



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 24-070

**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:**

Gulkowitz Berger LLP, attorneys for petitioner, by Shaya M. Berger, 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 the decision of an impartial hearing officer (IHO) which denied her request for direct funding of the costs of her daughter's private special education teacher support services (SETSS) for the 2023-24 school year. The 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, a CSE convened on November 2, 2022, determined the student was eligible for special education as a student with a speech or language impairment, and formulated an IESP for the student to be

implemented starting November 15, 2022 (see generally Dist. Ex. 1).<sup>1</sup> The November 2022 CSE recommended that the student receive five periods per week of direct, group SETSS, two 30-minute sessions per week of individual speech-language therapy, one 30-minute session per week of individual counseling, and one 30-minute session per week of group counseling (id. at pp. 9-10).

In a May 5, 2023 letter prepared by the district and signed by the parent on May 9, 2023, the parent notified the district that the student had been parentally placed in a nonpublic school and, as a student entitled to a special education program, the parent was requesting that the district provide those services to the student (see Parent Ex. E).

In a due process complaint notice, dated June 29, 2023, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) and equitable services for the 2023-24 school year (see IHO Ex. III). In an amended due process complaint notice dated August 1, 2023, the parent continued to assert that the district denied the student a FAPE and equitable services for the 2023-24 school year and requested a pendency order, an award of and funding for 15 sessions per week of "special education teacher services at an enhanced rate for the entire 12-month 2023-24 school year," and an award for "all related services and aides on the IEP" (Parent Ex. A).

The parent executed an undated contract with a specific special education teacher to provide the student with "15 hours / Sessions a week" of SETSS at a specified hourly rate for the 2023-24 school year effective September 1, 2023 (Parent Exs. C; D at p. 3). The student attended a general education nonpublic school during the 2023-24 school year and received 15 hours per week of SETSS at school (Tr. pp. 66-68, 71; Parent Ex. D at p. 1).

An impartial hearing convened on August 1, 2023, and concluded on December 12, 2023 after five days of proceedings (Tr. pp. 1-107). The IHO issued an interim decision, dated October 11, 2023, finding that the student's pendency placement lay in an IEP dated February 29, 2016—as the parent requested—and ordering 15 hours of individual "direct special educator services" per week, three 30-minute sessions of individual speech-language therapy per week and two 45-minute sessions of individual counseling per week for "12 months" (Interim IHO Decision; see Parent Ex. A at p. 1). In a final decision dated January 18, 2024, the IHO determined that the district failed to provide the student with a FAPE for the 2023-24 school year by failing to implement any IESP services, but that the parent failed to show that the 15 hours of unilaterally-obtained SETSS for the student were appropriate (IHO Decision at pp. 12-15). As relief, the IHO ordered the district to provide equitable services to the student consistent with the mandates in the student's November 2022 IESP through the end of the 2023-24 school year and to provide the student with a bank of 20 hours of compensatory individual speech-language therapy (id. at pp. 15-16).

#### **IV. Appeal for State-Level Review**

The parent appeals. The parties' familiarity with the particular issues for review on appeal in the parent's request for review and the district's answer thereto is also presumed and, therefore,

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<sup>1</sup> The student's eligibility for special education as a student with a speech or language impairment is not in dispute (see 34 CFR 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

the allegations and arguments will not be recited here. The essence of the parties' dispute on appeal is whether the IHO erred in determining that the parent failed to show that the 15 hours of unilaterally-obtained SETSS for the student were appropriate.

## 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]).<sup>2</sup> "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.*).<sup>3</sup> Thus, under State law an eligible New York State resident student may be voluntarily enrolled by a parent in a nonpublic school, but at

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<sup>2</sup> 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]).

<sup>3</sup> 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 same time the student is also enrolled in the public school district, that is dually enrolled, for the purpose of receiving special education programming under Education Law § 3602-c, dual enrollment services for which a public school district may be held accountable through an impartial hearing.

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

## **VI. Discussion**

Initially I note that neither party appeals from the IHO's findings that the district failed to offer the student a FAPE for the 2023-24 school year or provide the student with equitable services for that school year (IHO Decision at pp. 12-14). Additionally, neither party appeals the IHO's compensatory education award (*id.* at pp. 15-16). As such, those findings have 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]).

### **A. Unilaterally-Obtained Services**

Prior to reaching the substance of the parties' arguments regarding the parent's unilaterally-obtained SETSS services, some consideration must be given to the appropriate legal standard to be applied. 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 there. Rather, the parent seeks public funding of the costs of the private SETSS. Generally, districts that fail to comply with their statutory mandates to provide special education can be made to pay for special education services privately obtained for which a parent paid or became legally obligated to pay, a process that is essentially the same as the federal process under IDEA. Accordingly, the issue in this matter is whether the parent is entitled to public funding of the costs of the private services. "Parents who are dissatisfied with their child's education can unilaterally change their child's placement . . . and can, for example, pay for private services, including private schooling. They do so, however, at their own financial risk. They can obtain retroactive reimbursement from the school district after the [IESP] dispute is resolved, if they satisfy a three-part test that has come to be known as the Burlington-Carter test" (Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 526 [2d Cir. 2020] [internal quotations and citations omitted]; see Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 14 [1993] [finding that the "Parents' failure to select a program known to be approved by the State in favor of an unapproved option is not itself a bar to reimbursement"]).<sup>4</sup>

The parent's request for privately-obtained services must be assessed under this framework. That is, 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

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<sup>4</sup> 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 parents obtained via the contract with the provider (Educ. Law § 4404[1][c]).

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).

Here, contrary to the parent's arguments on appeal, the IHO correctly used the Burlington/Carter standard when determining whether the parent's unilaterally-obtained SETSS were appropriate. Next, the parent argues that the IHO erred when she found that the parent had not met her burden to show the appropriateness of the privately-obtained SETSS. For reasons discussed below, the IHO decision must be reversed.

To determine whether the unilaterally-obtained SETSS provided specially designed instruction to address the student's needs, it is necessary to identify the student's present levels of performance. The student's November 2022 IESP included formal assessment scores, and the November 2023 SETSS progress report, as well as testimony from the SETSS provider and the parent, provided updated present levels of performance and needs of the student (see Tr. pp. 57-98; Parent Ex. D at pp. 1-3; Dist. Ex. 1 at pp. 1-13).

According to the November 2022 IESP, administration of the Wechsler Intelligence Scale for Children-Fifth Edition (WISC-V) to the student yielded a full scale IQ in the "Extremely Low range," and her verbal comprehension, visual spatial, fluid reasoning, and working memory index scores also fell in the extremely low range (Dist. Ex. 1 at p. 1). The IESP stated that the student's scores from administration of the Wechsler Individual Achievement Test-Third Edition (WIAT-III) fell within the very low range (reading comprehension, word reading, numerical operations, addition, and basic reading subtests), and within the low range (pseudoword decoding, spelling, subtraction, multiplication, and math fluency subtests) (id. at pp. 1-2). In addition, the IESP reflected that according to results of the Vineland Comprehensive Interview Form, the student's adaptive behavior composite standard score was 71 (id. at p. 2).

According to the November 7, 2023 SETSS progress report (progress report) and the parent's testimony, during the 2023-24 school year the student attended seventh grade at a nonpublic school and received 15 hours of SETSS per week due to weaknesses in math, reading, auditory processing, expressive and receptive language, and executive functioning skills (Tr. p. 60; Parent Ex. D at p. 1). Generally, the progress report stated that the student demonstrated significant delays in processing, language, academic, and social/emotional skills, that services were geared towards building skills in the academic and social/emotional domains, and that delays in those areas "must be addressed in order for [the student] to function appropriately in the classroom setting and reach her utmost capacities" (Parent Ex. D at pp. 1, 3).

With respect to reading skills, the SETSS progress report indicated that the student read fourth grade level text with average fluency and accuracy, read at a slower than average pace, and demonstrated difficulty decoding unfamiliar words (Parent Ex. D at p. 1). The student's processing challenges contributed to difficulties with reading comprehension skills, and after reading a passage or text, the student struggled to answer questions not explicitly stated in the text (id.). In addition, the report stated that the student demonstrated difficulty distinguishing fact from opinion, understanding main idea and detail, and answering higher ordered thinking questions (id.). According to the report, when the student did answer a question, she was often unable to back up her answer from within the text (id.). With respect to writing skills, although the student had been successful with writing sentences and short paragraphs, the student demonstrated significant delays and her writing lacked age-appropriate vocabulary, depth, and clarity (id.). Additionally, according to the report, the student struggled with grammar acquisition and often used incorrect capitalization and punctuation, and when answering questions in writing, the student resorted to one-to-two-word phrases (id.). The report stated that the student performed at the fourth grade level in mathematics, and although she had the ability to solve double digit computations involving multiplication and division, she tended to become overwhelmed, and required "lots of encouragement" (id. at p. 2). In addition, the student struggled with comprehending fraction problems, measurements, and word problems (id.).

The November 2023 SETSS progress report indicated that the student's expressive and receptive language skills were delayed (Parent Ex. D at p. 2). Expressively, the student demonstrated "difficulties getting her thoughts across in a coherent manner," and this, according to the report, made it challenging for her teachers to determine her level of comprehension (id.). The report stated that the student's expressive language delays were further exacerbated by memory retrieval challenges as she often groped to produce the right answer or the right word (id.). In addition, when the student did not understand concepts, she tended to remain silent rather than ask questions (id.). The report stated that in the area of receptive language, the student followed simple one and two step directions, showed basic comprehension of the spoken word, demonstrated difficulty following typical multi-step directions, and did not grasp "new concepts as quickly as others" (id.). During class lessons, the student was "often lost in a sea of confusion, due to missing one simple concept" and became overwhelmed by her lack of comprehension and failed to apply herself for the duration of the lesson (id.).

According to the report, the student's social/emotional skills were "deficient," and she demonstrated "challenges with pragmatic language" and often confused social cues (Parent Ex. D at p. 3). Although the student had two friends in her class, she often tended to keep to herself and struggled with anxiety and overwhelming feelings, especially with respect to her "learning challenges" (id.). The report stated that the student found it difficult to identify and express her emotions and relied on her provider to help her work through difficult moments (id.).

The special education teacher who provided the student's services (SETSS provider) testified that the student was "severely weak" in academics including reading, writing, and math and required "a lot of the help" in expressive and receptive language, problem solving, and executive functioning skills (Tr. pp. 75-76; Parent Ex. D at p. 3). The SETSS provider testified that the student's social/emotional needs were "really hindering her success academically," that the student exhibited negativity and low confidence, was "quite anxious" and "very moody," and that the student was "a little bit of a misfit between her peers and her teacher and her class" (Tr. pp. 76,



80). The SETSS provider continued that the student needed "a lot of guidance in her social skills, social behaviors to help her . . . get along with her peers" because that went "hand in hand with her academically" (id. at p. 76). Further, the provider testified that the student had "very low mood," and that the SETSS provider was trying "to build up her confidence, self-esteem, social, what's socially appropriate, social behaviors" with other peers and that the work with the student's social/emotional skills "automatically" rolled over into academics (id.).

Additionally, the parent testified that the student struggled "a lot all across the board," in "reading and math and all subjects," and was not "up to par with her class at all," which affected her socially because the student knew that she was "not as smart as the other girls" or could not "keep up with them" (Tr. p. 60). The parent stated that, because the student did not feel like the other girls in the class, she "act[ed] up socially," her behavior was "not good," and her confidence and self-esteem were "affected by her doing poorly in the academic field" (id.).

With respect to specially designed instruction, according to the progress report, during reading instruction, the SETSS provider guided the student to use context clues and word attack skills while decoding unfamiliar words (Parent Ex. D at p. 1). In addition, the SETSS provider worked on building the student's reading comprehension skills using self-monitoring strategies, graphic organizers, and visual aids, as well as teaching the student to apply context clues to aid comprehension (id.). According to the report the SETSS provided also used scaffolding, verbal prompts, motivational praise and encouragement with the student (id.). To build writing skills, the report stated that the SETSS provider used scaffolding and motivational tools to "build skills from bottom up," and the report further noted that the SETSS provider was unable to devote as much time as was necessary to work on these writing skills which were a significant area of weakness (id. at p. 2). With respect to mathematics, the SETSS provider used explicit instruction to break each new skill down into smaller, more manageable parts (id.). According to the report, as with writing skills, the SETSS provider was unable to work on math goals consistently due to time constraints (id.). To address the student's expressive language delays, according to the report, the SETSS provider worked on teaching the student to use clear language such as "I don't understand" when needed (id.). To build processing and language skills, the student required information to be broken down into clear steps in order for her to understand them, and she required 1:1 support to calm her anxieties and help her calm down enough to be able to learn (id.). The report stated that once the student was calm, the SETSS provider was there to answer all her questions and clarify concepts repetitively, until understanding was gained (id.). Due to her processing and language difficulties, the student required sufficient support for her to be able to function in the classroom appropriately (id.). The progress report stated that the SETSS provider used the Zones of Regulation program to teach the student how to cope with her anxieties and strong emotions, and encouraged the student to increase her independence in dealing with her emotions and solving problems (id. at p. 3).

The SETSS provider testified that she spent approximately three hours per day with the student, with half of the time focused on academics, and the rest of the time focused on social/emotional performance (Tr. pp. 75-76). When asked whether the student needed "all 15 hours" per week of SETSS, the SETSS provider testified "[d]efinitely" due to the student's fourth grade level academic skills and her social/emotional needs (Tr. pp. 77-78). The SETSS provider testified that she taught the student "from scratch" and gave her "exams, not on the rate of the class" (Tr. p. 82). In addition, the SETSS provider testified that to address the student's needs, she

"did a lot of research," preparation, guidance, and courses to help figure out how she could "get the maximum success possible for the student" (Tr. p. 84). The SETSS provider testified that she provided services both in class and out of the classroom, which provided opportunities for 1:1 instruction and pre-teaching of skills to the student outside of the classroom, as well as opportunities to observe the student's behaviors in the classroom and provide verbal and visual aids (Tr. pp. 85, 93). The SETSS provider testified that she used the goals from the student's IEP or IESP as "major milestone goals" and used her own "small step goals in order to reach that main goal" (Tr. pp. 95-96).

The parent testified that the SETSS provider was with the student for about one and a half hours per day for academic help in reading, writing, and math, and for an additional hour and a half per day to provide the student with "social-emotional help for her anxiety, her moodiness," behavior, and social skills (Tr. p. 61). The parent opined that the SETSS provider taught the student "the appropriate skills" and helped her "overcome hardships in that area" (*id.*).

Based on the foregoing, the evidence in the hearing record shows that the SETSS provider identified the student's present levels of academic and social/emotional performance and needs, and the IHO acknowledged that the student received individualized instruction including scaffolding, verbal prompts, encouragement, and breakdown of materials (Parent Ex. D; IHO Decision at p. 14). While the IHO found that the SETSS provider "devot[ed] so much of her time to counseling concerns" and did not have "sufficient time" to address the student's academic needs, the SETSS provider nonetheless used specially designed instruction to address the student's reading, writing, and math needs including—in addition to the methods noted by the IHO—self-monitoring strategies, graphic organizers, visual aids, application of context clues to aid comprehension, motivational praise, and pre-teaching (Parent Ex. D at pp. 1-2).

In her decision, the IHO found it relevant that the SETSS provider did not appear to be certified to teach students past sixth grade and this student was in seventh grade (IHO Decision at p. 14; *see* Parent Ex. F). However, as set forth above, 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). Further, the IHO found that the SETSS provider was not a licensed counselor, which made her qualifications "all the less appropriate," given that half of her time with the student was devoted to addressing the student's social/emotional concerns (IHO Decision at p. 14). However, the SETSS provider testified that the student's social/emotional needs were "hindering her success academically" and therefore she required "a lot of guidance in her social skills" (Tr. pp. 75-76). As discussed above, the student exhibited needs in both areas, and as the district failed to implement the student's mandated SETSS and counseling services, it was appropriate for the SETSS provider to try to address the student's needs in both areas, which weighs in favor of finding that the unilaterally-obtained services were appropriate (Tr. pp. 64-65; Parent Ex. D; Dist. Ex. 1 at p. 10; IHO Decision at p. 14). Moreover, courts consistently have held that the failure of a unilateral placement to provide every related service that would be beneficial to a child given his or her needs will not, by itself, render a unilateral placement inappropriate if the placement as a whole is reasonably calculated to enable the student to receive educational benefits (*T.K. v. New York City Dep't of Educ.*, 810 F.3d 869, 878 [2d Cir. 2016]; *C.L. v. Scarsdale Union Free Sch. Dist.*, 744 F.3d 826, 838-39 [2d Cir. 2014]).

Next, the IHO stated that the SETSS provider did not conduct any formal assessment of the student, nor did she develop her own goals, and that she "simply recycled the student's goals from the previous IESP, despite the fact that it was a year old" (IHO Decision at p. 14). With regard to the IHO's concern about the student's lack of assessments, this type of rationale—denying relief based on a lack of information about a student's needs—has been found to improperly switch the responsibility for identifying the student's needs from the district to the parent (see A.D. v. Bd. of Educ. of City Sch. Dist. of City of New York, 690 F. Supp. 2d 193, 208 [S.D.N.Y. 2010] [finding that a unilateral placement was appropriate even where the private school reports were alleged by the district to be incomplete or inaccurate and finding that the fault for such inaccuracy or incomplete assessment of the student's needs lies with the district]), and further, the SETSS provider testified that she used basic assessments to keep in perspective what was appropriate for the student to work on, what level the student was at, and what she should be working towards (Tr. pp. 84, 94-95). Regarding the SETSS provider's use of the student's November 2022 IESP goals, review of those annual goals and the November 2023 progress report shows that during the 2023-24 school year the student continued to exhibit needs consistent with the skills identified in the IESP annual goals such that the SETSS provider's decision to use them, in conjunction with her development of her "own small step goals," was appropriate (Tr. pp. 95-96; compare Dist. Ex. 1 at pp. 6-9, with Parent Ex. D).

Further, the IHO stated that "despite conclusory allegations to the contrary and [the p]arent's subjective belief regarding the student's progress" there was no objective evidence in the record of progress, such as report cards, and after a year of working with the student the student had failed to "make any meaningful progress, academically" (IHO Decision at p. 14). However, it is well settled that a finding of progress is not required for a determination that a student's unilateral placement is adequate (Scarsdale Union Free Sch. Dist. v. R.C., 2013 WL 563377, at \*9-\*10 [S.D.N.Y. Feb. 4, 2013] [noting that evidence of academic progress is not dispositive in determining whether a unilateral placement is appropriate]; see M.B. v. Minisink Valley Cent. Sch. Dist., 523 Fed. App'x 76, 78 [2d Cir. Mar. 29, 2013]; D.D-S. v. Southold Union Free Sch. Dist., 506 Fed. App'x 80, 81 [2d Cir. Dec. 26, 2012]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 486-87 [S.D.N.Y. 2013]; C.L. v. Scarsdale Union Free Sch. Dist., 913 F. Supp. 2d 26, 34, 39 [S.D.N.Y. 2012]; G.R. v. New York City Dep't of Educ., 2009 WL 2432369, at \*3 [S.D.N.Y. Aug. 7, 2009]; Omidian v. Bd. of Educ. of New Hartford Cent. Sch. Dist., 2009 WL 904077, at \*22-\*23 [N.D.N.Y. Mar. 31, 2009]; see also Frank G., 459 F.3d at 364). However, while not dispositive, a finding of progress is, nevertheless, a relevant factor to be considered in determining whether a unilateral placement is appropriate (Gagliardo, 489 F.3d at 115, citing Berger, 348 F.3d at 522 and Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]).

Here, the SETSS progress report makes general statements concerning the student's progress and both the SETSS provider and the parent testified to more specific instances of progress. Specifically, the November 2023 SETSS progress report noted that with respect to the student's reading skills, progress was emerging at a slow but steady pace, and progress was noted with the student's writing and expressive language skills (Parent Ex. D at pp. 1-2). The report noted that "[w]ith support," the student made "tremendous progress in her ability to learn new concepts independently" (id. at p. 2). In addition, the report stated that the student had "made tremendous strides given her current mandate of 15 hours of SETSS services" (id. at p. 3).

The parent testified that she was "definitely seeing" the student achieve certain goals that the provider set for her, slowly but steadily (Tr. p. 62). The parent testified that with this provider, she was seeing "real progress", that even though the student still struggled, the struggle was "not as strong," and that she seemed to understand her homework, and understood the concept "maybe easier" (Tr. p. 63). The parent commented that the student was aware of what she learned in the classroom that day since she had the help in the classroom (*id.*). The SETSS provider testified that "slowly but surely" the student's moods were a "little bit" "better and her confidence going up a notch" and "[s]lowly, slowly we're see how it's affecting her academics" and "[s]lowly, slowly" "slight progress" (Tr. p. 77).

Based on the foregoing, I find that, while the parent's unilaterally-obtained services may not have furnished every special service necessary to maximize the student's potential, they were designed to meet the student's unique needs (*Frank G.*, 459 F.3d at 364-65). "[A] unilateral private placement cannot be regarded as 'proper under the [IDEA]' when it does not, at a minimum, provide some element of special education services in which the public school placement was deficient" (*Berger*, 348 F.3d at 523). Here, the district recommended five hours of SETSS per week and related services but failed to deliver them; whereas, the parent unilaterally obtained three times that amount of SETSS, which were delivered to the student during the 2023-24 school year. Moreover, the SETSS provider was familiar with the student's present levels of performance and applied specially designed instruction to address the student's significant needs in both the academic and social-emotional realms.

## **B. Equitable Considerations**

Having found that the parent met her burden to prove that the unilaterally-obtained services were specially designed to meet the student's unique needs, I now turn to weigh the equitable considerations. Again, the federal standard is instructive. The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (*Burlington*, 471 U.S. at 374; *R.E.*, 694 F.3d at 185, 194; *M.C. v. Voluntown Bd. of Educ.*, 226 F.3d 60, 68 [2d Cir. 2000]; see *Carter*, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]; *L.K. v. New York City Dep't of Educ.*, 674 Fed. App'x 100, 101 [2d Cir. Jan. 19, 2017]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; *E.M. v. New York City Dep't of Educ.*, 758 F.3d 442, 461 [2d Cir. 2014] [identifying factors relevant to equitable considerations, including whether the withdrawal of the student from public school was justified, whether the parent provided adequate notice, whether the amount of the private school tuition was reasonable, possible scholarships or other financial aid from the private school, and any fraud or collusion on the part of the parent or private school]; *C.L.*, 744 F.3d at 840 [noting that "[i]mportant to the equitable consideration is whether the parents obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA"]).

Reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to their removal of the student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger, 348 F.3d at 523-24; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G., 459 F.3d at 376; Voluntown, 226 F.3d at 68).

Here, the hearing record does not include a letter from the parent to the district stating the parent's intent to unilaterally obtain private services. However, the parent's original due process complaint notice was filed in June 2023 and there is no indication that the district took any action in response to learning of the parent's concerns or intent to seek private services (see Parent Ex. A2). Therefore, I do not find that the lack of a 10-day notice warrants a reduction or denial of relief under the circumstances of this matter.

The IHO also found equitable considerations weighed against the requested relief because "the [P]arent [wa]s predominantly responsible for the student's lack of educational progress" given her decision to parentally place the student in a general education nonpublic school (IHO Decision at p. 14). This was not an appropriate consideration to weigh. State law gives the parent the right to parentally place the student in a school of her choosing and seek special education services from the district of location (Educ. Law § 3602-c[2]). Here, the parent did not obstruct the district's ability to offer or deliver appropriate equitable services to address the student's needs. While the IHO may have been of the view that the student would have been better placed in a more supportive setting, such as a special class, there is no evidence in the hearing record that the parent prevented the district from recommending such support on the IESP.<sup>5</sup>

Accordingly, I find no equitable basis to reduce or deny funding for the unilaterally-obtained services in this instance.

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<sup>5</sup> With respect to the plausibility of a recommendation for equitable services consisting of a special class in addition to the student's attendance at the general education nonpublic school, it may be that the special class would have to be offered at a location other than the nonpublic school. In interpreting a prior version of § 3602-c, the New York Court of Appeals addressed the question of whether a district must provide special education programs and services to a student with a disability at the nonpublic school a student attends, and found that the location in which services are provided to a parentally-placed nonpublic school student with a disability pursuant to § 3602-c should be determined based on what is appropriate to address the individual educational needs of the student, with consideration given to LRE principles (Bd. of Educ. of Bay Shore Union Free Sch. Dist. v. Thomas K., 14 N.Y.3d 289, 293-94 [2010]; Bd. of Educ. of Monroe-Woodbury Cent. Sch. Dist. v. Wieder, 72 N.Y.2d 174, 183-88 [1988]).

## **VII. Conclusion**

Having determined that the evidence in the hearing record does not support the IHO's finding that the parent's unilaterally-obtained SETSS were not appropriate, and having found that equitable considerations do not warrant a reduction or denial of relief, the necessary inquiry is at an end.

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

### **THE APPEAL IS SUSTAINED.**

**IT IS ORDERED** that the IHO's decision dated January 18, 2024 is modified by reversing that portion which denied the parent's request for the district to fund unilaterally-obtained SETSS services for the 2023-24 school year; and

**IT IS FURTHER ORDERED** that the district shall reimburse or directly fund the costs of the unilaterally-obtained SETSS delivered to the student during the entirety of the 2023-24 school year at a rate consistent with the contract.

**Dated:**           **Albany, New York**  
                          **April 18, 2024**

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**CAROL H. HAUGE**  
**STATE REVIEW OFFICER**