



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 24-101

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

### **Appearances:**

Gulkowitz Berger, LLP, attorneys for petitioner, by Shaya M. Berger, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Fiona M. Dutta, 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 determined that the related services respondent's (the district's) Committee on Special Education (CSE) recommended for his son for the 2023-24 school year were appropriate and which denied the parent's request that the district fund the costs of her son's privately-obtained special education services delivered by Kids Domain Childcare Center (Kids Domain). The district cross-appeals from that portion of the IHO's decision which ordered the district to fund a bank of compensatory educational services for the student for the 2023-24 and 2024-25 school years. The appeal must be sustained. The cross-appeal must be sustained in part.

### **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 CSE that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law §§ 3602-c; 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts related to IESPs, State law provides that "[r]eview of the recommendation of the committee on special education may be obtained by the parent or person in parental relation of the pupil pursuant to the provisions of [Education Law § 4404]," which effectuates the due process provisions called for by the IDEA (Educ. Law § 3602-c[2][b][1]). Incorporated among the procedural protections of the IDEA and the analogous State law provisions is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

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

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

### III. Facts and Procedural History

The evidence in the hearing record concerning the student's educational history is sparse. Based on the limited evidence, it appears that the student has been parentally placed at the same nonpublic, religious school since at least the 2020-21 school year (see Parent Ex. B at p. 2).<sup>1</sup> A CSE convened on October 21, 2022 to develop an IESP for the student that would be implemented from November 3, 2022 through the projected annual review date of October 21, 2023 (see Dist. Ex. 2 at p. 1). Finding that the student remained eligible for special education as a student with a speech or language impairment, the October 2022 CSE recommended the following related services to address the student's needs: three 30-minute sessions per week of individual speech-language therapy, three 30-minute sessions per week of individual occupational therapy (OT), three 30-minute sessions per week of individual physical therapy (PT), and one 30-minute session per week of individual counseling services (id. at pp. 1, 5).<sup>2</sup>

On May 15, 2023, the student's mother executed a notice to the district, indicating that the student was parentally placed at her own expense at a nonpublic school and that she wished for the district to provide special education services to the student for the 2023-24 school year (see Parent Ex. G).<sup>3</sup>

The parent executed a contract with Kids Domain—effective September 1, 2023—for delivery of five periods per week of special education teacher support services (SETSS) and three 30-minute sessions per week of speech-language therapy services to the student for the 2023-24 school year at specified rates (Parent Ex. E).<sup>4</sup>

#### A. Due Process Complaint Notice

By due process complaint notice dated August 31, 2023, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2023-24 school year (see Parent Ex. A at p. 1). According to the parent, the student's May 2018 individualized education program (IEP) represented the last-agreed upon program, which included a recommendation for five hours per week of "special education teacher services" and "certain related services" (id.). The parent "dispute[d] any subsequent program the [district] developed that removed and/or reduced services on the IEP, and also dispute[d] any act the [district] may have taken to deactivate or declassify the student from being eligible to receive services" (id.). The

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<sup>1</sup> This information is drawn from an IHO decision issued on February 23, 2021 (February 2021 IHO decision) pertaining to the parent's challenges to the district's recommended special education program for the 2020-21 school year (see Parent Ex. B at pp. 2, 6).

<sup>2</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]).

<sup>3</sup> The evidence reflects that the student was in third grade during the 2023-24 school year (see Parent Ex. D at p. 1).

<sup>4</sup> Kids Domain has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

parent asserted that the student continued to require the "same special education services and the same related services each week as set forth on the IEP" (id.).

Next, the parent indicated that she could not locate providers at the district's "standard rates," and the district had not assigned any providers to deliver services to the student for the 2023-24 school year (Parent Ex. A at p. 1). The parent further indicated that she had located providers to deliver "all required services" to the student for the 2023-24 school year, but at "rates higher than standard [district] rate[s]" (id.).

As relief, the parent sought an order directing the district to continue the student's special education and related services under pendency, to fund five sessions per week of "special education teacher services" at an enhanced rate for the 2023-24 school year, and to issue related services authorizations (RSAs) for the parent to obtain the student's related services through parent-selected providers or to directly fund the costs of the student's related services delivered by parent-selected providers at the providers' rates "even if higher than the standard [district] rate" (Parent Ex. A at p. 2).

## **B. Impartial Hearing Officer Decision**

On October 13, 2023, the parties proceeded to an impartial hearing, which concluded on January 5, 2024, after three days of proceedings (see Tr. pp. 1-112).<sup>5</sup> At the impartial hearing, the district's representative affirmatively stated in the opening statement that the student was entitled to receive the related services set forth in the October 2022 IESP: three 30-minute sessions per week of individual speech-language therapy, three 30-minute sessions per week of individual OT, three 30-minute sessions per week of individual PT, and one 30-minute session per week of individual counseling services (see Tr. p. 44; Dist. Ex. 2 at pp. 1, 5).<sup>6</sup> During the parent's opening statement, his advocate asserted that the parent agreed with the related services recommended for the student in the October 2022 IESP, but disputed the appropriateness of the IESP because it failed to include a recommendation for SETSS (see Tr. pp. 39-40, 49-50; see also Tr. p. 25 [explaining that this matter was "not just an implementation case" because the parties also disputed the "appropriateness of the program"]).<sup>7</sup> The parent's advocate also asserted that the October 2022 IESP was not appropriate because there was "no data whatsoever to support" the recommendations in the IESP, the IESP had "very little information regarding present level[s] of performance," and the IESP had "no testing or assessments to support it" (Tr. p. 50). The parent's advocate pointed

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<sup>5</sup> On October 13, 2023, the district executed a "Pendency Implementation Form," which identified the following as the student's pendency services: "five times per week" special education itinerant teacher (SEIT) services, three 30-minute sessions per week of individual OT, three 30-minute sessions per week of individual speech-language therapy, and four 30-minute sessions per week of individual PT (see Supp. Document 4). According to the pendency implementation form, the student's pendency services were based on the unappealed, February 2021 IHO decision (id.; see generally Parent Ex. B).

<sup>6</sup> As noted in the October 2022 IESP, the recommended speech-language therapy and counseling services were to be delivered in Yiddish (see Dist. Ex. 2 at p. 5).

<sup>7</sup> At the time of the impartial hearing, the parent's advocate who appeared on the third day of the impartial hearing was an "associate pending admission" with Gulkowitz Berger (Tr. pp. 19, 22). Additionally, the district's representative was identified as a "consultant impartial hearing representative" (Tr. pp. 22-23).

to the October 2022 IESP and specifically noted that it did not include any "evaluation results" or "updated evaluation results," and thus, the IESP was "procedurally deficient" and the recommendations "should not be relied on" (id.).<sup>8</sup> According to the parent's advocate, the most recent unappealed IHO decision, dated February 23, 2021 (February 2021 IHO decision), which constituted the student's pendency placement during the current administrative proceedings, represented the student's "last appropriate educational program" and asserted that "it should remain in force as long as no new appropriate program was put in place" (Tr. pp. 50-51; Parent Ex. B at pp. 3, 6). In addition, the parent's advocate argued that a current SETSS progress report, dated December 19, 2023 (December 2023 SETSS progress report), explained the student's need for SETSS (see Tr. pp. 51-52; Parent Ex. D at p. 1). The parent's advocate noted that the parent had located and secured providers to deliver the student's SETSS and speech-language therapy services via contract but had not found providers to deliver the student's OT, PT, and counseling services (see Tr. pp. 52-53; Parent Ex. E).<sup>9</sup>

In a decision dated February 9, 2024, the IHO found that the district, through the October 2022 IESP, offered the student appropriate equitable services for the 2023-24 school year (see IHO Decision at pp. 9-10). To support this conclusion, the IHO found that the October 2022 IESP "complied with the procedural requirements" of section 3602-c and was "substantively proper" (id. at p. 10). The IHO indicated that the October 2022 CSE developed the IESP based on "due consideration to the information provided by [the s]tudent's mother, including her statement that [the s]tudent was 'doing well academically'" (id., citing Dist. Ex. 2 at p. 1). According to the IHO, given the information provided to the CSE, the team "determined that 'speech and language therapy, [OT] and [PT] w[ould] enable [the s]tudent to progress in the general education curriculum," and furthermore, that the counseling services would "'address social emotional needs'" (IHO Decision at p. 10, citing Dist. Ex. 2 at p. 2). The IHO opined that the "recommended program" met the student's needs and was "reasonably calculated to enable the student to make progress" (IHO Decision at p. 10).

The IHO then turned to the parent's contention that the district failed to conduct a reevaluation of the student (see IHO Decision at p. 10). The IHO noted that the evidence in the hearing record did not "support a finding that the educational or related services needs of [the s]tudent warranted a reevaluation before the time to conduct the mandated three-year reevaluation" pursuant to State regulation (id.). The IHO also noted that the hearing record did not include any

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<sup>8</sup> In a closing statement, the district's representative argued that the issues to be resolved at the impartial hearing must be limited to those raised in the parent's due process complaint notice, and as such, the allegations asserted in the parent advocate's opening statement that the October 2022 IESP was procedurally deficient based on a failure to evaluate the student was beyond the scope of the impartial hearing because the due process complaint notice did not allege any procedural violations (see Tr. p. 96).

<sup>9</sup> The parent's advocate affirmatively acknowledged at the impartial hearing that the parent's selected SETSS provider delivering services to the student through Kids Domain was the same individual identified in a district exhibit listing independent SETSS providers (compare Dist. Ex. 6, with Parent Ex. C at p. 1, and Parent Ex. D at p. 1, and Parent Ex. G ¶ 2). The director and sole owner of Kids Domain testified that the SETSS provider delivering services to the student was an independent contractor with the company as opposed to an employee of the company (Tr. pp. 73-75, 87; see Parent Exs. G ¶ 1; E). As an independent contractor, the company paid the SETSS provider a specified hourly rate but did not pay for "any other benefits" such as "workers' compensation, Social Security, [or] withholding of taxes" (Tr. p. 87).

evidence that either the parent or a teacher had requested a reevaluation of the student (id.). The IHO indicated that this was not a case where the student was "receiving educational services pursuant to an IESP that [wa]s approaching three years old and the [district] [wa]s contending it [wa]s still an appropriate program for [the s]tudent"—instead, this was a case where the parent asserted that the special education program in the student's preschool IEP remained appropriate for a school-aged student (id.). Therefore, in light of the foregoing, the IHO determined that the October 2022 IESP was appropriate and offered the student a FAPE for the 2023-24 school year (id. at pp. 9-10).

Despite having found that the October 2022 IESP offered the student a FAPE, the IHO examined whether the parent's unilaterally-obtained services were appropriate to meet the student's needs (see IHO Decision at pp. 10-11). Here, the IHO found that the parent failed to sustain his burden to establish the appropriateness of the "SETSS special education program unilaterally devised" for the student, especially when the October 2022 IESP did not include a recommendation for SETSS, which the IHO therefore interpreted as the parent seeking a modification of the student's IESP to prospectively include a recommendation for SETSS (id. at p. 11). However, the IHO concluded that such modification to the student's IESP, as a prospective award, would circumvent the statutory process of the CSE and further noted that the CSE had not considered or reviewed the December 2023 SETSS progress report (id.). The IHO indicated that the parent had not testified at the impartial hearing to "provide evidence of SETSS necessity," and because the parent failed to "present new information to the CSE," the parent's decision to unilaterally obtain SETSS was not an appropriate unilateral placement (id.). In light of the foregoing conclusions, the IHO found it was unnecessary to reach the issue of equitable considerations regarding whether the evidence in the hearing record supported an "award of direct payment to the SETSS provider" (id.).

Next, and notwithstanding that the IHO found that the district offered the student appropriate equitable services for the 2023-24 school year and that the parent failed to sustain his burden to establish the appropriateness of the SETSS obtained for the student, the IHO ordered relief in this matter (see IHO Decision at p. 12). Initially, the IHO denied the parent's request to modify the student's IESP to include a recommendation for SETSS for the 2023-24 school year, but directed the CSE to convene to consider the parent's contention that the "program developed for [the s]tudent [wa]s not an appropriate educational program" (id.). In addition, the IHO ordered the CSE to evaluate the student, if warranted, and for the district to issue RSAs to the parent to obtain the following related services during the 2023-24 school year: three 30-minute sessions per week of individual speech-language therapy (Yiddish), three 30-minute sessions per week of individual OT (English), three 30-minute sessions per week of individual PT (English), and one 30-minute session per week of individual counseling services (Yiddish) (id.). The IHO also ordered the district to provide the student with the following bank of compensatory educational services: 30 hours of individual speech-language therapy (Yiddish), 30 hours of individual OT (English), 30 hours of individual PT (English), and 10 hours of individual counseling services (Yiddish) (id.). The IHO indicated that the bank of compensatory educational services would be available to the student for "two school years, encompassing 2023-2024 and 2024-2025" (id.).

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

The parent appeals, arguing that the IHO erred by denying his request for five hours per week of SETSS for the student and by denying his request for the district to directly fund the costs of the unilaterally-obtained SETSS and speech-language therapy services delivered to the student for the 2023-24 school year. As relief, the parent seeks an order directing the district to directly fund five hours per week of SETSS, as well as the student's speech-language therapy services, for the 2023-24 school at specified rates.

In an answer, the district responds to the parent's allegations and generally argues to uphold the IHO's decision finding that the parent failed to sustain his burden to establish the appropriateness of the SETSS obtained for the student. The district also argues that the parent did not explicitly assert that he sustained his burden to establish the appropriateness of the requested speech-language therapy services; as a result, the district contends that the failure to appeal this issue is final and binding. Alternatively, the district asserts that the evidence in the hearing record does not support a finding that the speech-language therapy services, or the SETSS, were appropriate for the student. As a cross-appeal, the district argues that the IHO erred by awarding compensatory educational services as relief. The district contends that the parent did not seek compensatory educational services as relief in the due process complaint notice and raised the request for the first time at the impartial hearing; consequently, the district argues that the IHO exceeded her jurisdiction in awarding such relief. In addition, the district contends that equitable considerations did not weigh in favor of the parent's requested relief, and the IHO should have denied all relief to the parent on this basis. The district argues that the parent failed to comply with the statutory requirement of providing a 10-day notice of unilateral placement, which acts as a complete bar to any relief in this case.

The parent did not file an answer to the district's cross-appeal with the Office of State Review.

#### **V. Applicable Standards**

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

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

(Educ. Law § 3602-c[2]).<sup>10</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>11</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 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**

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. The parent alleged that the district did not offer appropriate equitable services or deliver the services mandated in the IESP for the 2022-23 school year and, as a self-help remedy, he unilaterally obtained private SETSS from Kids Domain for the student without the consent of the school district officials, and then commenced due process to obtain remuneration for the costs thereof (see Parent Ex. A). Generally, districts who 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

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<sup>10</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>11</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 at (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.



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 SETSS and speech-language therapy the parent obtained for the student during the 2022-23 school year. "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"]).

Thus, contrary to the parent's arguments to the contrary, 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 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).

#### **A. October 2022 IESP**

The parent generally alleges that, regardless of the legal standard applied in this case, the district failed to sustain its burden to establish that the October 2022 IESP was appropriate absent a recommendation for SETSS. In its answer, the district does not directly address this assertion, but instead, devotes the majority of its arguments to whether the parent sustained his burden to establish that the SETSS and speech-language therapy services were appropriate to meet the student's needs.

Initially, it is undisputed that the student's October 2022 IESP did not include a recommendation for SETSS (see Dist. Ex. 2 at pp. 1, 5, 8). After independently reviewing the hearing record, it is also undisputed that the district did not present any evidence—other than the IESP itself—to possibly explain the rationale for the October 2022 CSE's decision to not recommend SETSS, such as the evaluative information relied upon to develop the IESP or a prior written notice explaining why the CSE declined to recommend SETSS for the student or progress reports (see generally Tr. pp. 1-112; Dist. Exs. 1-6). Additionally, the October 2022 IESP, itself, does not include any explanation for the CSE's decision to either not consider SETSS or why the CSE ultimately rejected or refused to recommend SETSS for the student (see generally Dist. Ex. 1). To be clear, the October 2022 IESP's description of the student's present levels of performance

and individual needs were based solely on information provided by the student's mother and, while that information may be completely accurate, it does not describe the student's academic or social needs in more than one to two sentences (id. at p. 1).

While the district representative informed the IHO at the impartial hearing that it was not required to present testimonial evidence as part of its case-in-chief to defend the October 2022 IESP or to sustain its burden of proof, the hearing record must nonetheless contain sufficient evidence to otherwise explain the recommendations in the student's IESP—or, as in this case, the failure to recommend SETSS—if the district strategically decides to not present testimonial evidence (see Tr. pp. 45-46). At the impartial hearing, the district pointed to the decision issued in Application of a Student with a Disability, Appeal No. 23-005 to support its assertion that testimonial evidence was not required to meet its burden of proof and that instead, "the appropriateness of the IESP c[ould] be developed by cross-examination of [p]arent witnesses" (Tr. p. 45). However, in Application of a Student with a Disability, Appeal No. 23-005, the district in that case had conducted a mandatory three-year reevaluation of the student, and the CSE that developed the IEP at issue in that case had reviewed and considered evaluative information, which the district in that case submitted into the hearing record as documentary evidence (see Application of a Student with a Disability, Appeal No. 23-005). To be clear, the hearing record in the present matter does not include any such evaluative information (see generally Tr. pp. 1-112; Parent Exs. A-G; Dist. Exs. 1-6).

Significantly, within the district's response to the parent's due process complaint notice, the district did not identify any materials relied upon by the October 2022 CSE in making its recommendations and similarly did not specify a date identifying when the district sent the parent a prior written notice (see Dist. Ex. 1 at pp. 1-4 [emphasis added]). In addition, the October 2022 IESP reflects that there were "no updated evaluation results" and a review of the IESP reveals that the only CSE members participating at the meeting included the student's mother (via telephone) and the district representative who also served as the related service or special education teacher (id. at pp. 1, 8).

Thus, as an initial matter, because the hearing record fails to contain sufficient evidence upon which to conclude that the October 2022 CSE's decision to not recommend SETSS was appropriate, the IHO's finding that the district offered the student appropriate equitable services for the 2023-24 school year must be vacated.

## **B. Unilaterally-Obtained Services**

### **1. SETSS and Speech-Language Therapy from Kids Domain**

Having determined that the district failed to offer the student appropriate equitable services, the next inquiry is whether the parent's unilaterally-obtained services, as described above, were appropriate to meet the student's needs. The parent argues that the IHO erred by finding that he failed to sustain his burden to establish that the privately-obtained SETSS and speech-language therapy services were appropriate for the student. The parent contends that, based on the SETSS progress report in evidence, he demonstrated that five hours per week of SETSS addressed the student's needs in "many areas academically" (Req. for Rev. ¶ 22).

As for 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]). Citing the Rowley standard, the Supreme Court has explained that "when a public school system has defaulted on its obligations under the Act, a private school placement is 'proper under the Act' if the education provided by the private school is 'reasonably calculated to enable the child to receive educational benefits'" (Carter, 510 U.S. at 11; see Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 203-04 [1982]). 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 Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether a unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether the placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] ["evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison 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, the evidence in the hearing record demonstrates that the parent's desired educational placement of student was to consist of several components: a general education setting at the nonpublic, religious school; SETSS; and the related services recommended in the October 2022 IESP, including OT, PT, speech-language therapy, and counseling services. The parent seeks funding only for the costs of the SETSS and speech-language therapy delivered by Kids Domain.

The parent's agreement with Kids Domain indicated that the company would provide the student with five periods per week of SETSS and three 30-minute sessions per week of speech-language therapy for the 2023-24 school year (Parent Ex. E at p. 1). The director from Kids Domain provided direct testimony by affidavit that, for the 2023-24 school year, the company, through its providers, began delivering SETSS on September 3, 2023 and speech-language therapy services on September 10, 2023 (see Parent Ex. F ¶¶ 4-5). In her affidavit, the director identified, by name, the individuals delivering the student's SETSS and speech-language therapy and indicated that the providers' "qualifications" were "based on the New York State issued certificates or license" (id. at ¶¶ 2-3). For the SETSS provider named, the hearing record includes a document indicating that the provider held certifications in childhood education (grades 1-6) and to teach students with disabilities grades first through sixth (Parent Ex. C).<sup>12</sup>

There is little information in the hearing record regarding the student's needs other than the December 2023 SETSS progress report. As noted above, the October 2022 IESP included a minimal statement of the student's present levels of performance based entirely on information provided by the student's mother (Dist. Ex. 2 at p. 1).<sup>13</sup> To the extent the IHO faulted the parent for not identifying the student's needs, such a rationale 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]).

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<sup>12</sup> The provider's first name is spelled differently in the document listing the provider's certifications compared to the director's affidavit (compare Parent Ex. C at p. 1, with Parent Ex. F at ¶ 2). The director indicated that the provider was a bilingual Yiddish speaking provider and that, at times, in Yiddish, "the U and the O may be interchangeable" (Tr. p. 75).

<sup>13</sup> At the impartial hearing, the agency director testified that, prior to delivering SETSS to the student during the 2023-24 school year, they had not conducted any "baseline testing" of the student (Tr. p. 77). The agency director also testified that the agency had delivered services to the student during the 2022-23 school year and it was "very possible" that the agency had also delivered services to the student during the 2021-22 school year (see Tr. pp. 83-84).

According to the progress report, the student was in the third grade for the 2022-23 school year (Parent Ex. D at p. 1). In the present levels of performance section of the progress report, the student was described as a "sweet child with academic delays" who needed "instructions repeated to him" and who needed to be "'shown'" "many abstract ideas and knowledge" (id.). It was also noted that the student had a "difficult time sequencing his thoughts and feelings" and had "weak higher-level thinking and inferencing skills" (id.). As a result, the student required a "lot of one-on-one and pre-teaching" in order to "learn skills in the classroom" (id.). The progress report further noted that a "broad spectrum of methods, strategies, and techniques [we]re used to promote achievement" and that the student had demonstrated improvement when strategies were used with him (id.). The progress report identified the following as "Interventions" used with the student: "reinforcements, praise, prompts, visual aids, cues, social skills training, modeling and role-playing" (id. at p. 5).

In the area of math, the December 2023 SETSS progress report reflected that, although the student understood math concepts and could compute a worksheet with prompts, he needed help with reminders to look at the sign to determine what needed to be done and struggled with computing double-digit examples and remembering "times table" over 1-5 (Parent Ex. D at p. 2). The report indicated that the provider "use[d] manipulatives and counters to help with math concepts" but that learning new concepts took the student a long time (id.). In reading, the report described that the student's phonemic awareness had improved but that he struggled with comparing and contrasting stories and characters (id.). The student could answer inferencing questions but struggled to come up with questions on his own (id.). The student had difficulty understanding educational texts (id.). The student could "read simple sentences but with little accuracy and fluency" and "read at least 25 sight words and many cvc words regarding the alphabet" but was struggling to read "cvcc words" (id.). To assist the student, "[t]he providers" used flashcards and picture cards, tasks broken down, reading programs, and reinforcements (id.). In terms of writing, the provider reported that the student's handwriting skills "had improved but still need[ed] improvement" and his number writing skills were emerging (id. at p. 3). The provider helped the student with spelling and offered "a lot of prompts and cues to help [the student] brainstorm and write outlines on paper" (id.).

Although the hearing record does not include a separate progress report completed by the provider who delivered the student's speech-language therapy, the December 2023 progress report from the SETSS provider described the student's speech-language needs, goals, and supports used by "[t]he provider" (Parent Ex. D at p. 4).<sup>14</sup> In the area of language skills, the progress report reflected that the student "display[ed] weakness across the domain of receptive language skills," could "not follow complex directions and ones that are given to a group, needed two-step directions repeated, and struggled with and was slow to complete a few tasks or to multi-task without prompts" (id.). As for expressive language skills, the report indicated the student's "vocabulary and word bank [had] improved due to the many hours of games and social skills modeling" but that his cognitive skills affected his expressions and word usage (id.). According to the progress report,

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<sup>14</sup> It is unclear from the SETSS progress report whether the "provider" referenced in the section describing the student's speech-language needs meant the SETSS provider or the speech-language therapy provider (Parent Ex. D at p. 4). In other parts of the progress report, the narrative referenced "providers" plural as delivering certain supports (see id. at pp. 2, 5).

"[t]he provider utilize[d] many modalities to help [the student] in this area, including card games, role-playing, and book reading" (id.).

Although Kids Domain did not deliver counseling services to the student, the December 2023 progress report described the student's social/emotional needs, set forth annual goals in that area, and supports provided (Parent Ex. D at pp. 4-5). Specifically, the report reflected that the student had improved and "displayed good behavior in class" but was "still more immature than his peers" (id.). The report noted that the student needed to work on effective communication with peers (id. at pp. 4-5). According to the progress report, the student benefited from role-playing, modeling, prompts, and reminders to improve communication skills (id.).

The December 2023 progress report reflected that, overall, "the providers use[d] a lot of reinforcements, praise, prompts, visual aids, cues, social skills training, modeling and role-playing" (Parent Ex. D at p. 5). The progress report included annual goals in each area to address the student's areas of weakness (id. at pp. 1-5). The report recommended that the student continue to receive five hours per week "of 1:1 special education service" (id. at p. 6).

In finding that the parent failed to establish that the SETSS obtained for the student for the 2023-24 school year were appropriate, the IHO noted that the agency director had not been "asked to address the rationale for providing [the s]tudent with SETSS when this [service] was not mandated by the student's IESP" (IHO Decision at pp. 5, 11). However, as noted above, the district failed to explain its rationale for not recommending SETSS for the student in the October 2022 IESP. The December 2023 progress report, on the other hand, identified several areas of academic need which SETSS were designed to address through specific goals, strategies, and accommodations (see Parent Ex. D at pp. 1-5). Contrary to the IHO's rationale, the fact that the progress report had not been reviewed by the October 2022 CSE is of no consequence for purposes of examining whether the privately-obtained SETSS were specially designed to meet the student's needs (see IHO Decision at p. 5). As noted above, it was the district's obligation to identify the student's needs in the first instance.

Based on the foregoing, I find that there is sufficient evidence to show that the student received SETSS and speech-language therapy specially-designed to meet his needs as identified in the December 2023 progress report during the 2023-24 school year. Thus, the evidence in the hearing record shows that the parent met his burden to prove that the SETSS delivered by Kids Domain during the 2023-24 school year were appropriate.

## **2. Equitable Considerations**

As part of its cross-appeal, the district argues, as an alternative basis for denying relief, that the parent failed to provide notice to district of his intent to unilaterally obtain private services from Kids Domain and seek district funding of the costs thereof.

Turning to a review of equitable considerations, the final criterion for a reimbursement award, the federal standard for adjudicating these types of disputes is, again, instructive. 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 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"]).

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 Bd. of Educ., 226 F.3d at 68).

The district is correct that the parent did not present evidence that he provided the district with notice of his intent to secure unilaterally-obtained private services and seek district funding for the costs thereof. While the parent's due process complaint notice is not a substitute for a timely 10-day notice to the district, the parent's complaint was submitted prior to the beginning of the 2023-24 school year and the district does not allege—nor does the hearing record reflect—that, because of the lack of a 10-day notice, the district was unable to reconvene the CSE and determine if appropriate services could be offered and delivered to the student. Under the circumstances of this case, I decline to exercise my discretion to reduce or deny relief based on the lack of a 10-day notice. In its answer with cross-appeal, the district does not point to other equitable factors that would support a reduction or denial of relief.<sup>15</sup> Accordingly, the evidence in the hearing record

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<sup>15</sup> For example, although during the impartial hearing the district challenged the rates charged by Kids Domain as excessive (see Tr. pp. 48-49), the district has not pursued this argument on appeal.

does not support a finding that the parent's request for district funding of services delivered by Kids Domain during the 2023-24 should be reduced or denied on equitable grounds.

### **C. Compensatory Education**

The district cross-appeals that portion of the IHO's decision awarding the student compensatory educational services for OT, PT, speech-language therapy, and counseling. The district primarily argues that the parent did not request compensatory educational services as relief in the due process complaint notice, but made the request for the first time at the impartial hearing. Thus, the district contends that the IHO exceeded her jurisdiction by ordering such an award.

A review of the hearing record reveals that the first and only time the parent requested compensatory educational services as a form of relief in this matter was during the impartial hearing, after the presentation of both parties' cases and as part of the parent's closing statement to the IHO (see Tr. p. 99). The parent's advocate stated that because the parties agreed that the student was entitled to receive all of the related services recommended in the October 2022 IESP—and that the parent had been unable, to date, to locate and secure providers to deliver the student's recommended OT, PT, and counseling services—the student was entitled to an award of compensatory educational services to remedy the district's failure to implement those services (see Tr. pp. 98-99). The IHO questioned whether the parent had raised a request for compensatory educational services in the due process complaint notice, and in response, the parent's advocate indicated that "maybe" it was not "100 percent clear earlier, but [he] [ha]d reference[d] it" and it was also in the due process complaint notice (Tr. pp. 99-100). When the IHO asked the parent's advocate to point out where in the due process complaint notice the request was made for compensatory educational services, the parent's advocate referred to the "first paragraph and then in the proposed solution, paragraph 4, awarding all related services and aids in the IEP for the entire [2023-24] school year," as well as in the "rest of that paragraph" (Tr. pp. 101-02). At that time, the IHO noted that she was "going to differ with [the parent's advocate] on that interpretation" but further noted that it was "in the record now" and confirmed that the parent was seeking compensatory educational services (Tr. p. 102). The parent's advocate requested compensatory educational services in "makeup hours equal to those services that the student c[ould] use retroactive to the beginning of the school year and through the end of the school year, and for a reasonable time thereafter" (Tr. p. 99).

Generally, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). Under the IDEA and its implementing regulations, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[i][7][i][a]; [j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]). Moreover, it is essential that the IHO disclose his or her intention to reach an issue which the parties have not raised as a matter of basic fairness and due process of law (Application of a Child with a Handicapping Condition, Appeal No. 91-40; see John M. v. Bd. of Educ. of Evanston Tp. High Sch. Dist. 202, 502 F.3d 708 [7th Cir. 2007]). With respect to relief, State and federal regulations



require the due process complaint notice state a "proposed resolution of the problem to the extent known and available to the party at the time" (8 NYCRR 200.5[i][1] [emphasis added]; see 20 U.S.C. §1415[b][7][A][ii]; 34 CFR 300.508[b]).

Here, as the district argues, it does not appear that the parent requested compensatory education services in the due process complaint notice, as he instead sought funding for the services delivered by his preferred private provider (see Parent Ex. A at p. 2). Instead, the parent requested relief of pendency, SETSS funding, and related services via RSAs or direct funding to private providers (id.).<sup>16</sup> As the parent's claims related to the district's failures to recommend appropriate services and to deliver services and, as it appears from the hearing record that the parent did not privately arrange for the delivery of all of the student's related services, "compensatory education would have been an appropriate form of relief for [the parents] to seek at the outset of their case" (M.R. v. S. Orangetown Cent. Sch. Dist., 2011 WL 6307563, at \*13 [S.D.N.Y. Dec. 16, 2011]; see A.K. v. Westhampton Beach Sch. Dist., 2019 WL 4736969, at \*12 [E.D.N.Y. Sept. 27, 2019] [finding that a request for compensatory education damages was not properly before the IHO or the SRO as it was "not raised in their administrative due process complaint"]).

Further, upon an independent review of the hearing record, there is insufficient evidence to support a finding that the scope of the impartial hearing was expanded to include a request for compensatory relief. In this case, the impartial hearing consisted of three days (see Tr. pp. 1-112). During the impartial hearing, the district representative confined the opening statement to assert that the October 2022 IESP offered the student appropriate equitable services for the 2023-24 school year and that the student did not require SETSS to address his needs (see Tr. pp. 43-44). The district representative also clarified that, as an equitable consideration, the district would address the rates charged by the parent's contracted provider during cross-examination of the parent's witness (see Tr. pp. 48-49). In the parent's opening statement, the parent's advocate discussed the district's failure to recommend SETSS in the October 2022 IESP, that SETSS and the related services in the October 2022 IESP were appropriate for the student, that the parent had provided the student with SETSS and speech-language therapy (but not for the "other services"), and that the contract reflected the rates for the parent's providers (Tr. pp. 49-53). As already noted, the evidence in the hearing record reveals that the parent first raised the issue of compensatory educational services in the closing statement to the IHO (see Tr. p. 99). Neither party submitted a written closing brief. While IHOs have some latitude in fashioning appropriate relief, to survive a challenge there should be some specific request for the relief in the due process complaint notice or discussion at the impartial hearing so that a record may be developed as to what services the student may have already been receiving and from what source and what services remained undelivered and warranted based on the student's needs so that a compensatory education award could be crafted.<sup>17</sup> Therefore, to the extent the IHO granted compensatory education as substantive

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<sup>16</sup> The parent's request in the due process complaint notice for "such other and further relief as is appropriate" was too broad for the IHO to construe as a specific request for compensatory educational services and, as further noted, the parent did not raise it until the conclusion of the impartial hearing.

<sup>17</sup> Moreover, under State law in this jurisdiction, the burden of proof has been placed 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]). Accordingly, if

relief to remedy the claims raised in the due process complaint notice regarding the district's failure to offer and deliver appropriate equitable services for the 2023-24 school year, this was error.<sup>18</sup>

Consequently, upon an independent review of the hearing record, the evidence does not support an award of compensatory educational services on an equitable basis, and the IHO's award must be vacated.

## **VII. Conclusion**

In summary, an independent review of the hearing record demonstrates that the evidence does not support the IHO's finding that the district offered the student appropriate equitable services for the 2023-24 school year or that the parent did not meet his burden to demonstrate that the private services obtained from Kids Domain were appropriate. As equitable considerations do not warrant a reduction or denial of the relief sought, the district shall be required to fund the privately-obtained services. However, the evidence does not support an award of compensatory educational services.

**THE APPEAL IS SUSTAINED.**

**THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.**

**IT IS ORDERED** that the IHO's decision, dated February 9, 2024, is modified by reversing those portions which found that the district sustained its burden to demonstrate that it offered the student appropriate equitable services for the 2023-24 school year and that the parent did not meet his burden to prove that unilaterally-obtained services from Kids Domain were appropriate, and which denied the parent's request for the district to fund unilaterally-obtained SETSS and speech-language therapy delivered by Kids Domain during the 2023-24 school year;

**IT IS FURTHER ORDERED** that the IHO's decision, dated February 9, 2024, is modified by vacating the IHO's award of compensatory educational services consisting of 30 hours of individual speech-language therapy (Yiddish), 30 hours of individual OT (English), 30 hours of individual PT (English), and 10 hours of individual counseling services (Yiddish); and

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compensatory education is a remedy sought, the district must be given notice that it should describe its views, based on a fact-specific inquiry set forth in an evidentiary record, regarding an appropriate compensatory education remedy that would most reasonably and efficiently place the student in the position that he would have been but for the denial of a FAPE (Educ. Law § 4404[1][c]; see M.M. v. New York City Dep't of Educ., 2017 WL 1194685, at \*4 [S.D.N.Y. Mar. 30, 2017] [noting the SRO's finding that the district had the burden of proof on the issue of compensatory education]; see also Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 457 [2d Cir. 2015]; Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005]).

<sup>18</sup> The student may be entitled to compensatory education if the district agreed to fund certain of the services at issue pursuant to its pendency obligation. The parties agreed that the student's pendency placement arose from the unappealed February 2021 IHO decision, which ordered the district to pay for SEIT, OT, PT, and speech-language therapy services delivered by private providers at market rate (see Parent Ex. B at pp. 2, 5; Supp. Document 4). However, the hearing record is not developed regarding what services, if any, were delivered pursuant to pendency. Accordingly, there is not a sufficient record basis for the compensatory award. Nevertheless, nothing in this decision should be deemed to relieve the district of its obligations under pendency.

**IT IS FURTHER ORDERED** that, upon proof of delivery, the district shall directly fund the costs of up to five periods per week of SETSS and three 30-minute sessions per week of speech-language therapy delivered to the student by Kids Domain during the 2023-24 school year.

**Dated:**           **Albany, New York**  
                          **May 9 , 2024**

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**SARAH L. HARRINGTON**  
**STATE REVIEW OFFICER**