The University of the State of New York

The State Education Department
State Review Officer
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No. 24-625

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

Liz Vladeck, General Counsel, attorneys for respondent, by Lindsay Maione, 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. Petitioners (the parents) appeal from a decision of an impartial hearing officer (IHO) which denied their request that respondent (the district) fund the costs of their son's private special education teacher support services (SETSS) delivered by Yes I Can Services Inc. (Yes I Can) for the 2024-25 school year. The district cross-appeals from that portion of the IHO's decision which ordered the district to fund certain unilaterally obtained related services provided by Yes I Can and compensatory education services. The appeal must be sustained in part. The cross-appeal must be sustained.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, 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, 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 decision will not be recited in detail.

Briefly, a Committee on Preschool Special Education (CPSE) convened on August 27, 2018 and found the student eligible for special education as a preschool student with a disability and developed an IEP (August 2018 IEP) (see Parent Ex. B). The CPSE recommended 12-month programming consisting of the following: 10 hours per week of group (2:1) special education

itinerant teacher (SEIT) services in Yiddish; two 30-minute sessions per week of group (2:1) speech-language therapy in Yiddish; two 30-minute sessions per week of group (2:1) occupational therapy (OT) in English; two 30-minute sessions of individual physical therapy (PT) in English; two 30-minute sessions per week of group (2:1) counseling in Yiddish, and support of a fulltime health paraprofessional daily (id. at pp. 1, 24).[1]

The hearing record does not include any information regarding the student's educational history between the development of the August 2018 preschool IEP and the end of the 2021-22 school year, at which time the time was attending second grade at a nonpublic school and "receiving his preschool mandate through a pendency order" (Parent Ex. C at p. 1). A CSE convened on April 26, 2022, found the student eligible for special education as a student with a speech or language impairment, and developed an IEP for the student with a projected implementation date of September 8, 2022 (see id. at p. 1). The April 2022 CSE recommended that the student attend a general education placement with integrated co-teaching (ICT) services for instruction in English language arts (ELA) (five periods per week in English), mathematics (five periods per week in Yiddish), and social studies and sciences (each three periods per week in Yiddish), as well as related services consisting of two 30-minute sessions per week of group counseling services in Yiddish, two 30-minute sessions per week of individual OT in English, two 30-minute sessions per week of individual PT in English, and two 30-minute sessions per week of speech-language therapy (one group and one individual) in Yiddish (id. at pp. 25-26).

The district conducted a psychoeducational evaluation of the student on March 13, 2023 due to concerns regarding his academic performance (see Dist. Ex. 4 at p. 1). On April 26, 2023, a CSE convened to conduct the student's annual review, found the student remained eligible for special education as a student with a speech or language impairment, and developed an IEP with a projected implementation date of September 7, 2023 (see Dist. Ex. 1 at p. 1). The April 2023 CSE recommended that the student attend a general education placement with ICT services for instruction in ELA (10 periods per week in English), mathematics (10 periods per week in Yiddish), social studies (four periods per week in Yiddish), and sciences (three periods per week in Yiddish), as well as related services consisting of sessions of counseling, OT, PT and speech-language therapy (all in Yiddish) at the same frequency and duration as recommended above in the April 2022 IEP (compare Dist. Ex. 1 at p. 15, with Parent Ex. C at pp. 25-26).

The hearing record indicates that for the 2023-24 school year, the student attended a nonpublic school and received 10 hours per week of SETSS from a private provider (see Parent Ex. F at p. 1). The hearing record contains no evidence that a CSE meeting convened or that an IEP was developed for the student for the 2024-25 school year.

[1] State law defines SEIT services (or, as referenced in State regulation, "Special Education Itinerant Services" [SEIS]) as "an approved program provided by a certified special education teacher . . . , at a site . . . , including but not limited to an approved or licensed prekindergarten or head start program; the child's home; . . . or a child care location" (Educ. Law § 4410[1][k]; 8 NYCRR 200.16[i][3][ii]; see "[SEIS] for Preschool Children with Disabilities," Office of Special Educ. Field Advisory [Oct. 2015], available at https://www.nysed.gov/special-education/special-education-itinerant-services-preschool-children-disabilities). A list of New York State approved special education programs, including SEIS programs, can be accessed at: https://www.nysed.gov/special-education/approved-preschool-special-education-programs.

In an emailed letter to the district dated July 8, 2024, the parents, through their attorney, rejected the recommendations included in the April 2022 IEP and indicated that they were placing the student at Talmud Torah Tiferes Yechiel Daleksander for the 2024-25 school year (Parent Ex. D at p. 4). Further, the parents stated that they would make their "best efforts" to find providers to deliver special education services to the student at the nonpublic school and would be "seeking reimbursement, direct payment, and possibly a bank of compensatory hours from the [district] for this special education program and related services" (id.). The parents also indicated that they looked forward to hearing from the district regarding "any updated recommendations and placement" for the student (id.).

The student's father electronically signed a contract with Yes I Can for the 2024-25 school year, which indicated that the parents were "requesting" the following services to be provided: 10 hours of SETSS, two 30-minute sessions of OT, two 30-minute sessions of "Speech Services," and two 30-minute sessions of counseling (Parent Ex. E at pp. 1, 3, 4).[2, 3]

A. Due Process Complaint Notice

In a due process complaint notice dated July 9, 2024, the parents alleged that the district denied the student a free appropriate public education (FAPE) for the 2024-25 school year (see Parent Ex. A). Specifically, the parents alleged that the district's failure to convene a timely IEP meeting amounted to a denial of FAPE for the 12-month 2024-25 school year (id. at p. 3). Moreover, the parents listed the recommendations included in the April 2022 IEP and alleged that the district failed to recommend an "appropriate placement" for the student, that the parents did not receive a school location letter for the student, and that the district did not recommend an extended school year for the student (id. at pp. 2-3). The parents asserted that the last agreed upon program for the student lay in an August 2018 preschool IEP and that the student required a continuation of the "SEIT program or an appropriate placement in a hybrid special education/general education program" (id. at pp. 2, 3). The parents alleged that, due to the district's failure to offer a FAPE, they were forced to unilaterally obtain SEIT services and seek reimbursement from the district (id.).

[2] Next to the parent's electronic signature, the contract bears the date June 12, 2024; however, the electronic "Signature Certificate" accompanying the contract reflects that it was signed by the parent on September 4, 2024 (see Parent Ex. E at pp. 3-4). The contract had also listed PT as s service the parent was "requesting"; however, the service was crossed out and a notation was added that the company was "Not Providing" PT with the initials of the Yes I Can representative who signed the contract (id. at p. 3). The copy of the contract included with the hearing record on appeal has an extra page that is not marked as Exhibit E or with the exhibit pagination. It appears to be a duplicate of page 5 of the exhibit as marked. For purposes of this decision, the extra page has been disregarded and the exhibit pages are cited as marked.

[3] At times in the hearing record, the special education services provided by Yes I Can appear to be interchangeably referred to as either SEIT services or SETSS. The term SETSS is not defined in the State continuum of special education services (see NYCRR 200.6), and the manner in which those services are treated in a particular case is often in the eye of the beholder. As has been laid out in prior administrative proceedings, the term is not used anywhere other than within this school district and a static and reliable definition of "SETSS" does not exist within the district, and unless the parties and the hearing officer take the time to develop a record on the topic in each proceeding it becomes problematic (see Application of the Dep't of Educ., Appeal No. 20-125).

For relief, the parents requested that the district be required to fund the provision to the student of services from the August preschool 2018 IEP for the 2024-25 school year "at the provider's contracted rate" and a bank of compensatory education for services that were not provided to the student during the 2024-25 school year "at the prospective provider's contracted rate" (Parent Ex. A at p. 4).

B. Impartial Hearing Officer Decision

The matter was assigned to an IHO from the Office of Administrative Trials and Hearings (OATH). A prehearing conference was held on August 12, 2024 (Tr. pp. 2-19), after which an impartial hearing convened on September 23, 2024 and concluded on October 9, 2024 after two days of hearings (Tr. pp. 21-134). At the prehearing conference, the parents' attorney clarified that the issues before the IHO concerned the district's failure to recommend an appropriate placement for the 2024-25 school year and failure to recommend an extended school year for the student (Tr. pp. 6-7). The parents argued that the district denied the student a FAPE by failing to convene a timely CSE meeting for the 2024-25 school year (Tr. p. 7). In response, the district alleged during the prehearing conference that it was entitled to assert an affirmative defense pursuant to Education Law § 3602-c (Tr. p. 8). During the hearing, all of the parents' exhibits were admitted into evidence, including testimonial affidavits from the father and an educational supervisor at Yes I Can, both of whom appeared and gave testimony under cross-examination (Tr. pp. 57-96, 109-23).[4]

In a decision dated November 10, 2024, the IHO set forth the legal standards to be applied, noting that the matter was "a dual enrollment case[]" (IHO Decision at pp. 7-8). The IHO found the district offered the student appropriate services tailored to meet his unique needs for the 2024-25 school year and the parents were not entitled to district funding of private SEIT/SETSS services provided by Yes I Can (id. at p. 14). The IHO stated that the parents "primarily focus[ed] their arguments on the shift from SEIT to ICT" and, therefore, she would limit her analysis to that issue (id. at p. 11). The IHO determined that, while the district did not demonstrate that it had effectively implemented the services outlined "in any of the IEPs currently in evidence," she believed that the April 2023 IEP "include[d] services tailored to meet the [s]tudent's unique needs" and that, therefore, the district met its burden (id. at p. 14).[5] In reaching this determination, the IHO cited the evidence presented by the district, including the April 2023 IEP, as well as the March 2023 psychoeducational evaluation of the student (id. at p. 11-12). The IHO did not find the parents' evidence persuasive noting that "such documents [spoke] more to the issue of whether the [private] services provided . . . were appropriate, not what IEP [wa]s most appropriate" (id. at p. 13). The IHO concluded that the August 2018 preschool IEP could not be considered appropriate in light of the April 2023 IEP and recent psychoeducational evaluation, that the district successfully demonstrated that the April 2023 IEP was "designed to provide meaningful education benefits,"

[4] The district submitted a motion to dismiss the parents' due process complaint notice for lack of subject matter jurisdiction and ripeness, which the IHO denied (see IHO Decision at p. 4; Tr. pp. 34-35; Dist. Mot. to Dismiss).

[5] With respect to extended school year services, the IHO found that the parents had not met "their burden" to demonstrate that the student experienced "substantial regression" such that he required services during the extended school year and, therefore, denied the parents' request for funding of private services delivered during July and August 2024 (IHO Decision at p. 10).

and that on that basis the parents were not entitled to reimbursement for SEIT services (id. at p. 14).

Although the IHO found that the district met its burden to prove that the April 2023 IEP offered the student appropriate services for the 2024-25 school year and that it was not appropriate for Yes I Can to deliver services from the preschool IEP, given that the district "did not implement" the student's related services during the 2024-25 school year, "the frequency and duration" of which were "not in question," the IHO went on and made further findings regarding the private related services unilaterally obtained by the parents (see IHO Decision at pp. 14-15). The IHO found that the parents' contract for private servcies with Yes I Can was valid (id. at p. 15). The IHO also cited the remediation plans for OT and speech-language therapy services and noted that, while neither demonstrated the student had made progress given the timing of the reports just one month into the school year, the documents did describe "targeted interventions being implemented" to help the student make progress (id.). The IHO noted the district did not present evidence to dispute the appropriateness of the private related services, and she concluded that the parents met their burden of demonstrating the appropriateness of the speech-language and OT services provided to the student by Yes I Can for the 2024-25 school year (id.).

Finally, the IHO addressed equitable considerations noting that the record was devoid of evidence that the parents failed to cooperate or otherwise interfered with the district's obligations to provide the student a FAPE (IHO Decision at p. 16). The IHO determined that, based on her review of the record, relief in the form of district funding of private speech-language therapy and OT was "appropriate" and there was no justification to reduce the hourly rate sought by the parents (id.). The IHO also awarded funding for counseling services due the fact that the "student was still entitled to those services" while acknowledging the record did not include any evidence that they were being provided (id.). The IHO then determined that, due to the parent's uncontested request for a bank of compensatory education as it related to PT, the student was entitled to receive a bank of 36 hours of compensatory PT services as well (id.).

IV. Appeal for State-Level Review

The parents appeal.[6] The district cross-appeals. The parties' familiarity with the issues raised in the parent's request for review and the district's answer and cross-appeal is presumed and, therefore, the allegations and arguments will not be recited here in detail. The parents contend that the IHO should have awarded the requested relief, that is, funding/reimbursement for unilaterally

[6] The notice of the request for review accompanying the parents' request for review sets forth the student's name but lists an individual on the student's behalf who is not either of the parents (compare Not. of Req. for Rev., with Aff. of Verif., Parent Exs. A at p. 1; C at p. 33; D at p. 4; J; Dist. Ex. 1 at p. 22). The request for review itself does not have a caption or even identify the IHO case number associated with the matter. When filling out the electronic filing form associated with the request for review, the parents' attorney indicated that the student's mother was bringing the appeal; however, the student father signed the affidavit of verification accompanying the request for review. For purposes of this decision, the parents will be referred to collectively as the petitioners. In future matters, the parents' attorney should take care to place a caption on pleadings submitted to the Office of State Review and to accurately complete electronic filing forms to ensure efficient and accurate processing of appeals.

obtained services provided to the student, while the district contends the IHO erred in awarding any relief at all.[7]

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. 386, 399 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

[7] The parents requested two extensions of time to serve and file an answer to the district's cross-appeal (including one that was submitted after the pleading was due). While it seems the parents may have served the district with an answer to the cross-appeal, they did not file such pleading with the Office of State Review. As the parents' answer to cross-appeal was never filed, there is no need to consider the district's reply to the answer to the cross-appeal.

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 580 U.S. at 404). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 580 U.S. at 403 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).[8]

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). 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, 489 F.3d at 111; Cerra, 427

[8] The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 580 U.S. at 402).

F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85).

VI. Discussion

A. Scope of the Impartial Hearing

As an initial matter, I will address the parents' argument that the IHO "misunderstood th[e] case to be about an implementation failure."

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]). Indeed, "[t]he parent must state all of the alleged deficiencies in the IEP in their initial due process complaint in order for the resolution period to function. To permit [the parents] to add a new claim after the resolution period has expired would allow them to sandbag the school district" (R.E., 694 F.3d 167 at 187-88 n.4; see also B.M. v. New York City Dep't of Educ., 569 Fed. App'x 57, 58-59 [2d Cir. June 18, 2014]).[9]

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, 713 [7th Cir. 2007]). Although an IHO has the authority to ask questions of counsel or witnesses for the purposes of clarification or completeness of the hearing record (8 NYCRR 200.5[j][3][vii]), or even inquire as to whether the parties agree that an issue should be addressed, it is impermissible for the IHO to simply expand the scope of the issues

[9] When a matter arises that did not appear in a due process complaint notice, the next inquiry focuses on whether the district, through the questioning of its witnesses, "open[ed] the door" to the issue under the holding of M.H. v. New York City Department of Education (685 F.3d at 250-51; see also Bd. of Educ. of Mamaroneck Union Free Sch. Dist. v. A.D., 739 Fed. App'x 79, 80 [2d Cir. Oct. 12, 2018]; B.M., 569 Fed. App'x at 59; J.G. v. Brewster Cent. Sch. Dist., 2018 WL 749010, at *10 [S.D.N.Y. Feb. 7, 2018]; C.M. v. New York City Dep't of Educ., 2017 WL 607579, at *14 [S.D.N.Y. Feb. 14, 2017]; D.B. v. New York City Dep't of Educ., 966 F. Supp. 2d 315, 327-28 [S.D.N.Y. 2013]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 584-86 [S.D.N.Y. 2013]; A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 282-84 [S.D.N.Y. 2013]; J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, *9 [S.D.N.Y. Aug. 5, 2013]). In the present case, the district did not present any testimonial evidence therefore it could not "open the door."

raised without the express consent of the parties and then base his or her determination on new issues raised sua sponte (see Dep't of Educ., Hawai'i v. C.B., 2012 WL 220517, at *7-*8 [D. Haw., Jan. 24, 2012] [finding that the administrative hearing officer improperly considered an issue beyond the scope of the parents' due process complaint notice]).

In their due process complaint notice and, as outlined above, the parents did not allege that the district failed to implement dual enrollment services; rather, the parents' primary allegation was that the district failed to offer the student a FAPE under the IDEA by failing to convene a CSE to develop an IEP for the student for the 2024-25 school year (Parent Ex. A at p. 3). The parents more particularly alleged under the "Proposed Resolution" heading that they were seeking a finding that the district's "failure to convene a timely IEP meeting" amounted to a denial of FAPE as well as the district's failure to recommend an extended school year for the 2024-25 school year (id.). This argument was further clarified at the prehearing conference by the parents' attorney. When asked to summarize the parents' arguments, the parents' attorney stated that the parents sought findings that the district failed to recommend an appropriate program, failed to convene a timely CSE meeting, and failed to recommend an extended school year; and that these failures all amounted a denial of a FAPE for the 2024-25 school year; the parents sought reimbursement from the district for the costs of unilaterally obtained services (Tr. pp. 6-7). At no point did the parents' attorney mention or otherwise allude to an allegation that the district failed to implement services (Tr. pp. 2-19).

It appears that the IHO treated the matter as though the parents had sought services from the district to be implemented in the private school pursuant to Educational Law § 3602-c. 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]). On the other hand, 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]).[10] "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 individualized education services program [(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-

[10] 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]).

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.).[11] 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.

Here, although the student attended a nonpublic school leading up to and including the 2024-25 school year, apparently at the parents' own expense, there is no indication in the hearing record that the parents did not want the district to offer a public placement to the student or that they requested the district to make special education services available to the student while he attended the nonpublic school (i.e., dual enrollment services).[12] To the contrary, the IEPs in the haring record offered public school programming to the student (see Parent Ex. C; Dist. Ex. 1). The parents rejected the IEPs and informed the district of their intent to unilaterally obtain special education services for the student and seek funding from the district, while also stating a desire to hear from the district regarding "any updated recommendations and placement" for the student (see Parent Ex. D).

To be sure, the district added to the confusion when, during the prehearing conference and in response to the parents' attorney's summary of the issues presented, the district simply asserted that it would "raise[] the 3602-c June 1st defense," referring to a parent's obligation to submit a written request to the district for dual enrollment services prior to June 1 of the school year preceding the school year for which the request for services is made, and further submitted a motion to dismiss arguing that the IHO did not have subject matter jurisdiction over implementation disputes falling under Education Law § 3602-c (Tr. p. 8; Dist. Mot. to Dismiss; see Educ. Law § 3602-c[2]).[13] Indeed, despite the allegations in the due process complaint notice

[11] 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.

[12] For example, according to the April 2022 IEP, the student's father expressed at that time that he would "consider public school placement" (Parent Ex. C at p. 1).

[13] The IHO, at one point in her decision, noted that it was "questionable" why there was not an IESP developed for the student (IHO Decision p. 14, n. 109), demonstrating her misunderstanding of the matter as a case involving

and the parents' attorney's statement of the issues at the impartial hearing, on appeal, the district continues to maintain that the issues in this matter fell under the dual enrollment statute, rather than the IDEA. However, as set forth above, the district's understanding of the issues in this matter is misguided.

Ultimately, review of the hearing transcript reveals no indication from the IHO, and no express agreement from the parties, that the IHO would render a determination regarding the district's purported failure to implement services at the student's nonpublic school. I therefore find that the IHO went outside the scope of the impartial hearing in concluding that the district failed to implement services.

The remaining issues properly before the IHO included whether the district's failure to convene a CSE for the purpose of developing an IEP for the 2024-25 school year amounted to a denial of FAPE and whether the parent's unilaterally obtained program in light of the alleged failure was appropriate such that reimbursement for that program of services is warranted.

B. FAPE—2024-25 School Year

I now turn to the issue of the district's failure to convene a CSE to conduct the student's annual review and develop an IEP for the student for the 2024-25 school year.

A school district has a continuing statutory requirement to meet and revise a student's IEP periodically, but not less than annually. The IDEA and State regulations require the CSE to meet "at least annually" to review and, if necessary, to revise a student's IEP (see 20 U.S.C. § 1414[d][4][A]; 34 CFR 300.324[b][1]; 8 NYCRR 200.4[f]); however, there is no requirement that an IEP be produced at a parent's demand (Cerra, 427 F.3d at 194). Further, the regulations do not preclude additional CSE meetings, specifically prescribe when the CSE meeting should occur, or prevent later modification of an IEP during the school year through use of the procedures set forth for amending IEPs in the event a student progresses at a different rate than anticipated (20 U.S.C. § 1414[d][3][D], [F]; 8 NYCRR 200.4[f]-[g]). The IDEA's implementing regulations and State regulations require that a district must have an IEP in effect at the beginning of each school year for each child in its jurisdiction with a disability (34 CFR 300.323[a]; 8 NYCRR 200.4[e][1][ii]; Cerra, 427 F.3d at 194; K.L. v. New York City Dep't of Educ., 2012 WL 4017822, at *13 [S.D.N.Y. Aug. 23, 2012], aff'd, 530 Fed. App'x 81 [2d Cir. July 24, 2013]; B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 614 [E.D.N.Y. 2012]). As a matter of State law, the school year runs from July 1 through June 30 (see Educ. Law § 2[15]). Failure to provide a finalized IEP before the beginning of the school year is a procedural violation that may result in a finding that the district failed to offer the student a FAPE (see Y.S. v. New York City Dep't of Educ., 2024 WL 4355049, at *18 [S.D.N.Y. Sept. 30, 2024] [rejecting the argument that a failure to have an IEP in place was a per se denial of a FAPE]; Application of a Student with a Disability, Appeal No. 15-099 [finding that a district's failure to finalize an IEP until after start of school year contributed to a denial of FAPE despite evidence of the parties' extensive efforts to locate an appropriate placement]).

dual enrollment services.

In this instance, the district did not put forth any evidence that it convened a CSE at any point to engage in educational planning for the student for the 2024-25 school year (see Parent Exs. A-L; see also Dist Exs. 1, 3, 4). The district presented the April 2023 as the last IEP it had developed for the student (Dist. Ex. 1). Accordingly, the CSE should have convened by April 2024 to conduct the student's annual review and develop an IEP for the 2024-25 school year. Further, there are no mitigating factors in this matter that would indicate that the procedural violation did not impede the student's right to a FAPE, impede the parents' opportunity to participate in the decision-making process, or deprive the student educational benefits (see Y.S., 2024 WL 4355049, at *18 [finding that, despite the lack of an IEP, the student was "incontrovertibly receiving special education services"]). Therefore, contrary to the IHO's findings, the district denied the student a FAPE for the 2024-25 school year by failing to convene a CSE to develop an IEP for the student for the 2024-25 school year.[14]

C. Unilateral Placement

I now turn to the parties' contention that the IHO erred in her analysis of the appropriateness of unilaterally obtained services from Yes I Can .

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 370 [1985]), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 112, 115 [2d Cir. 2007]; Walczak, 142 F.3d at 129). 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 Rowley, 458 U.S. at 203-04; Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see also 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"]). 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]). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison, 773 F.3d at 386; C.L. 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.

[14] As I find that the district denied the student a FAPE by failing to convene the CSE, I do not find it necessary to separately consider whether the IHO erred in finding that the student did not require 12-month extended school year services and that the April 2023 IEP offered appropriate programming and services to meet the student's needs.

> No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

(Gagliardo, 489 F.3d at 112, quoting Frank G., 459 F.3d at 364-65).

1. The Student's Needs

A brief description of the student's needs provides context to determine whether, under the totality of the circumstances, the program unilaterally obtained by the parents' was specially designed to meet the student's needs for the 2024-25 school year.

According to the assessment results of the March 2023 psychoeducational evaluation report, the student presented with "overall intellectual capacity" in the average range with visual-spatial skill being an area of strength (Dist. Ex. 4 at p. 3). Academic assessments found the student's achievement ranging from the low to low-average range (id. at p. 2). The evaluator reported that, during the evaluation, the student was "initially cooperative" but became "restless, impatient and distracted as the session progressed" (id. at p. 3). Further, the evaluator noted that, while the student spoke in Yiddish and in English, his performance was enhanced when using his dominant language of Yiddish (id. at p. 2).

The 2023 evaluation noted that, "due to some deviations of standard testing procedures to accommodate bilingual issues, exact quantitative results [were] not presented, and the ranges presented should be interpreted with caution" (Dist. Ex. 4 at p. 2). The evaluation reflected the student's performance on the Wechsler Intelligence Scale for Children-Fifth Edition (WISC-V), which yielded results on the verbal comprehension index in the low average range, visual-spatial index in the high average range, fluid reasoning index in the average range, a working memory index in the average range, processing speed index in the average range, and a full- scale IQ score in the average range of intelligence (id.). The evaluator described that the student was able to provide explanations for social situations such as "why most schools do not allow students to bring cell phones to class," but was not able to explain "why one should close lights when no one is using them" (id.). He also had difficulty when required to express how two items such as "summer and winter" and "angry and happy" were alike (id.). The student's decoding and reading comprehension skills as measured by the Woodcock-Johnson III NU-Tests of Achievement (WJ-III NU Tests of Achievement) yielded results in the in the low range (id. at pp. 2- 3). The student was reported to be able to read Yiddish but did so "in a slow manner" (id. at p. 3). Administration

of the WJ-III NU Tests of Achievement mathematics indexes to the student yielded results in the low average range (id. at pp. 3-4).

The March 2023 psychoeducational evaluation indicated that, socially, the student was reported to be anxious and insecure and had difficulty expressing his thoughts and feelings, which "interfered with his relating to his peers" (Dist. Ex. 4 at p. 3). The evaluation reported that the student had received a diagnosis of generalized anxiety disorder (id.).

According to the April 2023 IEP, which summarized the academic results from the March 2023 evaluation noted above, socialization was a strength for the student, and he had started counseling during the 2022-23 school year and was "showing a lot of progress" (Dist. Ex. 1 at p. 2). The April 2023 IEP noted that the student interacted more easily with younger students or students functioning "below [the] level" at which the student functioned, as he was anxious and threatened when he interacted with older, higher functioning children (id.). The parent described the student as defiant at home with regards to following rules and performing household chores (id.). The parent also shared concerns that the student was not able to express his needs appropriately due to his anxiety and expressive language delays, had difficulty taking constructive criticism, and did not respond "appropriately to authority figures" (id.). The parent further noted that the student had difficulty engaging in group activities and required a lot of help with his homework (id.).

Turning to the student's physical development, the April 2023 IEP reported that the student had severe egg and nut allergies and exhibited sensory deficits (Dist. Ex. 1 at p. 3). The April 2023 IEP also noted that the student was a messy eater and was unable to keep himself and his belongings well organized (id. at p. 2). The parent concerns noted in the April 2023 IEP listed that the student was "lagging behind" in his fine motor skills and had poor proprioceptive skills (id. at pp. 2-3).

In addition to recommending ICT services and related services to address the student's needs, the April 2023 IEP included strategies to address his management needs as follows: preferential seating; teacher check-ins; movement breaks; visual schedule; access to manipulatives; multi- sensory learning environment; praise and encouragement; positive reinforcement; directions broken down and repeated; explicit instruction; prompts; flash cards; and drills and repetition (Dist. Ex. 1 at p. 3).

The hearing record includes a June 2024 SETSS progress report which indicated that the student continued to struggle with reading "grade level texts independently for comprehension," inferencing information from grade level texts, self-regulation without prompts, and identifying multi-step math word problems (Parent Ex. F at p. 1).[15] Regarding writing, the June 2024 SETSS progress report reflected that the student struggled with capitalization and spelling of multi-syllabic words (id. at p. 3). Socially, the SETSS provider noted that the student continued to struggle with regulating emotions but had learned to identify emotions and understand how they

[15] The June 2024 SETSS progress report does not identify an agency or company with which the special education teacher who completed the report was associated (see Parent Ex. F). However, the June 2024 SETSS progress report was completed by the same special education teachers identified on a July 2024 Yes I Can SETSS plan of remediation for the student for the 2024-25 school year (compare Parent Ex. F at p. 4, with Parent Ex. G at p. 4).

were linked to behavior (id.). In addition, the SETSS provided indicated that, due to the student's "inability to retain information and [his] previous instances of regression," the student "must" receive extended school year services to have an educational benefit (id.).

The associate director of educational services (director) at Yes I Can testified by affidavit and in person at the impartial hearing (Tr. p. 75; Parent Ex. I ¶ 4).[16] With respect to the student's needs, the director stated that with a break "of a couple of days" the student exhibited "significant regression," and a two-month break would be a "significant step backward for the student," and he "would be worse off for it" (Tr. p. 77). The director also testified that he felt that an ICT class would be more restrictive than the student's "current setup" (Tr. pp. 78-79). The student's father, in his testimony by written affidavit, indicated that the student struggled in "many academic and social/emotional areas," requiring extra assistance, and that "without the extra assistance he [would] not be able to maintain his mainstream placement" (Parent Ex. J ¶ 2).

2. Services from Yes I Can

Initially, with respect to the IHO's analysis of the unilaterally obtained services, to the extent the IHO found the parents did not meet their burden to prove that the SETSS were appropriate but did establish that the related services were specially designed to meet the student's needs (see IHO Decision at pp. 14-15), this was error. The IHO was required to consider the appropriateness of the unilaterally-obtained services under the totality of the circumstances standard forth above without carving out a portion of the services upfront. As the Second Circuit Court of Appeals has recently held, it is error for an IHO to apply the Burlington/Carter test by conducting reimbursement calculations that are based on the IHO's analysis of the appropriateness of the unilateral placement (A.P. v. New York City Dep't of Educ., 2024 WL 763386 at *2 [2d Cir. Feb. 26, 2024] [holding that the IHO should have determined only whether the unilateral placement was appropriate or not rather than holding that the parent was entitled to recover 3/8ths of the tuition costs because three hours of instruction were provided in an eight hours day]). The Court further reasoned that "once parents pass the first two prongs of the Burlington-Carter test, the Supreme Court's language in Forest Grove, stating that the court retains discretion to 'reduce the amount of a reimbursement award if the equities so warrant,' suggests a presumption of a full reimbursement award" (A.P., 2024 WL 763386 at *2, quoting Forest Grove Sch. Dist., 557 U.S. at 246-47).

Turning to evidence in the hearing record regarding the unilaterally obtained services, during the 2024-25 school year, the student attended a nonpublic school and was receiving 10 hours of SETSS per week and one hour each per week of speech-language therapy, OT, and counseling delivered by Yes I Can (Parent Exs. E at p. 4; J ¶ 9). The evidence in the hearing record is unclear as to which grade the student was in as the student's 2023-24 SETSS provider indicated he was then in fifth grade, while the Yes I Can director testified that the student was in fourth grade for the 2024-25 school year (compare Parent Ex. F at p. 1, with Tr. p. 88).

[16] The director stated that he was familiar with the student, he screened and hired all special education teachers, reviewed students' IESPs or IEPs, discussed parent needs and requests, and visited schools to "collaborate with the providers and school personnel to address any needs and concerns" (Parent Ex. I ¶¶ 5, 8-9).

The director testified that, during the 2024-25 school year, the student was receiving SETSS and related services of speech-language therapy, OT, and counseling from Yes I Can, and that the student's providers held State certification in in their respective fields (Parent Exs. H, I ¶¶ 13-25). Further, the director stated that the providers had experience working with elementary school students and were selected based on their training and successful teaching experiences with students with similar education profiles to the student's (Parent Ex. I ¶ 28). In his written affidavit, the director indicated that the student's services were "typically provided both inside the classroom as push-in sessions and 1:1 in a separate location," and that the sessions were "individualized," including a "great deal of specialized instruction" (id. ¶ 33). However, in later testimony, the director indicated that the student's SETSS were "primarily pull-out" sessions delivered in a separate location rather than in the classroom (Tr. p. 85).

As previously noted, the parents entered into a contract with Yes I Can for the 2024-25 school year on June 6, 2024 for the following services: SETSS, OT, speech-language therapy, and counseling (Parent Ex. E at p. 3). The director testified that Yes I Can began providing SETSS services to the student "at the beginning of the summer session" and that the student was previously "serviced by another agency" (Tr. p. 79).[17] Further, the director indicated that "over the summer" Yes I Can only provided SETSS to the student as the agency was unable to arrange for any related service providers to deliver the student's services (Tr. p. 79). The director testified that, in September 2024, the student continued to receive SETSS, and then, speech-language therapy, OT and counseling services began to be provided to the student (Tr. p. 123). However, at the impartial hearing held on September 23, 2024, the student's father testified that SETSS and speech-language therapy were being provided to the student, OT services would be starting soon, and that he had no confirmation of when counseling would begin (Tr. p. 67).

When asked during the impartial hearing if Yes I Can or the service providers completed any formal assessments of the student's skills, the director indicated that the providers were required to do assessments four times a year and "believe[d] that if they ha[d]n't done it already, they probably [would] be doing it in the very near future" (Tr. p. 86). In math, the director stated that the providers conducted informal assessments such as a test or a quiz to ascertain the specific skills that the student was missing and then focused on those skills (Tr. p. 87). In the July 2024 plan of remediation, the SETSS provider reported that, in reading, based on the Fountas and Pinnell assessment, the student was performing at level "R," which the director testified was "connect[ed] to somewhere in 4th grade" but that the student's fluency and speed needed to be improved to be on grade level (Tr. p. 89; Parent Ex. G at p. 1).

The director indicated that the student's progress was measured through "quarterly assessments, consistent meetings with the providers and support staff, observation of the student in the classroom, and daily session notes" (Parent Ex. I ¶ 34). He also stated that the progress report entered as evidence in the hearing record was an "accurate representation of the progress the student made during the 2023-2024 school year," and "what providers worked on during the 2023-2024 school year, including goals" (id. ¶ 31). However, while the hearing record includes

[17] While the director indicated that a different agency provided the student's services during the 2023-24 school year, as noted above, the same special education teachers completed the student's June 2024 SETSS progress report and the July 2024 Yes I Can SETSS plan of remediation (compare Parent Ex. F at p. 4, with Parent Ex. G at p. 4).

the June 2024 progress report for the 2023-24 school year, given the director's testimony that the student's services were provided by a different agency during the 2023-24 school year (Tr. p. 79), it is unclear how the director made conclusions about the accuracy of the progress report relating to the 2023-24 school year. No progress reports or session notes were entered into evidence for the 2024-25 school year (see Parent Ex. F).

The hearing record contained three "plans of remediation": a July 2024 SETSS plan; a September 2024 speech-language therapy plan; and a September 2024 OT plan (see Parent Exs. G, K, L). Each plan included goals that the providers planned to work on with the student, and, as the SETSS plan was dated in July 2024, the providers indicated that they had been using guided reading, Orton Gillingham methodology, metacognition, graphic/semantic organizers, think alouds, worksheets, teacher modeling, and the "All About Spelling" curriculum to address the student's reading comprehension and writing needs (Parent Ex. G at pp. 1-4).[18] To assist the student with his math goals, the SETSS providers broke down problems into smaller steps and used graphic organizers, step by step cue cards, and manipulatives (id. at pp. 2-3). The September 2024 speech-language therapy plan contained four speech-language goals and indicated that the speech-language pathologist would use games, books from Super Duper and Lakeshore publications, and the Visualizing and Visualizing curriculum (Parent Ex. K at p. 1). The September 2024 OT plan contained four OT goals and indicated the occupational therapist would use tabletop activities and reflex integration exercises to provide sensory input through vestibular, proprioceptive, and tactile channels and work on core and upper body strengthening and bilateral coordination (Parent Ex. L at p. 1). The hearing record does not include a counseling plan for the student, or, as noted above, any progress reports completed by Yes I Can providers for the 2024-25 school year; however, review of the SETSS remediation plan shows that as part of the 10 hours per week of SETSS, the SETSS providers would be addressing some of the student's social/emotional and language needs in addition to the student's academic needs (see Parent Ex. G at pp. 3-4).[19]

In light of the above, the parents did not sustain their burden to establish that the private services they arranged for with Yes I Can were appropriate for the student during the 2024-2025 school year. While there is some evidence of the SETSS, speech-language therapy, and OT providers' plans for the student that identified specific goals, curriculums, and strategies, notably absent from the hearing record is testimony from the student's providers, any plan for counseling services, and any evidence of any progress reports, session notes, or other evidence describing the specially-designed instruction that was actually delivered to the student during the 2024-25 school year. This omission is compounded by discrepancies in the hearing record between the parent's direct testimony and the director's testimony by written affidavit regarding if and when the student's related services of OT and counseling started. Regarding the director's testimony, that IHO found that he showed "some bias regarding the appropriateness of services" and further opined that it was "challenging to see how the" August 2018 preschool IEP, which the agency

[18] A comparison of the June 2024 SETTS progress report and the July 2024 Yes I Can SETSS remediation plan reveals that the statement of academic needs and goals are nearly identical (compare Parent Ex. F with Parent Ex. G).

[19] As noted, the student's father testified that counseling had not been started for the student as of September 23, 2024 and he did not know when services would begin (Tr. p. 67).

purported to be implementing, could still be appropriate for the student (IHO Decision at p. 14). Generally, an SRO gives due deference to the credibility findings of an IHO, unless non-testimonial evidence in the hearing record justifies a contrary conclusion or the hearing record, read in its entirety, compels a contrary conclusion (see Carlisle Area Sch. v. Scott P., 62 F.3d 520, 524, 528-29 [3d Cir. 1995]; P.G. v. City Sch. Dist. of New York, 2015 WL 787008, at *16 [S.D.N.Y. Feb. 25, 2015]; M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 330 [E.D.N.Y. 2012], aff'd 725 F.3d 131 [2d Cir. 2013]; Bd. of Educ. of Hicksville Union Free Sch. Dist. v. Schaefer, 84 A.D.3d 795, 796 [2d Dep't 2011]; Application of a Student with a Disability, Appeal No. 12-076). Here, the hearing record does not provide a basis to reach a conclusion contrary to the IHO's on the issue of the director's credibility.

Finally, the hearing record is devoid of evidence regarding the curriculum at the nonpublic school, the student's non-SETSS instruction, and how SETSS would have been connected to the instruction provided by the nonpublic school during the 2024- 25 school year. Without such information, it is not possible to ascertain whether the student received special education support in the classroom to enable him to access the general education curriculum or whether the SETSS delivered to him, even if provided in a separate location, supported his classroom functioning. Given that, by definition, specially designed instruction is the adaptation of instruction to allow a student to access a general education curriculum so that the student can meet the educational standards that apply to all students (8 NYCRR 200.1[vv]; see 34 CFR 300.39[b][3]), under the totality of the circumstances, the evidence in the hearing record is insufficient to demonstrate that the student's program was appropriate to meet his needs. As a result, the parents have failed to meet their burden of proving that the services they obtained privately were appropriate for the student under the Burlington-Carter standard, and the IHO erred in awarding relief in the form of district funding for unilaterally obtained services.

As a final matter, the IHO awarded compensatory PT services apparently based on the premise that the district had been required to deliver services to the student at the nonpublic school, which as set forth above, is not supported by the evidence in the hearing record (see IHO Decision at p. 16). Here, where the parents engaged in self-help and unilaterally obtained private services for the student, I find no basis for an award of compensatory education services to make up for gaps in the unilateral programming arranged for by the parents, especially absent specific evidence regarding difficulties arranging for the services (see, e.g., Application of the Dep't of Educ., Appeal No. 22-139). There is no other support in the hearing record for an award of compensatory education.

VII. Conclusion

In conclusion, I find that the district violated the procedural requirements of the IDEA by failing to convene a CSE to conduct the student's annual review and develop an IEP prior to the beginning of the 2024-25 school year and that such violation resulted in a denial of a FAPE to the student. However, I find that the parents did not meet their burden to prove that the unilaterally obtained services for which they seek district funding were appropriate. Accordingly, the parents are not entitled to district funding of those services and there is no need to reach the issue of equitable considerations.

I have considered the parties' remaining contentions and find them to be without merit.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision, dated November 10, 2024, is modified by reversing those portions which determined that the district offered the student a FAPE for the 2024-25 school year but failed to deliver special education services to the student at the nonpublic school and that a portion of the parents' unilaterally obtained services from Yes I Can were appropriate for the student for the 2024-25 school year, and which ordered the district to directly fund speech-language therapy, OT, and counseling services provided by Yes I Can and awarded a bank of compensatory PT services.

Dated: **Albany, New York**
April 30, 2025

SARAH L. HARRINGTON
STATE REVIEW OFFICER