the student and found the student eligible for special education services as a student with a hearing impairment (Parent Ex. B at p. 1).¹ For the 2021-22 school year, the CSE recommended that the student receive special education teacher support services (SETSS), speech-language therapy, counseling, and hearing education services as well as assistive technology devices and services (id. at pp. 1, 9).

The student was parentally placed at United Talmudical Academy-Keap (UTA), a nonpublic school, for the 2022-23 school year (see Parent Exs. C at p. 2; F at p. 2). Beginning on August 23, 2022, the parent initiated a series of email exchanges with an audiologist employed by the district to request additional support services for the student's 2022-23 school year and later told the district's audiologist that she was "working with [UTA] to open an IEP meeting" (Parent Ex. F). The audiologist advised the parent to write a letter to the CSE requesting a reevaluation of the student (id. at p. 1).

The parent emailed a 10-day notice letter to the district dated September 2, 2022 to advise that she "consent[ed] to all" the services listed in the student's May 2021 IESP but that she was unable to locate service providers at the district's "standard rate[s]" and would therefore be "implement[ing] the May 2021 IESP on [her] own" and seeking reimbursement/direct payment from the district for the 2022-23 school year (Parent Ex. C).

In a due process complaint notice, dated September 6, 2022, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2022-23 school year because it did not convene a "new IEP meeting" and the student's May 2021 IESP was outdated and expired (Parent Ex. A). The parent further argued that the district failed to implement the May 2021 IESP and the parent could not locate service providers on her own accord (id. at p. 2). The parent sought pendency based on the May 2021 IESP and the following relief: a finding that the district failed to offer the student a FAPE for the 2022-23 school year; an order directing the district to fund the student's program set forth in the May 2021 IESP; and an order directing the district to provide a bank of compensatory education services for the services that the district did not provide during the 2022-23 school year (id. at pp. 1, 3).

The parent reported that she contacted Beyond Limits Services, a private agency, to provide SETSS, speech-language therapy, and oral transliterator services to the student for the 2022-23 school year, beginning on September 6, 2022 (Parent Ex. G at ¶¶ 11, 12).

¹ The student's eligibility for special education as a student with a hearing impairment is not in dispute (see 34 CFR 300.8[c][5]; 8 NYCRR 200.1[zz][5]).

An impartial hearing convened on November 7, 2022 and concluded on October 17, 2023, after seven days of proceedings (Tr. pp. 1-80).² During the course of the impartial hearing, the CSE convened on March 20, 2023 and created a new IESP to be implemented beginning April 3, 2023, recommending the same program as it had recommended in the student's prior May 2021 IESP, with the addition of occupational therapy (OT) and oral transliterator services (Parent Ex. E at p. 15).

The parent served the district with an amended due process complaint notice, dated April 4, 2023, in which the parent repeated the allegations from her original September 2022 due process complaint notice and amended her proposed resolution to seek an order directing the district to fund the student's program as set forth in the March 20, 2023 IESP retroactively to the start of the 2022-23 school year (Parent Ex. D at p. 4). The parent also sought an updated pendency order that reflected the services listed in the March 20, 2023 IESP (id. at p. 2).³

In a decision dated January 19, 2024, the IHO determined that the district failed to offer the student FAPE for the 2022-23 school year, that the parent had met her burden to show that the private agency provided educational instruction specially designed to meet the unique needs of the student, and that equitable considerations weighed in favor of the parent's requested relief (IHO Decision at pp. 9-13). As relief, the IHO ordered the district to "directly pay/fund the [p]arent/[p]rivate [a]gency for the programming and services per the February 6, 2023 IESP" with the rate to be determined by the "implementation unit in cooperation with the [p]arents and/or their agency or providers based upon the market value for said services" (id. at p. 14).

IV. Appeal for State-Level Review

The parent appeals, alleging that the IHO's reference in the ordering clause of the decision to a February 6, 2023 IESP was an obvious "clerical mistake" because the only IESPs relevant to the proceeding were the student's May 7, 2021 IESP and the March 20, 2023 IESP. The parent requests that the district be directed to fund the services set forth in the May 2021 and March 2023 IESPs.

In an answer and cross-appeal, the district responds that, regardless of the IHO's clerical mistake, the IHO erred in awarding any relief because the parent failed to comply with a State statutory June 1 deadline for requesting services and failed to sustain her burden to establish the appropriateness of the unilaterally-obtained services. The district further alleges that the parent has not demonstrated a legal obligation to pay the cost of the unilaterally-obtained services.

In a reply and answer to the cross-appeal, the parent alleges that the district waived the June 1 affirmative defense by its course of conduct. The parent also asserts that she demonstrated

² The IHO issued an interim decision dated November 7, 2022 that found the student's pendency program consisted of the services listed in the May 7, 2021 IESP and was in effect as of September 6, 2023, when the parent filed the due process complaint notice (Nov. 7, 2022 Interim IHO Decision).

³ The IHO issued an interim decision dated August 1, 2023 that added OT and oral transliterator services to the student's pendency placement, with an effective date of March 27, 2023 that the parties agreed to (Aug. 1, 2023 Interim IHO Decision; see Tr. pp. 36-37).

the appropriateness of the unilaterally-obtained services provided to the student and that she incurred a financial obligation to pay for such services.

V. Applicable Standards

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

However, under State law, parents of a student with a disability who have privately enrolled their child in a nonpublic school may seek to obtain educational "services" for their child by filing a request for such services in the public school district of location where the nonpublic school is located on or before the first day of June preceding the school year for which the request for services is made (Educ. Law § 3602-c[2]).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 [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 Thus, under State law an eligible New York State resident student may be voluntarily enrolled by a parent in a nonpublic school, but at the same time the student is also enrolled in the public school district, that is dually enrolled, for

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 (Questions and Answers), VESID Mem. [Sept. 2007], available at <https://www.nysed.gov/special-education/guidance-parentally-placed-nonpublic-elementary-and-secondary-school-students>). The guidance document further provides that "parentally placed nonpublic students must be provided services based on need and the same range of services provided by the district of location to its public school students must be made available to nonpublic students, taking into account the student's placement in the nonpublic school program" (*id.*). The guidance has recently been reorganized on the State's web site and the paginated pdf versions of the documents previously available do not currently appear there, having been updated with web-based versions.

the purpose of receiving special education programming under Education Law § 3602-c, dual enrollment services for which a public school district may be held accountable through an impartial hearing.

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

VI. Discussion

A. Scope of Review

It is first necessary to identify what issues are properly before me on appeal. State regulations governing practice before the Office of State Review require that the parties set forth in their pleadings "a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately," and further specify that "any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer" (8 NYCRR 279.8[c][2], [4]; see 8 NYCRR 279.4[a]). Further, an IHO's decision is final and binding upon the parties unless appealed to a State Review Officer (34 CFR 300.514[a]; 8 NYCRR200.5[j][5][v]).

Although the IHO acknowledged that the parent's due process complaint notice requested relief in the form of compensatory education services, the IHO did not make any findings or issue a ruling with respect to the parent's request for compensatory education relief (see IHO Decision at pp. 2, 7-14). The parent does not appeal the IHO's failure to address her claim for compensatory education relief. Consequently, the parent's request for compensatory education services has been abandoned and will not be further discussed (8 NYCRR 279.8[c][4]).

In addition, the district does not appeal the IHO's finding that it failed to offer the student a FAPE for the 2023-24 school year (IHO Decision at pp. 7-8). As such, that finding has become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

B. Individualized Education Services Program (IESP) -- June 1 Deadline

The district asserts as a cross-appeal that the student was ineligible for equitable services under Education Law § 3602-c because the parent failed to comply with the statutory June 1 deadline for requesting the services. The IHO did not issue a ruling with respect to the district's June 1 deadline defense and the crux of the parties' dispute on appeal is whether the district waived its June 1 defense by its conduct.

The State's dual enrollment statute requires parents of a New York State resident student with a disability who is parentally placed in a nonpublic school and for whom the parents seek to obtain educational services to file a request for such services in the district 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 issue of the June 1 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"]). "By requiring parties to raise all issues at the lowest administrative level, IDEA 'affords full exploration of technical educational issues, furthers development of a complete factual record and promotes judicial efficiency by giving these agencies the first opportunity to correct shortcomings in their educational programs for disabled children.'" (R.B. v. Dep't of Educ. of the City of New York, 2011 WL 4375694, at *6 [S.D.N.Y. Sept. 16, 2011], quoting Hope v. Cortines, 872 F. Supp. 14, 19 [E.D.N.Y. 1995] and Hoelt v. Tucson Unified Sch. Dist., 967 F.2d 1298, 1303 [9th Cir. 1992]; see C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at *12 [S.D.N.Y. Sept. 22, 2011]).

In addition, a district may waive the June 1 deadline requirement through its conduct. A district may, through its actions, waive a procedural defense (Application of the Bd. of Educ., Appeal No. 18-088). The statute itself is not drafted in jurisdictional terms insofar as it creates a June 1 notice requirement but does not specify that a school district is precluded from providing services special education services to a student with a disability if a parent misses the June 1 deadline (Educ. Law § 3602-c[2][a]).⁶ 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]).

⁶ The statute supports a policy of excluding resident students from receiving services under an IESP if parents miss the June 1 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).

In this instance, the hearing record indicates that the district's attorney first orally raised the June 1 deadline in his opening statement at the October 17, 2023 hearing, which was the seventh and final hearing date (see Tr. p. 56; see also Tr. pp. 1, 11, 17, 23, 32, 40). In response, the parent's attorney argued that the district waived the affirmative defense because it did not raise such defense at an earlier administrative hearing date and waived the June 1 requirement by its actions in convening the March 2023 CSE to develop an IESP after the June 1, 2022 deadline during the school year in dispute (see Tr. pp. 58-60, 71). The IHO requested that the parties submit written briefs with legal citations to support their respective positions by the deadlines he scheduled (see Tr. pp. 65-67, 75-78). The parties did not submit closing briefs and the IHO's January 19, 2024 decision is devoid of any finding with respect to the June 1 issue that predominated the October 17, 2023 hearing date (see IHO Decision; see also Tr. pp. 51-79). The parent argues in her reply and answer to the cross-appeal that the district's failure to submit a closing brief within the scheduled timeframes as directed by the IHO is further indication that the district waived its June 1 defense (Reply & Answer to the Cr.-Appeal at p. 2).

In the exercise of my discretion, under the circumstances of this case where the parties failed to submit written arguments as directed by the IHO and the IHO made no rulings on the district's affirmative defense argument and instead rendered a substantive decision on the merits of the parent's amended due process complaint notice, I decline to render a determination this late in the administrative process on a dispositive procedural ground and also find it is not necessary to do so in light of my findings below.

C. Unilaterally-Obtained Services

The district also asserts for a cross-appeal that the IHO erred in finding that the parent sustained her burden to show that the unilaterally-obtained services provided educational instruction specially designed to meet the unique needs of the student.

In this matter, the student has been parentally placed in a nonpublic school and the parent does not seek tuition reimbursement for the cost of the student's attendance at UTA. Rather, the parent seeks public funding of the costs of the unilaterally-obtained services from Beyond Limits Services. "Parents who are dissatisfied with their child's education can unilaterally change their child's placement . . . and can, for example, pay for private services, including private schooling. They do so, however, at their own financial risk. They can obtain retroactive reimbursement from the school district after the [IESP] dispute is resolved, if they satisfy a three-part test that has come to be known as the Burlington-Carter test" (Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 526 [2d Cir. 2020] [internal quotations and citations omitted]; see Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 14 [1993] [finding that the "Parents' failure to select a program known to be approved by the State in favor of an unapproved option is not itself a bar to reimbursement"]).⁷

The parent's request for unilaterally-obtained services must be assessed under this framework. That is, a board of education may be required to reimburse parents for their

⁷ State law provides that the parent has the obligation to establish that a unilateral placement is appropriate, which in this case is the special education services that the parent obtained from Beyond Limits Services for the student (Educ. Law § 4404[1][c]).

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 (Carter, 510 U.S. 7; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 252 [2d Cir. 2009]). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

Turning to a review of the appropriateness of the unilaterally-obtained services, the federal standard 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 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. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 207 [1982]). 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 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's Needs

Although not in dispute, a brief description of the student's special education needs is warranted to resolve the issue on appeal. The evidence in the hearing record regarding the student is generally limited to the information included in the student's May 2021 IESP and March 2023 IESP (see Parent Exs. B; E). According to the May 2021 IESP, the student had a moderately-severe to severe hearing loss bilaterally and middle ear pathology that significantly impacted her hearing (Parent Ex. B at p. 1).⁸ The May 2021 IESP reported that, due to the student's significant hearing loss, she did not have full access to all speech sounds, had difficulty listening, confused sounds, deleted sounds and exhibited many articulation errors within her speech, and "slur[red] many of her words together, making intelligibility difficult" (id.). Additionally, the student had difficulty sustaining attention for auditory tasks such as reading books and following directions (id.).

According to the May 2021 IESP, developed when the student was four years and seven months of age, her language skills were judged to be mildly to moderately delayed and she presented with cognition and communication deficits (Parent Ex. B at p. 1). In the area of academics, the May 2021 IESP indicated that the student did not count in order up to 10, follow two-step directions, or recognize her name in print, and she struggled to follow along when read a story aloud, had a limited attention span, and could not match items (id. at p. 2). In the area of social development, the May 2021 IESP reported the student did not have age-appropriate play skills, did not take turns or follow rules of a game, and during free play the student usually did not engage with the whole group (id. at p. 3).

In connection with the student's physical development, the May 2021 IESP indicated that the student "perform[ed] gross motor and fine motor activities" at an age-appropriate level (Parent Ex. B at p. 4). The May 2021 IESP indicated that the student was scheduled to receive a cochlear

⁸ The student's May 7, 2021 IESP reported information in areas of academics and social development from a May 2021 speech and language progress report and a December 2020 special education itinerant teacher (SEIT) progress report (Parent Ex. B at pp. 1-2, 3). The May 2021 IESP cited an undated social history update within social development and physical development sections (id. at pp. 3,4).

implant sometime during summer 2021 and at the time the IESP was developed, the student wore two hearing aids and used an FM unit so that she could "clearly hear the teacher" (*id.* at pp. 1, 4).

The May 2021 IESP identified management strategies and interventions to address the student's needs, including preferential seating, refocusing and redirections prompts, frequent check ins, repetition, extended time to respond, simplified and shortened directions, positive reinforcement and praise, visual aids/models, and use of graphic organizers (Parent Ex. B at p. 4).

Based upon the student's stated needs, the May 2021 CSE recommended a program of related services consisting of SETSS for five periods per week provided in a group; four 30-minute sessions per week of individual speech-language therapy; one 30-minute session per week of counseling provided in a group; and two 30-minute sessions per week of individual hearing education services, and assistive technology devices and services (Parent Ex. B at p. 9).

The March 2023 IESP included updated information on the student's hearing ability and information from a January 2023 occupational therapy (OT) evaluation (Parent Ex. E at pp. 1-3, 4, 5). As reported in the March 2023 IESP, results of the OT evaluation indicated that the student presented with challenges with fine motor coordination, graphomotor skills, attention and following directions (*id.* at p. 3). The March 2023 IESP included information from a June 2022 SETSS progress report that identified the student's needs in the areas of reading, writing, math, and social development (*id.* at pp. 3, 4, 5). In the areas of reading and writing, the student recognized, named, and wrote Hebrew letters, and sang the ABC song; however, the student did not recognize or write the ABCs (*id.* at p. 3). Further, the student counted to 20 with 1:1 correspondence, recognized written numbers through 10, and added and subtracted with her fingers within five, but did not write numbers, tell time on a digital clock, or demonstrate understanding of place value (*id.* at p. 4). The March 2023 IESP included information from a September 2022 speech progress report that, "[a]s [the student] [wa]s not receiving much gain from her hearing aid, therapy ha[d] been focused primarily on improving the functioning of her cochlear implant" (*id.*). According to the March 2023 IESP, the student's receptive and expressive language skills were delayed due to her hearing issues; she used simple, short sentences and had difficulty hearing and processing words spoken in the classroom with noise present and when not close to the teacher (*id.*). In the area of social development, the March 2023 IESP reflected that the student needed to improve her social skills, had difficulty showing appropriate proximity to others, and became overwhelmed in a large group (*id.*). Further, the March 2023 IESP included information from the June 2022 SETSS progress report that the student frustrated easily, requested constant reassurance, and "[w]hen she work[ed] with her auditory verbal therapist, she absolutely refuse[d] to cooperate if circumstances [we]re challenging, like when she had fluid in her ear" (*id.* at p. 5). In the area of physical development, the March 2023 IESP reported the student received a cochlear implant in January 2023 that she had not fully adjusted to and continued to present with hearing difficulties (*id.*).

The March 2023 IESP identified the same management needs as indicated in the student's May 2021 IESP, including repetition, use of visuals, extra time to respond and use of graphic organizers for writing and reading and the March 2023 IESP identified additional strategies and interventions that included: providing a multisensory approach, presenting concept in story form, directions presented in small chunks along with visuals, direct social skills instruction, small groups for tasks and tests, clear, concise instructions, fine and gross motor drills, direct feedback,

pre-teaching and post-teaching, as well as paraprofessional services for navigation of hallways and health concerns (compare Parent Ex. B at p. 4, with Parent Ex. E at pp. 5-6). Based on the above identified needs, in addition to the recommendations and services included within the May 2021 IESP, the March 2023 CSE recommended that the student's program include two 30-minute sessions per week of individual OT, and individual interpreting services/oral transliterator provided full-time on a daily basis (compare Parent Ex. B at p. 9, with Parent Ex. E at pp. 15-16).

2. Beyond Limits Services

As stated above, the IESPs identified several of the student's needs with respect to her hearing, speech and language skills, attention, academic abilities, social development, and motor skills, but there is sparse evidence in the hearing record that demonstrates what services the student received or how the contracted agency addressed the student's needs.

According to the affidavit testimony from the owner/educational director at Beyond Limits Services (director) and the student's parent, for the 2022-23 school year, Beyond Limits Services provided the student with five hours per week of SETSS, four 30-minute sessions per week of individual speech-language therapy, and full-time oral transliterator services beginning on September 6, 2022 (Parent Exs. G ¶¶ 11, 12; H ¶¶ 3, 12, 13).⁹ According to the director, the student's SETSS provider held New York State certification to teach students with disabilities and had experience and training to teach literacy and comprehension to school aged children; the speech-language therapy provider held New York State licensure as a speech-language pathologist (Parent Ex. H ¶¶ 15-16; see also Parent Ex. I). The director also identified by name two individuals who were oral transliterators for the 2022-23 school year (Parent Ex. H ¶ 17). The director stated that the SETSS provider and speech-language therapy provider "prepared for sessions, created goals and met with teachers and parents" and that the student had made progress with her service providers (id. ¶¶ 18, 20). None of the providers identified by the director testified at the impartial hearing.

Based on the foregoing, I find that the evidence in the hearing record does not support the IHO's finding that the parent sustained her burden to demonstrate the appropriateness of the unilaterally-obtained services. Although the parent's and director's affidavits provided general statements about the services provided to the student and frequency, the hearing record lacks objective evidence about how the services from Beyond Limits Services provided specially-designed instruction to address the student's needs (see Gagliardo, 489 F.3d at 112; Frank G., 459 F.3d at 364-65). For example, although the director stated that the student made progress and "progress was measured through informal quarterly assessments, consistent meetings with providers and support staff, observation of [the student] in the classroom, and daily session notes" the hearing record contains no evidence related to the student's participation with the service providers and does not include any of the assessments, classroom observations or session notes referenced by the director (Parent Ex. H ¶ 19; see generally Parent Exs. A-J). Likewise, the hearing record does not include any records of attendance or a schedule of services in relation to the 2022-23 school year, nor does it include reports from the service providers or testimony from the

⁹ The director specified that, although recommended in the student's IESPs as group services, the privately-obtained SETSS were delivered in a 1:1 setting as the agency had been unable "to locate a similarly situated group of students" and that the agency delivered 1:1 speech-language therapy services (Parent Ex. H ¶¶ 14, 18).

providers of SETSS, speech-language therapy or oral transliterator services that reported on or described the specialized instruction provided to the student for the 2022-23 school year and how such services addressed the student's unique needs (see generally Parent Exs. A-J; Tr. pp. 1-80). Without such evidence, I find that the parent did not sustain her burden by only submitting anecdotal evidence of the student's program and limited, if any, objective evidence to demonstrate how the unilaterally-obtained services provided specially designed instruction to meet the student's unique needs (see L.K. v. Northeast 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]).

Accordingly, I find that the parent did not meet her burden to demonstrate that the services provided by Beyond Limits Services were appropriate for the student's 2022-23 school year and therefore the IHO's determination must be overturned.

VII. Conclusion

Having determined that the IHO erred in concluding that the parent sustained her burden to demonstrate the appropriateness of her unilaterally-obtained services, the parent's requested relief is denied.

I have considered the parties' remaining contentions, including the parent's allegation that the IHO made a clerical error by referencing the incorrect date of the IESP, and find it is unnecessary to address them in light of my determinations above.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision dated January 19, 2024 is modified by reversing that portion which found that the parent met her burden to establish that the unilaterally-obtained services were appropriate to meet the student's needs; and

IT IS FURTHER ORDERED that the IHO's decision dated January 19, 2024 is modified by reversing that portion which directed the district to reimburse/fund services for the 2022-23 school year.

Dated: Albany, New York
April 15, 2024

SARAH L. HARRINGTON
STATE REVIEW OFFICER