



The University of the State of New York

The State Education Department

State Review Officer

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No. 25-008

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

Appearances:

Shehebar Law PC, attorneys for petitioner, by Ariel A. Bivas, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Abigail Hoglund-Shen, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request to be reimbursed for the costs of her daughter's unilaterally-obtained special education teacher support services (SETSS) and speech-language therapy services delivered by Alpha Student Support (Alpha) for the 2023-24 school year. Respondent (the district) cross-appeals from that portion of the IHO's decision which determined that the district waived its June 1 affirmative defense and which denied the district's motion to dismiss the parent's due process complaint notice for lack of subject matter jurisdiction. The appeal must be dismissed. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

When a student who resides in New York is eligible for special education services and attends a nonpublic school, Article 73 of the New York State Education Law allows for the creation of an individualized education services program (IESP) under the State's so-called "dual enrollment" statute (see Educ. Law § 3602-c). The task of creating an IESP is assigned to the same committee that designs educational programming for students with disabilities under the IDEA (20 U.S.C. §§ 1400-1482), namely a local Committee on Special Education (CSE) that includes, but

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

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

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4[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 reflects that on April 12, 2022, a CSE convened and, having found that the student was eligible for special education as a student with a speech or language impairment, developed an IESP (April 2022 IESP) that included recommendations for the student to receive three periods per week of SETSS in a group (separate location, English) and two 30-minute sessions per week of speech-language therapy services in a group (separate location therapy room, English) to address her identified needs (see Parent Ex. B at pp. 1, 8, 10).^{1, 2} In addition, the April 2022 IESP included approximately six annual goals targeting the student's language skills (id. at pp. 5-7).³

On September 5, 2023, the parent signed a "Parent Service Contract" with Alpha to deliver three periods per week of SETSS to the student, as well as two 30-minute sessions per week of speech-language therapy, during the 2023-24 school year (Parent Ex. C at pp. 1-2).⁴ According to the terms of the contract, the agency indicated that it would "make every effort to implement the recommended services mentioned-above with suitable qualified providers" and charged \$195.00 per hour for SETSS and \$250.00 per hour for speech-language therapy (id.).

Evidence in the hearing record indicates that the student received SETSS and speech-language therapy services from Alpha from "September 2023 through June 2024" (Parent Ex. I ¶ 14). In addition, the evidence also reflects that the student received "her services in a mainstream [religious, nonpublic school]" and that "[s]ervices [we]re typically provided outside of the classroom" (Parent Exs. D ¶ 21; I ¶ 18).

¹ 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]).

² 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 example, SETSS has been described in a prior proceeding as "a flexible hybrid service combining Consultant Teacher and Resource Room Service" that was instituted under a temporary innovative program waiver to support a student "in the general education classroom" (Application of a Student with a Disability, Appeal No. 16-056), and in another proceeding it was suggested that SETSS was more of an a la carte service that is completely disconnected from supporting the student in a general education classroom setting (Application of a Student with a Disability, Appeal No. 19-047).

³ The April 2022 IESP included a projected implementation date of September 1, 2022 and a projected annual review date of April 12, 2023 (see Parent Ex. B at p. 1). Based on the student's date of birth, she would have been considered, chronologically, as a kindergarten student during the 2022-23 school year (id.). According to the IESP, the student had been receiving five hours per week of special education itinerant teacher (SEIT) services, two 30-minute sessions per week of individual speech-language therapy, and two 30-minute sessions per week of individual physical therapy (PT) at her preschool during the 2021-22 school year (id.).

⁴ Alpha has not been approved by the Commissioner of Education as a school or agency with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

By due process complaint notice dated July 15, 2024, 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 demonstrated difficulty with "focusing and attending during story time," "playing with other peers," and she did "not always understand when she [wa]s asked a question or given a directive" (id. at p. 2). The parent further noted that these "deficits [we]re inhibiting [the student's] academic and educational progress and caus[ed] her to regress" (id.). Therefore, the parent indicated the "CSE ha[d] set up a special education program for [the student] and strongly recommend[ed] that she continue in her current placement and program set forth on the [April 2022] IESP," which included the following: three periods per week of SETSS and two 30-minute sessions per week of speech-language therapy in a group (id.). Next, the parent indicated that the district failed to implement the student's special education program set forth in the April 2022 IESP, and "[h]aving [had] no success securing a [district] rate SETSS and related service provider, the [p]arent unilaterally secured their own providers to work with the [s]tudent for an enhanced rate" (id.). In addition, the parent requested pendency services based on the special education program set forth in the April 2022 IESP, and as relief for the alleged violations, the parent requested an order directing the district to directly fund or reimburse the parent for the SETSS and related services set forth in the April 2022 IESP at an enhanced rate (id. at pp. 2-3). The parent reserved her right to seek compensatory educational services for any services not provided to the student by the district (id. at p. 3).

In a response to the parent's due process complaint notice, dated August 22, 2024, the district generally denied the parent's allegations, asserted the affirmative defense that the parent failed to comply with the requirement to request equitable services on or before June 1, and attached a June 11, 2024 prior written notice of the recommendations related to a "CSE meeting" held on June 11, 2024 (see generally Dist. Response to Due Process Compl. Notice).⁵

A. District Motion to Dismiss

In a motion to dismiss, dated August 30, 2024, the district argued that the IHO had no subject matter jurisdiction over the issues raised in the parent's due process complaint notice (see generally Dist. Motion to Dismiss). In response, the parent prepared her Opposition to the Motion to Dismiss on or about September 3, 2024 (see generally Parent Opp. to Motion to Dismiss).

Thereafter, on October 28, 2024, the parent submitted her disclosures to the district representative and the IHO, and on October 29, 2024, the IHO asked the parent to send a revised disclosure packet with the proper exhibit and page numbers (see Supp. Ex. 8 at pp. 3-4). In the same email, the IHO noted that she had not received any disclosures from the district and asked whether none were sent or whether none were sent to her (id. at p. 3). The hearing record does not include any response from the district to the IHO's inquiry.

⁵ According to the June 2024 prior written notice, the June 2024 CSE relied on the following documentation: an April 2022 classroom observation, a May 2022 social history assessment, a January 2024 psychoeducational evaluation, a March 2024 speech-language therapy progress report, and a December 2023 teacher report (see Dist. Response to Due Process Compl. Notice at pp. 3-4). The prior written notice also indicated that recommended services—SETSS and speech-language therapy—would be "put into effect" on September 9, 2024 (id. at p. 4). However, as noted above, this proceeding relates to the 2023-24 school year.

Based on the limited information in the hearing record, it appears that the impartial hearing was scheduled to occur on November 3, 2024; however, due to illness, the IHO could not go forward on that date and provided the parties with two options as to how to proceed: first, the parties could agree to go forward without a "hearing," since the district had not submitted any disclosures and had not reserved the right to cross-examine any of the parent's witnesses; or second, the parties could reschedule (Supp. Ex. 8 at pp. 2-3). The parent's attorney responded and selected the first option to forego an impartial hearing (id. at p. 2). The hearing record does not include any response to the IHO's proposal from the district.

Two days later, on November 6, 2024, the IHO sent an email to the parties and provided the district with the opportunity to "register any objection to proceeding" with the parent's exhibits and written closing statements by the end of the November 6, 2024, business day (Supp. Ex. 8 at p. 1). The IHO provided the parties with the opportunity to submit written closing arguments by November 15, 2024, and to advise if more time was needed (id.). In addition, the IHO asked the parties if either wished to "address compliance," as the matter was "out of compliance when [it] got transferred to [her]"(id.). The hearing record does not include any response to the IHO's inquiries, other than noting that the parent submitted a closing brief (see generally IHO Ex. I).

B. Impartial Hearing Officer Decision

In a decision dated November 22, 2024, the IHO initially noted that she had been assigned to the instant matter on October 29, 2024, after another IHO with the Office of Administrative Trials and Hearings (OATH) had "set the hearing date and issued standing orders for the [impartial] hearing," parenthetically indicating an "Omnibus Part Standing Order" (see IHO Decision at p. 2).⁶ The IHO noted that the district had submitted a motion to dismiss for lack of subject matter jurisdiction and ripeness "to the previous IHO," and the parent's attorney had submitted opposition to the motion to dismiss (id.). However, according to the IHO, "it [wa]s unclear whether that motion was resolved by the prior IHO," but regardless, the IHO indicated that the district had "not renew[ed] their motion or sent it to [her] after the case was transferred, nor did they respond to any of [her] emails or participate in the [impartial] hearing process" (id.). Consequently, the IHO determined that the district's motion to dismiss was "not properly before [her]," but "[e]ven if it was, it would be denied as unfounded" (id.).

With respect to the impartial hearing, the IHO noted that, based on the "standing orders," the parties were required to submit "all direct testimony" by affidavit, and the "opposing party" was required to "reserve cross-examination of any affidavit witness in writing after the disclosures were submitted but at least three calendar days before the scheduled hearing" (IHO Decision at p. 2). The IHO noted that the impartial hearing had been scheduled to occur on November 4, 2024,

⁶ In a footnote, the IHO indicated that the matter was "already out of compliance" when it was assigned to her, and the "parties declined to address compliance at any point after [her] appointment, so the case remain[ed] out of compliance" (IHO Decision at p. 2 n.3). To be clear, the administrative hearing record submitted to the Office of State Review includes a document with the following caption: "In the Matters of: Omnibus Docket." To the extent that the IHO was referring to this document as the "Omnibus Part Standing Order" within the decision, I note that the document is neither signed nor dated, and there is no indication in the hearing record that it was distributed to the parties in this matter. In legal parlance, omnibus most commonly refers to numerous matters within a case being addressed at once; however, it appears that OATH uses the term to address many different students in different proceedings.

and prior to that date, the district failed to submit any disclosures and did not reserve their opportunity to cross-examine the parent's affidavit witness (id.). Due to the IHO's illness, however, the impartial hearing did not go forward as scheduled on November 4, 2024, and the parties were provided with options as to how to proceed (id.). The parent's attorney elected to go forward on "papers," and the district did not "respond or object, despite multiple emails seeking their position" (id.). As a result, the hearing record consisted of the parent's disclosures and a closing brief, and the hearing record was "closed on November 15, when the parties' written closings were due" (id.).

Thereafter, the IHO set forth the background of this matter, noting that the hearing record lacked any evidence that the parent requested equitable services for the 2023-24 school year or that the parent sent the district a 10-day notice of unilateral placement and her related intention to seek funding for unilaterally-obtained services (see IHO Decision at pp. 2-3). However, because the district had not participated at the impartial hearing and had not "raise[d] that defense"—which the IHO noted "would be a bar to any relief"—the IHO determined that the district had "waived" the defense (id. at p. 3). Additionally, the IHO found that it was "undisputed" that the district had not implemented equitable services for the 2023-24 school year, but contrary to the parent's argument, the unilaterally-obtained services must be analyzed under the "Burlington/Carter" standard (id.).

Turning to the findings of fact, the IHO reviewed the parent's evidence in the hearing record (see IHO Decision at pp. 3-5). Of note, the IHO indicated that the parent's contract with Alpha did not specify whether the agency provided "group services or what their rates [we]re for group services" (id. at p. 4). However, the IHO further indicated that, although the agency director and the agency assistant director both testified that "they were unable to locate a similarly situated group of students," the director "did not say what efforts were made to find one" (id.). In addition, the IHO found that, although the agency director and the agency assistant director both testified that "goals were created for the student during the 2023-24 school year and [were] reviewed quarterly," the hearing record was devoid of the "results of the quarterly reviews" (id.). The IHO similarly found that the evidence had indicated that "[d]aily session notes were made of the SETSS sessions," the hearing record was devoid of any session notes (id.). Moreover, the IHO found that, although the agency director and the agency assistant director both testified that the "sessions were 'individualized' with 'a great deal of specialized instruction,' . . . , they did not provide examples of how the instruction was individualized or specialized to meet the student's needs" (id.). The IHO also found that, although the agency director and the agency assistant director both testified that the student "'ha[d] shown signs of progress, . . . , they gave no information about progress that was made" (id.). Finally, the IHO noted that although the agency assistant director testified that the student continued to require "1:1 SETSS, . . . the student ha[d] not been recommended for individual SETSS and [the p]arent ha[d] not challenged the recommendation for group services" (id.).

Next, the IHO reviewed and considered information in the April 2022 IESP about the student's needs; information provided in a "Student Progress Report," dated June 20, 2024 and prepared by the student's SETSS provider during the 2023-24 school year (June 2024 SETSS progress report); and information in a "Student Progress Report," dated March 27, 2024 and prepared by the student's speech-language provider during the 2023-24 school year (March 2024 speech-language progress report) (IHO Decision at pp. 4-5; see generally Parent Exs. B; E-G). With respect to the June 2024 SETSS progress report, the IHO described what the SETSS provider

had addressed with the student in the areas of reading, comprehension, mathematics, writing, as well as noting that the progress report reflected the student's "then-current goals for reading, comprehension, writing, and math" (IHO Decision at pp. 4-5; see Parent Ex. F at pp. 1-3). With respect to the March 2024 speech-language progress report, the IHO noted that, while it "contain[ed] a description of the student's present levels of performance as well as current and new annual goals," it did not include "any information about individualized methods or specialized instruction used to achieve the goals, nor d[id] it contain any specific information about progress made towards the goals (such as a percentage of accuracy achieved)" (IHO Decision at p. 5; see Parent Ex. G).

After a recitation of the legal standards applicable to the issues in this matter and the parties' respective burdens of proof and persuasion, the IHO initially concluded that the district failed to provide the student with equitable services for the 2023-24 school year and failed to timely raise the "June 1 defense" (see IHO Decision at pp. 5-13). With respect to whether the parent was entitled to reimbursement or funding for the costs of the unilaterally-obtained SETSS and speech-language therapy services delivered by Alpha during the 2023-24 school year, the IHO found that the parent failed to sustain her burden (id. at p. 13). Here, the IHO noted that, although the hearing record included "limited" information about how the "SETSS services were specialized to meet the student's needs, there [wa]s no such information about the [speech-language therapy] services" (id.). The IHO pointed to the March 2024 speech-language progress report, indicating that it provided "only basic information about the student's current functioning and goals and no information about methods used in the sessions or individualized supports provided to meet the student's unique needs" (id.). Relying on Second Circuit authority, the IHO indicated that the "private placement [wa]s either appropriate or not appropriate; it c[ould not] be partially appropriate and then funding awarded for the portion of instruction that was appropriate" (id., citing A.P. v. New York City Dep't of Educ., 2024 WL 763386 at *2 [2d Cir. Feb. 26, 2024]). Moreover, according to the IHO, the student's "social deficits [we]re clear from the record, which justified the recommendation for group services that [the p]arent did not challenge" (IHO Decision at p. 13). The IHO found that the hearing record lacked any evidence to explain how the agency, which delivered services to the student individually and on a pull-out basis, could meet "this significant area of the student's needs when all the services were provided in the absence of other students" (id.). The IHO also noted that the hearing record was devoid of "session notes or other quarterly reports," and while the hearing record included "some subjective evidence of progress in the SETSS progress report, there [wa]s none in the [speech-language progress] report and there [wa]s no objective evidence of progress at all" (id.). Therefore, based on the "totality of the evidence," the IHO concluded that the parent failed to sustain her burden (id.).

Notwithstanding the foregoing determinations, the IHO also addressed equitable considerations in the alternative (see IHO Decision at pp. 13-14). The IHO found that she "would have reduced the contract rate" in this matter because the hearing record failed to contain any evidence that the parent timely requested equitable services and failed to provide the district with a 10-day notice of unilateral placement (id.). In addition, the IHO found that the contract rate included "impermissible costs and costs that went beyond what was necessary for the student," including "consultation costs, 1:1 supervision, and individual services," as well as "loan interest," which the IHO found was "not a permissible expense for public funding in this forum" (id. at pp. 13-14).

Based on these findings, the IHO dismissed the parent's claims with prejudice (see IHO Decision at p. 14).

IV. Appeal for State-Level Review

The parent appeals, alleging that the IHO erred by finding that she failed to meet her burden to establish the appropriateness of the student's unilaterally-obtained SETSS and speech-language therapy services delivered by Alpha during the 2023-24 school year. More specifically, the parent argues that the IHO erred by placing an "undue emphasis" on implementing individual SETSS, rather than the recommended group SETSS. Next, to the extent that the IHO found that the SETSS delivered to the student were appropriate, the parent asserts that the IHO erred by finding that the hearing record failed to contain sufficient evidence to conclude that the speech-language therapy services were also appropriate to meet the student's needs. The parent also argues that the IHO erred by relying on legal authority that the "services cannot be partially appropriate." Finally, the parent argues that the IHO erred by finding that equitable considerations warranted a reduction in the contracted rates for SETSS and speech-language therapy services. As relief, the parent seeks an order directing the district to fund the costs of the student's unilaterally-obtained SETSS and speech-language therapy services delivered by Alpha during the 2023-24 school year.

In an answer, the district responds to the parent's allegations and generally argues to uphold the IHO's decision in its entirety. As a first defense and cross-appeal, the district asserts that the parent has abandoned her request for pendency services by failing to raise the issue of pendency in the request for review. Next, the district argues that the IHO erred by failing to dismiss the parent's due process complaint notice because the parent failed to timely request equitable services by June 1, 2023. Next, the district contends that the IHO properly found that the parent failed to sustain her burden to establish the appropriateness of the unilaterally-obtained SETSS and speech-language therapy services delivered by Alpha. The district also contends that the IHO properly found that equitable considerations did not weigh in favor of the parent's requested relief because the parent failed to comply with the 10-day notice of unilateral placement and because the agency's rates were excessive. Finally, the district argues that the IHO erred by failing to dismiss the matter for lack of subject matter jurisdiction and by finding that the district's motion to dismiss was not properly before her.

In an answer to the district's cross-appeal, the parent responds to the district's allegations and argues, initially, that the parent is no longer seeking pendency services. The parent also argues that the district failed to raise the June 1 affirmative defense during the impartial hearing, and therefore, waived the defense. In addition, the parent contends that the district did not timely raise the defense in its response to the due process complaint notice, as the response, itself, was untimely, and because the district did not proffer any evidence for consideration at the impartial hearing. The parent also argues that she timely requested equitable services and submits additional documentary evidence for consideration on appeal. Finally, the parent argues that she was not required to submit a 10-day notice of unilateral placement, the IHO retained subject matter jurisdiction over the issues raised in the due process complaint notice, and equitable considerations weighed in favor of her requested relief.

The district submits a reply to the parent's answer to its cross-appeal and asserts that the parent's pleading must be rejected because it was not properly notarized.⁷

V. Applicable Standards

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

However, under State law, parents of a student with a disability who have privately enrolled their child in a nonpublic school may seek to obtain educational "services" for their child by filing a request for such services in the public school district of location where the nonpublic school is located on or before the first day of June preceding the school year for which the request for services is made (Educ. Law § 3602-c[2]).⁸ "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.*)."⁹ Thus, under State law an eligible New

⁷ The affidavit of service shows the verification was not served together with the parent's answer to the cross-appeal and was instead served the following day. Counsel for the parent is reminded that parents are required to serve verified pleadings on the opposing party, not unverified pleadings and may face rejection by an SRO due to such procedural irregularities.

⁸ 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]).

⁹ 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

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

A. Preliminary Matters

1. Additional Documentary Evidence

As noted, the parent submits additional documentary evidence with the answer to cross-appeal (see generally Answer to Cr. App. Exs. A-D).¹⁰ A review of the four documents reveals that all four of the documents were available at the time of the impartial hearing (*id.*).¹¹ Generally, documentary evidence not presented at an impartial hearing is considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]). The factor specific to whether the additional evidence was available or could have been offered at the time of the impartial hearing serves to encourage full development of an adequate hearing record at the first tier to enable the IHO to make a correct and well supported determination and to prevent the party submitting the additional evidence from withholding relevant evidence during the impartial hearing, thereby shielding the additional evidence from cross-examination and later springing it on the opposing party, effectively distorting the State-level administrative review and transforming it into a trial de novo (see M.B. v. New York City Dep't of Educ., 2015 WL 6472824, at *2-*3 [S.D.N.Y. Oct. 27, 2015]; A.W. v. Bd. of Educ. of the Wallkill Cent. Sch. Dist., 2015 WL 1579186, at *2-*4 [N.D.N.Y. Apr. 9, 2015]). On the other hand, both federal and State regulations authorize SROs to seek additional evidence if necessary, and SROs have accepted evidence available at the time of the impartial

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.

¹⁰ Other than arguing to reject the parent's answer to the cross-appeal, the district does not specifically address the submission of the parent's additional documentary evidence (see generally Reply).

¹¹ The proffered evidence consists of emails from May through June 2023 and July through August 2024 (Answer to Cr. App. Exs. A-B, D), and the response to the due process complaint notice with prior written notice that is duplicative of what is already contained in the administrative hearing record.

hearing when necessary (34 CFR 300.514[b][2][iii]; 8 NYCRR 279.10[b]; Application of a Student with a Disability, Appeal No. 08-030; Application of a Child with a Disability, Appeal No. 00-019 [finding it necessary to accept evidence available at the time of the impartial hearing to determine the student's pendency placement]).

While proffering the additional documentary evidence on appeal, the parent offers no explanation for not submitting all four documents to the IHO for consideration at the first tier (see generally Answer to Cr. App.). Nevertheless, in an exercise of my discretion, and in light of determinations made below, I decline to consider the parent's additional documentary evidence on appeal as it is not now necessary to render a decision.

2. Scope of Review

The district argues that the IHO erred by finding that the district waived its June 1 affirmative defense, and relatedly, the district asserts that the affirmative defense was timely raised in its response to the parent's due process complaint notice, which was dated August 22, 2023. In addition, the district notes that the IHO properly found that the hearing record lacked any evidence that the parent had timely requested equitable services.

In response, the parent argues that the district did not raise the June 1 affirmative defense at or before the impartial hearing, especially since the district did not proffer any evidence for consideration at the impartial hearing. The parent also argues that even if the district raised the affirmative defense in its response to the parent's due process complaint notice, the district's response, itself, was untimely and not sent within 10 days of receiving the due process complaint notice.

The State's dual enrollment statute requires parents of a New York State resident student with a disability who is parentally placed in a nonpublic school and for whom the parents seek to obtain educational services to file a request for such services in the district where the nonpublic school is located on or before the first day of June preceding the school year for which the request for services is made (Educ. Law § 3602-c[2]). With respect to a parent's awareness of the requirement, the Commissioner of Education has previously determined that a parent's lack of awareness of the June 1 statutory deadline does not invalidate the parent's obligation to submit a request for dual enrollment by the June 1 deadline (Appeal of Austin, 44 Ed. Dep't Rep. 352, Decision No. 15,195, available at <https://www.counsel.nysed.gov/Decisions/volume44/d15195>; Appeal of Beauman, 43 Ed Dep't Rep 212, Decision No. 14,974 available at <https://www.counsel.nysed.gov/Decisions/volume43/d14974>). Specifically, the Commissioner stated that Education Law § "3602-c(2) does not require [the district] to post a notice of the deadline" and that a parent being "unaware of the deadline does not provide a legal basis" for the waiver of the statutory deadline for dual enrollment applications (Appeal of Austin, 44 Ed. Dep't Rep. 352).

The issue of the June 1 deadline fits with other affirmative defenses, such as the defense of the statute of limitations, which are required to be raised at the initial hearing (see M.G. v. New York City Dep't of Educ., 15 F. Supp. 3d 296, 304, 306 [S.D.N.Y. 2014] [holding that the limitations defense is "subject to the doctrine of waiver if not raised at the initial administrative hearing" and that where a district does "not raise the statute of limitations at the initial due process

hearing, the argument has been waived"]; see also R.B. v. Dep't of Educ. of the City of New York, 2011 WL 4375694, at *4-*6 [S.D.N.Y. Sept. 16, 2011] [noting that the IDEA "requir[es] parties to raise all issues at the lowest administrative level" and holding that a district had not waived the limitations defense by failing to raise it in a response to the due process complaint notice where the district articulated its position prior to the impartial hearing]; Vultaggio v. Bd. of Educ., Smithtown Cent. Sch. Dist., 216 F. Supp. 2d 96, 103 [E.D.N.Y. 2002] [noting that "any argument that could be raised in an administrative setting, should be raised in that setting"]. "By requiring parties to raise all issues at the lowest administrative level, IDEA 'affords full exploration of technical educational issues, furthers development of a complete factual record and promotes judicial efficiency by giving these agencies the first opportunity to correct shortcomings in their educational programs for disabled children.'" (R.B. v. Dep't of Educ. of the City of New York, 2011 WL 4375694, at *6 [S.D.N.Y. Sept. 16, 2011], quoting Hope v. Cortines, 872 F. Supp. 14, 19 [E.D.N.Y. 1995] and Hoeft v. Tucson Unified Sch. Dist., 967 F.2d 1298, 1303 [9th Cir. 1992]; see C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at *12 [S.D.N.Y. Sept. 22, 2011]).

As part of the administrative hearing record submitted to the Office of State Review, the district included a copy of the district's response to the parent's due process complaint notice (see generally Dist. Response to Due Process Compl. Notice). However, in reviewing the hearing record before the IHO, the parent correctly argues that the district did not proffer any evidence at the impartial hearing, notwithstanding the IHO's emails to both parties seeking disclosures. In fact, the district never responded to any of the IHO's email inquiries about the impartial hearing. Significantly, although the district filed a motion to dismiss on other grounds, the district did not include or otherwise raise the June 1 affirmative defense within the motion (see generally Dist. Motion to Dismiss). Therefore, it was unsurprising that the parent did not respond with evidence regarding the June 1 issue. This proceeding is not unlike one in which the district apparently mentioned the defense in a blanket response to a due process complaint notice, but then failed similarly failed properly pursue the defense in its motion to dismiss or otherwise during impartial hearing process (Application of a Student with a Disability, Appeal No. 24-582). As a result, the IHO did not err by finding that the district, under the facts and circumstances presented herein in which the district was unresponsive to the IHO and the failed to otherwise pursue the defense in its motion to dismiss, effectively waived the June 1 affirmative defense in this matter. Ultimately, even if the IHO did err, there are other factors discussed below that result in dismissal of the parent's claim.

B. Unilateral Placement

Here, the student has been parentally placed in a nonpublic school and the parent does not seek tuition reimbursement from the district for the cost of the parental placement. Instead, the parent alleged that the district failed to implement the student's mandated public special education services under the State's dual enrollment statute for the 2023-24 school year and, as a self-help remedy, she unilaterally obtained private services from Alpha for the student without the consent of the school district officials, and then commenced due process to obtain remuneration for the costs thereof. Generally, districts that fail to comply with their statutory mandates to provide special education can be made to pay for special education services privately obtained for which a parent paid or became legally obligated to pay, a process that is essentially the same as the federal process under IDEA. Accordingly, the issue in this matter is whether the parent is entitled to public funding of the costs of the private services. "Parents who are dissatisfied with their child's

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

The parent's request for district funding of privately-obtained services must be assessed under this framework. Thus, a board of education may be required to reimburse parents for their expenditures for private educational services they obtained for a student 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]).¹² In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

Turning to a review of the appropriateness of the unilaterally-obtained services, the federal standard for adjudicating these types of disputes 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, 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"]). 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]).

¹² State law provides that the parent has the obligation to establish that a unilateral placement is appropriate, which in this case is the special education that the parent obtained from Alpha Student Support (Educ. Law § 4404[1][c]).

"Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G., 459 F.3d 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). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

The Second Circuit has set forth the standard for determining whether parents have carried their burden of demonstrating the appropriateness of their unilateral placement.

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

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

1. Student's Needs

Although the student's needs are not at issue, a review thereof facilitates the discussion of the issue to be resolved—namely, whether the parent sustained her burden to establish the appropriateness of the unilaterally-obtained SETSS and speech-language therapy services delivered by Alpha to the student during the 2023-24 school year. Here, evidence of the student's needs consists primarily of the student's April 2022 IESP, which was developed for the 2022-23 school year when the student was expected to enter kindergarten.

At the time of the April 2022 CSE meeting, the student was receiving five hours per week of SEIT services, two 30-minute sessions per week of individual speech-language therapy, and two 30-minute sessions per week of individual PT services (see Parent Ex. B at p. 1). The April 2022 IESP noted that, based on the student's preschool classroom teacher's report, the student exhibited "emerging" prereadiness skills and demonstrated "some knowledge in her early literacy skills including print awareness, print motivation, letter knowledge, and vocabulary" (*id.*). The student did not, however, "demonstrate understanding or make connections between letters and

sounds" (id.). The IESP also noted that the student was "often observed to be inattentive and looking around the room" during circle time, and she had "difficulty with focusing and attending during story time which ma[de] it difficult to assess if she comprehend[ed] the story being presented" (id.). At that time, the student did not respond to "questions asked during whole group activities," and her teacher had difficulty "assessing and determining the extent that [the student] underst[ood] new concepts" (id.). In the area of mathematics, the student demonstrated "early math skills," and as reflected in the IESP, she could "identify shapes, colors, and count to 10" (id.). With regard to her social/emotional and behavioral skills, the IESP indicated that it was challenging for the student to "regulate her emotions and engage in cooperative play with other peers," and she would be "'moody' and w[ould] get upset over minor situations [or] events" (id.). It was also reported that the student had a "difficult time identifying and expressing her feelings and emotions" (id.).

Based on a January 2022 progress report, the April 2022 CSE noted the student's "major improvement in her overall language development" within the IESP (Parent Ex. B at p. 1). According to the IESP, the student's "vocabulary and expressive language" improved in each session, she could use descriptive sentences to express her feelings and needs," and she had "mastered upper case letters" (id.). At that time, the student could "write her name with uppercase letters," and she was then-currently "working on lower case letters" (id.). The student was also able to "label numbers 1 [through] 15" and rote count to "50" (id.). In addition, the IESP indicated that the student enjoyed "movement and dance," and her "major areas of concern [wa]s center based play," as she wandered from "center to center and need[ed] to be redirected to stay in one center" (id.). The student also did not like "clean up time," and needed reminders to "clean up after herself once an activity [wa]s completed" (id.). According to the IESP, the student was "more focused when play[ing] with table toys," and she could take turns and follow directions (id. at pp. 1-2).

Relying on the January 2022 progress report, the April 2022 CSE noted that the student made "steady progress" and had "improved her ability to tolerate structured tasks and activities" (Parent Ex. B at p. 2). The student could "sit at the table and complete exercises and activities given an appropriate reinforcement and break system" (id.). In speech-language therapy, the student's sessions "focused on improving her receptive and expressive language skills, articulation, social skills and communication" (id.). At that time, the student could "attend to a task for 5 [to] 10 minutes with minimal verbal cues for redirection" (id.). The student also had made "excellent progress in regard[] to labeling and identifying verbs and adjectives in pictures such as (animals, food, shapes, numbers colors and letters)," but she continued to have "difficulty labeling attributes and naming categories or a described object" (id.). The student used four to five word utterances per sentence "when requesting wants and needs" and was working on "answering wh questions to increase vocabulary and utterance length" (id.). It was reported that the student could "answer what and who questions with 80 [percent] accuracy using 3 [to] 4 words given verbal cues" (id.). Additionally, the student could "ask questions about the missing (not in sight) objects of wants [and] needs," and she was "encouraged to ask more questions to improve her communication repertoire" (id.). At that time, the student required "redirections to complete activities and use longer phrases when communicating," but was "difficult to understand" when she used "spontaneous speech" because the student "mumble[d] her words" (id.). The student was "beginning to label actions in pictures and label a category given models and cues"; she demonstrated "difficulty with concepts such [as] dirty/clean, old/new, [and] hard/soft"; and she

also demonstrated difficulty with "labeling locative concepts and attributes" (id.). However, the student could appropriately use the pronouns "he/she" with "70 [percent] accuracy given verbal prompts," but continued to have "difficulty with possessive pronouns ([h]is/hers)" (id.). With regard to play skills, IESP noted that the student made "significant improvement" and could "attend to a game and take turns with 80 [percent] accuracy independently" (id.). It was also noted that the student "demonstrated pretend play while playing with the doll as she was able to feed and put them to sleep;" however, the student had "some difficulty playing with peers and required models and cues" (id.).

As noted in the April 2022 IESP, the student demonstrated "age appropriate daily living skills," she toileted and ate independently, and she "trace[d] and wr[o]te letters with a variety of writing tools" (Parent Ex. B at p. 2). In addition, the student could "cut, glue, and draw"; she safely navigated the classroom; kept pace with peers when navigating stairs; and communicated her "wants and needs" (id.). The student also understood concepts such as "yes/no, hot/cold, and safe/unsafe" (id.).

The April 2022 CSE noted the parent's concerns in the IESP, which included concerns about the student's "processing and retention skills," and the student's inability, at times, to "understand when she [wa]s asked a question or [wa]s given a directive" (Parent Ex. B at p. 3). The parent also noted that the student required a "lot of repetition to complete a daily task" at home (id.).

Turning to the student's social development, the April 2022 IESP described her as "careful and deliberate in her actions to complete a task" and needing "occasional reminders" to follow "class routines and procedures" (Parent Ex. B at p. 3). In addition, the CSE noted that the student was "sensitive" and required "encouragement and redirection to engage in class activities" (id.). The student reportedly got "upset over slight misperceptions or when she d[id] not get her way" and she would then "cry, moan, or sob" (id.). At that time, it was noted that the student could take "up to 10 [to] 15 minutes to calm down and integrate back into the concurrent class activity" (id.). The parent expressed concerns about the student's "difficulty managing her emotions" and noted that the student displayed similar behaviors at home when she felt that she was "not getting enough attention compared to her siblings" (id.). The parent agreed that the student was "sensitive" and needed "reassurance throughout the day to talk about her feelings," but the parent did not believe that "this w[ould] significantly impact[] her academic functioning in a general education setting" (id.).

With respect to the student's physical development, the April 2022 IESP noted that she was "independent in her daily living skills," and her "writing skills [we]re improving with each session" (Parent Ex. B at p. 4). The student could "trace different lines such as straight, curved, zigzag to write her first name with [a] visual cue," and she could "cut a straight line" (id.). The student's gross motor skills were also reportedly improving, as she could "alternate her feet" ascending and descending stairs, and she could "jump, balance, and climb the jungle gym" (id.). The student did, however, need "some assistance to go down the jungle gym" (id.). The parent did not express any concerns about the student's physical development (id.).

To address the student's needs, the April 2022 CSE recommended that the student receive three periods per week of SETSS in a group and two 30-minute sessions per week of speech-

language therapy services in a group (see Parent Ex. B at p. 8). The CSE also recommended the following as strategies to address the student's management needs: visual cues; modeling; verbal prompting; small group instruction; refocusing and redirection to follow routines and complete an activity; use of a multimedia and multisensory approach to learning new concepts; and speech-language therapy to address her articulation, expressive, and receptive language delays (id. at p. 4).

In addition to the April 2022 IESP providing information about the student's needs, the hearing record also includes a "Student Progress Report," dated June 20, 2024 (June 2024 SETSS progress report), which describes the student's needs (Parent Ex. G at p. 1). The June 2024 SETSS progress report appears to have prepared by the student's SETSS provider during the 2023-24 school year (compare Parent Ex. F at pp. 1, 5, with Parent Ex. G ¶ 15). According to the SETSS provider, the student "present[ed] with significant impairments in many foundational skills which hinder[ed] her ability to make progress in the mainstream classroom" (Parent Ex. F at p. 1). More specifically, the SETSS provider indicated that the student "present[ed] with expressive and receptive language delays, deficient processing skills, poor recall, and a highly distractable nature," as well as "limited knowledge in many areas" and "insufficient reasoning ability" (id.). According to the SETSS provider, the student expressed herself "in an unclear manner and use[d] only very short sentences," "ha[d] a hard time expressing emotions, and struggle[d] to participate in classroom discussions" (id.). The SETSS progress report indicated that, receptively, the student was "unable to follow multi step directions without repetition and prompting"; she "often los[t] focus during the lessons"; and due to her deficits, it took her "a long time to master each new goal" (id.). Additionally, the SETSS provider reported that the student was "unmotivated and unwilling to invest energy in her work" (id.). She further noted that the student did "not grasp information taught in the classroom independently and require[d] individualized support to make progress" (id.).

2. Unilaterally-Obtained SETSS and Speech-Language Therapy

Having reviewed the hearing record to identify the student's needs, the inquiry now turns to whether the parent's unilaterally-obtained SETSS and speech-language therapy services from Alpha during the 2023-24 school year provided the student with specially-designed instruction to meet those needs. As noted above, to qualify for reimbursement under the IDEA, parents must demonstrate that the unilateral placement provided instruction specially designed to meet the student's unique needs, supported by services necessary to permit the student to benefit from instruction (Gagliardo, 489 F.3d at 112; see Frank G., 459 F.3d at 364-65). Regulations define specially designed instruction, in part, as "adapting, as appropriate to the needs of an eligible student under this Part, the content, methodology, or delivery of instruction to address the unique needs that result from the student's disability" (8 NYCRR 200.1[vv]; see 34 CFR 300.39[b][3]).

In an effort to sustain her burden of proof, and in addition to submitting documentary evidence, the parent proffered the testimony of three witnesses: the program director at Alpha, a secretary employed at Alpha, and an assistant to the program director at Alpha (see generally Parent Exs. D; H-I).¹³ The program director testified that Alpha delivered three hours per week of

¹³ The parent submitted affidavits in lieu of the three witnesses' direct testimony at the impartial hearing (see

SETSS to the student during the 2023-24 school year—in a 1:1 setting, as opposed to a group as recommended—from a teacher who was certified by New York State to instruct students with disabilities and who had "train[ing] and experience[] to teach literacy and comprehension to school aged children and adolescents" (Parent Ex. D ¶¶ 4, 13-15, 19; see Parent Ex. E at p. 1). The program director also testified that Alpha provided the student with two 30-minute sessions per week of individual speech-language therapy, which was delivered by a State certified speech-language pathologist (Parent Ex. D ¶¶ 14, 16, 19). According to the program director, the SETSS and speech-language therapy services were provided in a 1:1 setting, rather than in a group, because the agency was "not able to locate a similarly situated group of students" (id. ¶ 19).

Next, the program director testified that in addition to "providing direct 1:1 services to [the student], [the SETSS provider] and [speech-language pathologist] also prepare[d] for sessions, create[d] goals, w[rote] progress reports, and m[et] with teachers and parents" (Parent Ex. D ¶ 20). The program director noted that Alpha providers "typically" delivered services to the student "outside of the classroom" at "her mainstream school," and described those sessions as "individualized" and as "includ[ing] a great deal of specialized instruction" (id. ¶¶ 21, 23). Additionally, the program director testified that the Alpha providers developed goals for the student "to work on during the 2023-24 school year," which were "reviewed quarterly," and the student's progress was "measured through quarterly assessments, consistent meetings with the provider[s] and support staff, observation of [the student] in the classroom, and daily session notes" (id. ¶¶ 22, 24).¹⁴ According to the program director, the student "ha[d] already shown signs of progress with her s[ervice] providers"; however, the student's "academic and social delays warrant[ed] the need for continued services," and specifically, the "continuation of SETSS on a 1:1 basis [three] periods per week" and two 30-minute sessions per week of speech-language therapy (id. ¶¶ 25-26).

The assistant to the program director testified that the progress reports entered into the hearing record were an "accurate representation of what [the SETSS provider] and [the speech-language pathologist] ha[d] been working on with [the student], including goals, over the course of the 2023-24 school year" (Parent Ex. I ¶¶ 4, 20).

Consistent with the assistant to the program director's testimony, the hearing record includes a "Student Progress Report" completed on district letterhead and dated March 27, 2024, which appears to have been prepared by the student's speech-language pathologist (March 2024 speech-language progress report) (Parent Ex. G at p. 1; see Parent Ex. D ¶ 16).¹⁵ It was noted

generally Parent Exs. D; H-I). For all intents and purposes, the assistant to the program director's affidavit was similar, if not identical in some respects, to the program director's testimony (compare Parent Ex. D ¶¶ 6, 9, 13-16, 19-20, 22-25, with Parent Ex. I ¶¶ 5, 7, 9, 13-20). Additionally, it appears that the final three paragraphs of the assistant to the program director's affidavit are incorrectly numbered (see, e.g., Parent Ex. I ¶¶ 18-20). Additionally, the affidavit submitted on behalf of the secretary at Alpha provides no relevant information whatsoever with regard to the parent's burden of proof (see generally Parent Ex. H).

¹⁴ The hearing record does not include any session notes (see generally Parent Exs. A-I; IHO Ex. I).

¹⁵ Curiously, the speech language pathologist's progress report was completed on district letterhead rather than on Alpha's letterhead, a point which the district left unexplored.

therein that the student "present[ed] with expres[s]ive [and] receptive language delays and auditory listening deficits," as well as "difficulties with auditory recall, following multi-step directions and with reading comprehension skills" (Parent Ex. G at p. 1). Additionally, the speech-language pathologist reported that the student "ha[d] difficulty answering questions that require[d] abstract thinking, such as making inferences and predictions," "reduced attention span and often require[d] redirecting to stay focused on tasks" (id.). According to the speech-language pathologist, the student's "[d]elays in the above listed areas must be addressed in order to participate in educational type activities and [to] function age appropriately in a school and/or other social settings" (id.).

With regard to the student's then-current annual goal to increase language skills by answering "'wh' and inferential questions about a story, and retelling narratives," the speech-language pathologist reported that the student "c[ould] answer basic wh questions about a story" but "[s]he continue[d] to display difficulty with critical thinking skills, such as making inferences and predictions" (Parent Ex. G at pp. 1-2). With respect to the then-current annual goal for the student to improve her auditory listening skills, the speech-language pathologist reported that the student "often require[d] repetitions when following multi-step directions" and "[s]he continue[d] to display difficulty with auditory recall" (id.). Although labeled as "New Annual Goals," the March 2024 speech-language progress report reflected a continuation of the same speech-language annual goals for the student (id.). The speech-language pathologist also recommended that the student continue to receive two 30-minute sessions per week of speech-language therapy "so that [the student wa]s able to function properly in a classroom environment" (id. at p. 2).

In the June 2024 SETSS progress report, the provider described the student's reading performance over the course of the school year (see Parent Ex. F at pp. 1-3). By June 2024, with "continued provider support," the student could "read CVC words with adequate fluency and ha[d] learned to read some sight words" using activities such as hopscotch, matching, frisbee, and "sensory bowls," as well as through the use of practice, review, drills, and teaching word attack skills (id. at p. 2). With regard to reading comprehension, the SETSS provider reported that the student's "limited processing, focusing issues, and language delays d[id] not support proper comprehension," and her "poor decoding ability further hinder[ed] her ability to understand what she read[]" (id.). At the time of the June 2024 progress report, while the student "still struggle[d] significantly," the student could "answer very basic and concrete 'wh' questions" and "provide key details" when prompted by the SETSS provider (id. at pp. 2-3). The SETSS provider reported using "[c]ontinued redirection, simplification, modeling, and prompting" to help the student gain skills (id. at p. 3). The June 2024 SETSS progress report reflected "[c]urrent reading goals" designed to improve the student's ability to read words with initial sound blends and a variety of CVC/CVCe words, answer oral comprehension questions, retell the story sequentially and with sufficient detail, and list the main supporting details leading to the main idea from first grade level passages (id. at pp. 2-3).

In the area of writing, the June 2024 SETSS progress report indicated that the student had improved her ability in the area of letter formation and sizing "through provider input and guided practice" (Parent Ex. F at pp. 3-4). During SETSS sessions, the provider taught the student "CVC spelling concepts," and at the time of the June 2024 SETSS progress report, the student spelled CVC words correctly (id. at p. 4). The SETSS provider reported that "[c]ontinued teaching and practice, with the use of flashcards, teaching of word attack skills, and much encouragement and review, [the student] w[ould] increase her abilities" in this area (id.). A then-current writing annual

goal targeted the student's ability to "spell CCVC and CVCC words with blends and digraphs" (id.).

In mathematics, the June 2024 SETSS progress report noted that the student "ha[d] made some progress in mathematics, but [wa]s still considerably behind her peers" and identified a "major concern" as the student not having "mastered many foundational skills" (Parent Ex. F at p. 3). The student was reported to have made some progress during the course of the school year, such as learning to add and subtract, count by rote, identify numbers, and with "much provider support, along with the use of manipulatives and drawings," label some coins and compare number amounts to 10 (id.). The SETSS provider identified the student's then-current mathematics goals as labeling all coins and stating their value, counting change to 10 cents, and providing coins to match a given sum (id.).

Although the June 2024 SETSS progress report identified the student's academic and social/emotional needs and the interventions the SETSS provider used with the student during the 2023-24 school year, the hearing record overall does not provide sufficient evidence describing how the student's special education needs were met during the remainder of the school day in her mainstream classroom when she was not receiving special education support (see generally Parent Exs. A-I; IHO Ex. I). For example, the SETSS provider reported that the student "present[ed] with significant impairments in many foundational skills which hinder[ed] her ability to make progress in the mainstream classroom" (Parent Ex. F at p. 1). Furthermore, the SETSS provider reported that the student "d[id] not grasp information taught in the classroom independently and require[d] individualized support to make any progress" (id.). Also, the student's "severe distractibility and inability to comprehend new information at the level and pace of her peers hinder[ed] her from progressing at the classroom rate" (id. at p. 3). Regarding the student's social/emotional skills, the SETSS provider reported that the student "struggle[d] in all areas of classroom functioning, which impact[ed] her ability to progress in the mainstream classroom," and due to her communication, social/emotional, and attention difficulties, the student "d[id] not know how to follow along independently in the classroom and miss[ed] out on a lot of the curriculum taught" (id. at p. 4).

Additionally, the June 2024 SETSS progress report reflected that the student "need[ed] prompting to begin or complete her work," she did "not understand instruction independently, and d[id] not follow directions promptly if she d[id] not receive a private or personal reminder or prompt"; yet the hearing record is devoid of any evidence concerning the student's mainstream nonpublic school, the instruction she received therein, or how the student's needs were met in her mainstream classroom (compare Parent Ex. F at p. 3, with Parent Exs. A-E; G-I; IHO Ex. I). Further, while the SETSS provider reported that the student had "been able to learn some new skills" within a "setting with minimal distraction and much simplification, motivation, and reteaching using visual, tactile, and verbal prompts," the evidence in the hearing record lacks any information concerning how those conditions were present in the student's mainstream classroom, or how her learning environment was modified to accommodate this need (compare Parent Ex. F at p. 1, with Parent Exs. A-E; G-I; IHO Ex. I). In addition, although the March 2024 speech-language progress report identified the student's needs and goals, it lacked any information about the specially designed instruction the speech-language pathologist used with the student (see generally Parent Ex. G). Lastly, 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 2023-24 school year (see generally Parent Exs. A-I; IHO Ex. I).

Given the totality of the circumstances, the evidence in the hearing record supports the IHO's finding that the parent failed to meet her burden to establish that the unilaterally-obtained SETSS and speech-language therapy services were specially designed to meet the student's needs. Consequently, there is no reason to disturb the IHO's determinations, and there is no reason to reach the question of whether equitable considerations weighed in favor of the parent's requested relief.

VII. Conclusion

As set forth above, the evidence supported the IHO's determination that the parent failed to sustain her burden to establish that the special education or SETSS and speech-language therapy services delivered by Alpha to the student constituted specially-designed instruction sufficient to meet the student's identified needs.

Based on the foregoing determination, I need not consider the parties' remaining contentions.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

Dated: **Albany, New York**
 March 31, 2025

JUSTYN P. BATES
STATE REVIEW OFFICER