



The University of the State of New York

The State Education Department

State Review Officer

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No. 25-013

Application of a STUDENT WITH A DISABILITY, by his parents, 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:

New York Legal Assistance Group, attorneys for petitioners, by Felicia Gaon, Esq. and Elizabeth Curran, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Cynthia Sheps, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. 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 privately obtained services for the 2024-25 school year. The 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 student has received diagnoses of a genetic disorder, autism spectrum disorder, global developmental delay, intellectual disability, chronic static encephalopathy, cerebral palsy, and conductive hearing loss (Parent Ex. D at p. 1).

While the hearing record is sparse related to the student's educational history, the parent testified that an April 2014 CSE determined that "due to his fragile medical condition" the student required home instruction consisting of 20 hours per week of special education itinerant teacher (SEIT) services, three 45-minute sessions per week of physical therapy (PT), two 45-minute sessions per week of occupational therapy (OT), and two 45-minute sessions per week of speech-language therapy (Parent Ex. W ¶ 7). The student had been receiving the same program of home

instruction since 2014, with the only change being the replacement of SEIT services with special education teacher support services (SETSS) when the student turned five (id. ¶ 7).

A CSE convened on August 19, 2021 and, after finding the student eligible for special education as a student with multiple disabilities, created an IEP for the student with an implementation date of September 1, 2021 (see Dist. Ex. 1). The IEP noted that, at the time of the meeting, the student was receiving SETSS at home, along with nursing services to address his medical needs (id. at p. 2).¹ The IEP indicated that the student had significant health needs (id. at pp. 1-2). For the 2021-22 school year, the CSE recommended the student attend a 12-month 6:1+1 special class in math, English-language arts (ELA), social studies, and sciences and participate in adapted physical education (id. at pp. 32, 34). Additionally, the CSE recommended one 45-minute session of individual counseling per week, two 45-minute sessions of individual OT per week, three 45-minute sessions of individual PT per week, two 45-minute sessions of individual speech-language therapy per week, one 60-minute session of parent counseling and training per month, and school nurse services consisting of "non-1:1 skilled nursing services" as needed (id. at pp. 32-33). The CSE further recommended the student be provided with full-time daily individual health paraprofessional services for support related to his genetic disorder and self-injurious behaviors and individual daily health transportation paraprofessional services with duration designated as "0.2" (id. at p. 33).² The CSE recommended transportation services to the closest safe curb location to school inclusive of 1:1 paraprofessional services, a lift bus, air conditioning, a regular size wheelchair, a route with fewer students, and a door-to-door matron (id. at pp. 38-39).³

In a letter dated June 13, 2024, the parent provided the district with notice of her intent to provide the student with home-based services (see Parent Ex. C). The parent alleged that the district had failed to convene a CSE to create a new IEP, which denied the student a free appropriate public education (FAPE) for the 2024-25 school year (id.). The parent asserted that she would continue the student's home-based services of 20 hours per week of SETSS, three 45-minute sessions of PT per week, two 45-minute sessions OT per week, and two 45-minute sessions speech-language therapy per week (id.). The parent indicated that she would request these services be provided by independent providers at reasonable market rates and that she would pursue her due process rights (id.).

A. Due Process Complaint Notice and Subsequent Facts

In a due process complaint notice dated July 1, 2024, the parents alleged that the district denied the student a FAPE for the 2024-25 school year (see Parent Ex. A). The parents alleged that the district failed to convene a CSE to develop an IEP for the student for the 2024-25 school

¹ At the time of the meeting, the IEP noted that the student was not receiving PT, OT, or speech-language therapy due to the "current health crisis" (COVID -19) (Dist. Ex. 1 at p. 2). The IEP also noted that the student was receiving 20 hours of SETSS per week (Dist. Ex. 1 at p. 5).

² The CSE recommended assistive technology devices consisting of a dynamic display speech generating device and a communication application, with both designated for use at school and at home (Dist. Ex. 1 at p. 34).

³ The IEP indicated that the reason for special transportation was the student's genetic disorder and self-injurious behavior (Dist. Ex. 1 at p. 39).

year as the last IEP was developed in 2021 and the district failed to provide the parents with prior written notices or a school location letter (*id.* at pp. 2, 4).⁴ For relief, the parents request funding for: 20 hours of SETSS provided by New York Therapy Placement Services, Inc. (NYTPS) or another qualified provider at the enhanced rate of \$140.00 per hour; three 45-minute sessions of PT at the enhanced rate of \$210.00 per hour to be provided by OI or another qualified provider; two 45-minute sessions of 1:1 home-based OT at the enhanced rate of \$210 per hour to be provided by OI or another qualified provider; two 45-minute sessions of 1:1 home-based speech-language therapy at the enhanced rate of \$210 per hour to be performed by NYTPS or another qualified provider; and any other relief deemed appropriate (Parent Ex. A at pp. 1-2, 4).

The district executed a pendency implementation form in July 2024 (*see* Parent Ex. O). The signed form indicated that the student's pendency program was based on an April 13, 2024 unappealed IHO decision (*id.*). The district acknowledged that the student was entitled to 12-month services consisting of 20 hours per week of SETSS, two 45-minute sessions of speech-language therapy per week, three 45-minute sessions of PT per week, two 45-minute sessions of OT per week, with all services to be provided by a private provider (*id.*).

The parent signed a contract with New York Therapy Placement Services, Inc. (NYTPS) on September 19, 2024 for SETSS to be provided during the 12-month 2024-25 school year from July 8, 2024 through June 30, 2025 (*see* Parent Ex. Q). The contract indicated that the agency would provide 20 hours of SETSS per week at the rate of \$140 per hour for 46 weeks, totaling \$128,800 per year (*id.* at p. 1).

The parent also signed a contract with NYTPS on September 19, 2024 for speech-language therapy services during the 12-month 2024-25 school year starting on July 8, 2024 through June 30, 2025 (*see* Parent Ex. R). The cost for the service was \$157.50 per 45-minute session (*id.* at p. 1). The contract indicated that the student was entitled to two 45-minute sessions per week at a rate of \$315 per week for 46 weeks, totaling \$14,490 (*id.*).

On the same day, September 19, 2024, the parent signed a contract with NYTPS for OT services for the 10-month 2024-25 school year starting on September 5, 2024 through June 30, 2025 (*see* Parent Ex. S). The contract indicated that the cost for the service was \$157.50 per 45-minute session and that the student was entitled to two 45-minute sessions per week (*id.* at p. 1). The contract indicated that the cost per week was \$315 for 40 weeks, totaling \$12,600 per year (*id.*).

The parent signed a contract with Optimized Independence OT PLLC (Optimized Independence) on September 19, 2024 for PT services for the 12-month 2024-25 school year starting on July 1, 2024 through June 30, 2025 (*see* Parent Ex. T). The cost for the service was \$157.50 per 45-minute session (*id.* at p. 1). The contract indicated that the student was entitled to three 45-minute sessions per week totaling \$472.5 per week for 46 weeks (*id.*). The total contracted amount was \$21,735 per year (*id.*).

⁴ The parents asserted pendency based on a prior IHO decision, dated April 13, 2024 (Parent Ex. A at p. 2).

B. Impartial Hearing Officer Decision

An impartial hearing convened before the Office of Administrative Trials and Hearings (OATH) on August 2, 2024 and concluded on October 8, 2024 after three days of proceedings (see Tr. pp. 1-72). In a decision dated November 26, 2024, the IHO found that the district had conceded that it did not offer the student a FAPE for the 2024-25 school year (IHO Decision at pp. 4, 16,). The IHO reviewed the student's educational and medical background and recounted the facts in the case (id. at pp. 4-9). The IHO noted that the provider agencies provided the student with SETSS, OT, speech-language therapy, and PT each week during the extended school year (id. at pp. 7-8).⁵

Turning to the appropriateness of the unilaterally obtained services, the IHO found that the parents failed to meet their burden (IHO Decision at pp. 16-17). First, the IHO held that the parents' contention that the student could only be educated in a sterile environment was defeated by their own services as the hearing record showed the student's SETSS were often provided via community outings (id. at p. 16). The IHO found that if the student was not able to attend school because he required a sterile environment, then the SETSS provider was putting him at risk with each community outing (id.). The IHO opined that if the student was able to attend community outings, then there should be a school he could attend (id.). Moreover, the IHO gave little weight to a letter from the student's physician recommending home-based services as the letter "was testimonial in nature but the physician was not presented as a witness" (id.). The IHO also noted that she requested all relevant medical documentation, but very little was included in the hearing record (id.). Based on these findings, the IHO determined that the record was contradictory and incomplete (id.).

Next, the IHO found that although there was information in the hearing record regarding the specialized instruction provided in SETSS and speech-language therapy, the PT report did not describe how the student's PT sessions were individualized and the hearing record did not include an OT report for the school year at issue (IHO Decision at p. 16). The IHO found that, in addition to the provision of SETSS in the community contradicting the student's stated need for a sterile environment, it also contradicted assertions that the student became dysregulated and overwhelmed when around more than 2-3 people(id.). The IHO noted the parent's testimony that the student required feeding instruction as part of his speech-language therapy and the fact that there was no indication in the hearing record that the student received feeding instruction as part of his private speech-language therapy (id.). The IHO further determined that, although there was some evidence of progress in the hearing record, the evidence was subjective and it was unclear what portion of the student's progress actually occurred during the school year at issue (id.). The IHO noted that the fact that the providers were appropriately qualified and experienced was not sufficient to meet the parents' burden (id.). Based on the totality of the circumstances, the IHO held that she could not find that the parents' unilateral program involved sufficient specialized instruction or met all of the student's stated areas of need (id. at p. 17).

⁵ The IHO noted that the student's mother initially testified that the student received OT for six weeks during the summer but then, in response to leading questioning, indicated that he did not (IHO Decision at p. 7). In addition, the IHO noted that the agency director testified that the agency was unable to find an OT provider for the student for the summer and therefore his OT services did not begin until September 5, 2024 (IHO Decision at p. 7).

Turning to the parents' request for compensatory OT services for service not provided to the student during the summer, the IHO treated the parent's request as being based on pendency and denied the request finding that the parent failed to arrange the services and the pendency agreement only required the district to fund services (IHO Decision at p. 17). Accordingly, the IHO found that compensatory services were not warranted because the parents' failed to arrange for private services for the student (id.).

Although, the IHO did not find that the parents' relief was warranted, the IHO ordered the district to reevaluate the student and reconvene a CSE in order to develop a new IEP (IHO Decision at p. 17). The IHO noted that it was unclear whether the parents were providing updated medical information to the district and it was unclear whether the district reviewed the physician's note, which had changed since the last CSE meeting (id.). The IHO also noted that contrary to the physician's note, the SETSS reports indicated that the student may have been able to be educated in a non-sterile environment, which should be considered by the CSE (id.). The IHO held that it was not appropriate for her to make IEP recommendations due to the conflicting evidence in the hearing record and the fact that it was not clear that home-based instruction was the student's least restrictive environment (id.).

Moreover, the IHO noted that had she found the parent's unilateral services appropriate, she would not have ordered funding through the end of the school year because the contracts indicated that they could be terminated at any time and the IHO would not have ordered funding for the entire school year (IHO Decision at p. 17). The IHO determined that it would be inappropriate to "lock" the student in a program that might not meet his needs (id. at pp. 17-18). The IHO ordered the district to immediately conduct a comprehensive reevaluation of the student and upon the completion of all necessary assessments, reconvene the CSE within 14 days to develop an appropriate IEP based on all current evaluative information (id. at p. 18).

IV. Appeal for State-Level Review

The parents appeal.⁶ The parents argue that the IHO erred by finding they failed to meet their burden of proof regarding the unilaterally obtained services and that the decision was not supported by law or fact. The parents contend that the IHO improperly weighed the evidence and her findings were arbitrary and capricious. The parents assert the IHO used an improper standard in determining the appropriateness of the unilaterally obtained services as the IHO was too stringent and imposed a "least restrictive" analysis. The parents contend that they met their burden of showing that the home-based program was appropriate as it provided the student with specially designed instruction to meet his unique needs. Next, the parents assert the IHO erred in relying on a January 2017 statement reported in the August 2021 IEP, which noted home instruction was denied because the student's physician was in favor of sending him to school. The parents contend the IHO gave undue weight to the reported statement and further contend that the hearing record contains no evidence that the prior determination that the district's denial of home instruction or its recommendation for a district special class placement in the August 2021 IEP was appropriate. The parents also argue that the IHO erred by giving little weight to the physician's September 2024

⁶ The parents filed an amended request for review as the initial request for review was rejected for failing to comply with State regulations (8 NYCRR 279.7[b]).

letter, which recommended home-based instruction for the student for his safety and further assert that the IHO improperly ignored the testimony of the parents' witnesses, which was consistent with the physician's letter. The parents contend that the IHO erred by placing the burden on them to show that there were no schools that could safely educate the student and assert that this was a stricter burden than required by the legal standard. The parents argue against the IHO's reasoning that the parents' claim the district denied the student a FAPE because the student required a sterile environment was an indication that community outings put the student at risk, alleging that there was no risk as the student had 1:1 support during those outings and the support had a deep understanding of the student's needs.

The parents further argue that the IHO erred by not addressing equitable considerations. The parents assert they provided notice of their intention to obtain unilateral services in a timely manner and the district failed to convene a CSE, which gave them no choice but to obtain unilateral services. Moreover, the parents contend that the IHO's characterization of the requested relief as prospective was improper and harmed the student. They argue the contracts for unilateral services imposed a liability on them for the entire school year. Lastly, the parents assert the order for a reconvene does not provide a remedy to the student as it leaves the student without educational services until an IEP is developed. The parents request funding for the student's home-based services for the 2024-25 school year.

In its answer, the district counters that the IHO decision should be affirmed. The district asserts the IHO correctly noted that the parents' arguments contain contradictions. The district further asserts the hearing record does not support a finding that the parents met their burden to demonstrate that the unilaterally obtained services were appropriate. Regarding the parents' argument that the IHO erred in denying prospective relief, the district contends that this argument is without merit. The district contends that the IHO properly denied prospective relief and properly ordered the CSE to reconvene and conduct a comprehensive evaluation of the student. Lastly, the district asserts that the IHO properly denied the request for OT services as the parent elected to obtain the services on their own and failed to do so. The parents have not alleged that the district failed to fund the pendency program.

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).

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]).⁷

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 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

Neither party has appealed from the IHO's determinations that the district conceded it did not offer a FAPE to the student for the 2024-25 school year or the IHO's denial of compensatory OT services for the extended school year. Accordingly, these findings have become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

A. Unilaterally Obtained Educational Program

In this matter, the parents arranged for a home-based program for the student and the hearing record indicates that the student does not attend a school. Accordingly, the student's educational program is the unilaterally obtained private services from NYTPS and Optimized, and the appropriateness of those services, taken together, must be assessed as the student's private school placement.

⁷ 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).

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]). "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. Students Needs

Prior to addressing the adequacy of the unilateral placement, a brief discussion of the evidence related to the student's needs leading up to the 2024-25 school year is necessary and the only information available in the hearing record regarding the student's needs prior to the start of the 2024-25 school year is the August 2021 IEP and the student's May 2024 medical records (Parent Exs. D; Dist. Ex. 1).

The August 2021 IEP noted that a January 2019 bilingual psychological evaluation found that on the Stanford-Binet Intelligence Scale-Fifth Edition, the student received a full scale IQ of 48 (Dist. Ex. 1 at p. 2). The IEP stated the student exhibited global and profound delays in all areas and behaviors that interfered with learning (*id.* at p. 5). He was easily distracted and had a short attention span (*id.*). According to the August 2021 IEP, the student required one-on-one support at all times due to his lack of safety awareness and self-injurious behaviors, including head banging, slapping his face or head, hitting his head with objects, biting and sucking on his hand/arm when frustrated, throwing his body back very hard in his chairs, throwing objects, pulling hair/glasses/necklace/clothing, and scratching and pinching others (*id.*). The IEP noted the student would spontaneously vomit or gag himself with his hand, particularly when his throat hurt, if a piece of food were stuck, or if he were very frustrated (*id.* at pp. 5, 8). While gagging behavior had been reduced, it still needed to be addressed—as did the student's "constant need to mouth on everything he [could] get his hands on," as he would "grab anything in reach while walking or sitting at a table just to take it, mouth it or throw it down" unless he received "constant verbal redirection and shadowing" (*id.* at pp. 5-6, 8). The IEP stated the student had a history of knocking over plants, lamps, grabbing things on tables, or items in the bathroom (*id.* at p. 6). There was a gate to prevent the student from entering the kitchen, and the parent had devised a seat belt system to safely adapt seating (*id.*). The IEP indicated that given the student's lack of safety awareness, low frustration tolerance, and high impulsivity, the student was a "danger to himself and others" (*id.*). He was self-directed and impulsive and would not follow one-step commands without repeated redirection and prompting, needing as many as 100 prompts in three hours' time (*id.* at p. 7). While the student had a daily reward chart where he earned stars and free play, there was no formal behavior plan in place (*id.*). The August 2021 IEP reported that according to the student's SETSS provider all she had to do was touch the student's arm and he would stop hurting himself (*id.*). The parent was also able to use this prompting model outside the home (*id.* at p. 8). The IEP stated the student's "most dangerous" behavior was pulling out his gastronomy tube (G-tube) while it was still inflated, which had resulted in "many" hospital visits, countless broken G-tubes, and medical procedures (*id.* at p. 6). The student would pull out his G-tube when frustrated, when limits were placed on him, and when he did not get what he wanted (*id.*). This could happen very quickly, in "one second and one quick pull" and could happen numerous times a week; sometimes numerous times in one day or weekend (*id.*). The August 2021 IEP reported that the student was no longer pulling his g-tube out as often but would still pull it out for attention (*id.* at p. 8). According to the August 2021 IEP, the student had a compromised immune system and required a "very controlled environment to limit germs and distractions" (*id.* at p. 6). He relied on a G-tube for 70 percent of his nutrition, and due to a "paralyzed flap and a partially functioning flap," was unable to safely drink liquids without a thickener and required close monitoring to ensure that he did not aspirate on saliva, vomit, or food (*id.*). He could chew on "finely chopped food" (*id.* at p. 8). The August 2021 IEP described that the student was "medically fragile" and received 60 hours of home nursing services per week (*id.*). He exhibited constant movement, often going into

extension, had difficulty performing activities with upper extremities without involving his lower extremities, and was unable to sit still (id.). He required close supervision to remain safe while walking and when moving around (id.). The student used a wheelchair but could walk short distances with assistance (id.). He was unsteady on his feet and frequently dropped to the floor to crawl (id. at pp. 8-9).

The August 2021 IEP further reported that the student "thrive[d]" in a one-on-one environment with minimal distractions and became overwhelmed when more than two or three people were present, when a situation was new, or when he felt nervous or threatened (Dist. Ex. 1 at p. 6). He relied on physical prompts and redirection to calm, soothe, and provide the sensory input he craved (id.). According to the IEP, the student self-stimulated "constantly" and needed "constant" redirection, praise, and positive reinforcement to remain on tasks, control his body, and reduce his injurious behaviors (id.). He needed "constant" physical or verbal prompts to resist mouthing and would lick shoes or the floor and bite tables, trays, and other objects, if allowed (id.).

Turning to the student's speech-language needs, the August 2021 IEP related that the student communicated with utterances and gestures, but only those "inside his circle" understood him (Dist. Ex. 1 at p. 5). He received speech-language therapy to address his receptive and expressive communication needs and was making progress towards increasing and improving oral motor functions (id. at pp. 6-7). The student was working on goals targeting using three-to-four-word phrases to request and comment on age-level stories and could produce three-word phrases with direct modeling, redirecting, and prompting (id. at p. 7). However, according to the IEP, at times, the student would choose to remain silent, hit himself, or look away to escape target productions (id.). He followed one-step directions with language-based activities but required modeling and instruction to complete two-step activities with language-based activities (id.). The IEP indicated that the student had met a receptive language goal targeting "what" questions and was working on responding to "where" and "when" questions (id.). When using his augmentative and alternative communication (AAC) device, the student requested desired toys independently and had begun using two words to request, comment, or decline (id.). According to the IEP, the student responded well to visual and physical models provided by his speech-language therapy provider, loved working for a turn with one of his favorite toys, and enjoyed melodic intonation/song activities (id.). The IEP stated the student would greet anyone who came into the room (id.). He had more opportunities to engage with other children than in the past and would interact with children at the park, library, gym, and swim class, and with his family (id. at p. 8). The August 2021 IEP noted that "per previous IEP" the student required a very controlled environment to limit germs and distractions which limited opportunities for social interactions other than with his family and therapists and related more with adults and would not initiate interactions with peers (id.).

2. Services Provided by NYTPS and Optimized Independence

The parents assert that the hearing record demonstrates that the student's home instruction program provided him with appropriate educational instruction, specially designed to meet his unique needs.

In her September 2024 direct testimony by affidavit, the parent testified that the student was "extremely impulsive," had low frustration tolerance, became overwhelmed in the presence of strangers and exhibited behaviors such as banging, slapping himself, hitting his head with objects, and biting and chewing himself to avoid such situations (Parent Ex. W at ¶ 3). He often attempted to pull out his g-tube, even when with his 1:1 nurse, and if it could not be repositioned, he required an emergency room visit (*id.* at ¶ 4). According to the parent, due to the student's fragile medical condition and behaviors, his doctor, teachers, and providers felt that he could not be safely educated at school and required home instruction (*id.* at ¶ 5). The hearing record includes a September 18, 2024 medical note from the student's physician, which recommended "24-hour monitoring and well managed care as necessary to avoid life threatening situations and potential medical complications," and noted that "due to his fragile condition and compromised immune system," the student required a well-controlled environment (Parent Ex. E at p. 1). The September 2024 medical note stated that "[g]iven his fragile condition, [the student] [wa]s unable to attend school and receive[d] home-based instruction," and the physician "strongly recommended" that the student "continuously receive home-based instruction to ensure his safe learning" (*id.* at p. 2).

The director of services from NYTPS testified that the agency provided the student's SETSS, speech-language therapy, and OT during the 2024-25 school year (Tr. pp. 49-50; Parent Ex. U at ¶ 10). The hearing record shows that the student received SETSS from two providers who taught the student simple math, counting, sight words, community helpers, senses, the seasons, weather, and communication skills; brought the student to community settings such as the library or supermarket; and worked with the student on behavioral issues (Tr. pp. 40-42, 51). The director testified that SETSS providers worked on "everything from safety awareness to behaviors," such as pulling out the g-tube or "licking the floor" (Tr. p. 51). In addition, they worked on staying on task, redirecting when the student was "stimming," money skills, sequencing activities, and saying people's names, phone numbers and addresses (*id.*). SETSS providers also worked on money skills, matching timeframes with activities, and saying hello independently (*id.*). According to the director, the two SETSS providers were "working off the same goals" but used different teaching styles and addressed different skills (Tr. p. 52). They worked collaboratively and "[were] in communication ... using the same strategies and carryover" (*id.*).⁸

The student's August 2024 SETSS progress report showed that the provider's instruction focused on annual goals related to increasing cognitive skills, increasing communication skills, controlling the student's behavior, reducing self-stimulatory behaviors outside of his home, seeking attention using appropriate means, using a communication device to engage with others, and increasing activities of daily living skills (Dist. Ex. F at p. 2). According to the progress report, the student had made progress using visual behavior cue cards and consistent community outings helped "keep him aware and desensitize him to the outside world" (Parent Ex. F at p. 3). The progress report stated that the student's providers took him to a farm, the zoo, an aquarium, and the Hall of Science, and he "regularly" went to the library, bakery, pharmacy, grocery store, and a pizzeria (*id.*). During these trips, the student's SETSS providers reinforced positive behaviors and exposed the student to different learning environments with multisensory activities (*id.*).

⁸ The director testified that she believed both SETSS teachers were certified to teach grades 1-6; however, the hearing record shows that both teachers held permanent certification in special education without a grade-level designation (Tr. p. 52; Parent Exs. J at p. 3; K at p. 3).

According to the SETSS report, these trips were "pivotal to [the student's] development" and the ability to "control him in different environments" (*id.*). The progress report noted that during community outings, the student demonstrated progress in social interactions and communication, following directions, sequencing activities, money skills, and increased independence (*id.* at p. 4). He used a checklist to prepare items to place in his backpack with minimal support (*id.*). His ability to recognize items from a written list, locate the item, and manipulate the closure on his backpack "remained steady" though he required support to complete the task (*id.*). The progress report indicated the student recognized "crossing road" signs, crosswalks for stopping, and the need "for crossing at the light" but did not show awareness of the danger of crossing the road and needed the "highest level of support" (*id.*). At the library, the student greeted the librarian with increased independence; returned books given moderate gestural reminders, support, and directed guidance; and checked out books when leaving (*id.*). He was able to acclimate while in the community and showed interest, taking the initiative to use words to say hello independently (*id.*). According to the progress report, the student's SETSS providers used his speech generating device (SGD) to facilitate more independence with his language, thoughts, and requests and to incorporate into lessons (*id.*). The student's SETSS providers also used verbal and visual checklists for appropriate behavior while in the community, physical and verbal prompts, visual cues, rule charts, and a time out chart to reduce self-stimulatory and injurious behaviors and help the student stay on task (*id.* at pp. 3-4). The student worked for free play, preferred toys, or his favorite story on the iPad and the student's sessions focused on skills such as being helpful, waiting for his turn, and being a good listener through music, visual cues, reinforcement, and consistency (*id.* at p. 3).

The SETSS report showed that the student's SETSS also focused on daily living skills such as practicing putting on deodorant, and the motions of shaving his face with a mirror and nonworking electric razor with a handheld vibration tool to recreate the feeling (Parent Ex. F at p. 3). The student toileted on a schedule and was encouraged to request to use the bathroom but had shown regression due to inconsistency of the routine (*id.*). The progress report stated the student identified emergency vehicles and their functions and tolerated hearing sirens due to "daily desensitizing" (*id.*). He was learning to call 911 to request assistance by saying "help me," stating his and his parents' names, and calling his parents (*id.*). According to the SETSS report, the student was "thriving on a routine, language-rich environment focusing on key words and phrases, with praise, positive reinforcement and motivators" (*id.*). He frequently "praise[d] himself by gesturing that he ha[d] nice hands, [wa]s smart and a good boy, and w[ould] look for ways to show his intelligence so that [his providers'] w[ould] praise him" (*id.* at pp. 3-4).

Here, while the SETSS provided in the community may have been in environments that were no more sterile than a 6:1+1 special class, the community outings were only a portion of the student's educational program. Further, the hearing record shows that the student was supported during the community outings and the instruction provided addressed the student's impulsivity, low frustration tolerance, behavior, communication, and social needs as identified in the IEP and the SETSS progress report (see Parent Ex. F; Dist. Ex. 1 at pp. 6-8). Accordingly, the hearing record does not support the IHO's finding that the community outings made the unilateral placement inappropriate because the parent claimed the student required a sterile school environment.

The IHO also found that while there was information in the hearing record regarding the specialized instruction provided as to the student's SETSS and speech-language therapy services,

the PT report did not describe the ways that instruction was individualized and there was no OT report or information about OT sessions for the school year at issue (IHO Decision at pp. 16-17). The IHO found the lack of information as to PT and OT services, combined with the lack of information on feeding instruction and subjective evidence of progress, were an indication that the unilaterally obtained services provided insufficient specialized instruction and did not meet all of the student's needs (id.). However, review of the hearing record compels a contrary conclusion.

The student received PT services from Optimized Independence during the 2024-25 school year (Parent Exs. I; V at ¶ 7). A review of the September 2024 PT annual report shows that it identified annual goals related to ascending and descending 15 flights of stairs, ambulating outdoors, and ambulating in a straighter path (Parent Ex. I at p. 1). According to the PT annual report, the student was working on ascending and descending stairs with "contact [g]uard assist," as needed, using one hand on the handrail and the other on the wall (id.). With the use of ankle braces, the student exhibited more consistent heel strike with less foot dragging (id.). The PT annual report noted that when standing up from the floor, the student was unable to sequence the proper order of steps and often required assistance and verbal cues (id.). In addition, the student required "handheld minimal assistance" to prevent falls when ambulating on uneven surfaces (id. at p. 2). According to the annual report, during gait training the student had difficulty ambulating in a straight line and needed tactile and verbal cues for correction (id.). He was very unsteady and "wobbly" on his feet and required close contact guard to minimum assist (id.).

The hearing record shows that the student received OT services from Optimized Independence until September 2023 (Parent Ex. V at ¶ 7). The student did not receive OT during July and August of 2024-25 due to difficulty finding a provider but began receiving OT from NYTPS in September 2024 (Tr. pp. 45-46, 56; Parent Exs. S; U at ¶ 10). As the IHO noted, the OT report contained in the hearing record is from January 2024, prior to the school year at issue and was from Optimized Independence, not NYTPS which is the agency that was providing the student's OT services during the 2024-25 school year (see Parent Ex. H). However, the NYTPS director provided some information on the student's OT in her live testimony, indicating that the OT provider worked with the student on sensory integration and did a lot of "heavy work" to help with reading his self-regulation and fine motor tasks such as "grasping different writing utensils, scooping out of a bowl, imitating lines, drawing shapes, buttoning, dressing, and ADL skills" (Tr. p. 54-55).

Here, the August 2024 speech-language therapy report related that speech-language therapy focused on annual goals related to oral motor strength and range of motion, articulation of targeted sounds, expressive and receptive language skills, and using an AAC device to answer questions with one-word responses and independently make requests (Parent Ex. G at p. 1). The progress report indicated the student increasingly produced voiced utterances to communicate, typically consisting of 1-3 words and up to 4-5 words at a time when given segmented visual and auditory models (id. at p. 2). In addition, he benefitted from prompts to use three-word sentences via his SGD containing "noun [plus] action" (id.). According to the report, the speech-language therapy provider used Toobaloo, an auditory feedback tool, and the student increasingly used it independently to repeat phrases and words from his SGD or contextually relevant vocabulary (id.). The student used the assistive technology program Proloquo2Go to practice verbalizing, which helped broaden his understanding of his device, expanded his vocabulary/world knowledge, and yielded broader communication opportunities (id. at p. 3). The progress report noted that he

benefited from hand-over-hand support to slow down when using his device (id.). The director testified that the provider "work[ed] a lot with [the student's] AAC device ... to answer questions, make requests, [and] spell words on it to locate vocabulary" (Tr. p. 53). The speech-language therapy provider also worked on skills such as decreasing the number of breaks the student took during sessions and imitating sounds (id.).

The IHO noted that, while the parent testified that feeding instruction must be part of the student's speech-language therapy in order to deal with his risk of choking and aspiration, there was no indication in the hearing record that the student's speech-language therapy sessions provided by NYTPS addressed the student's feeding instruction (IHO Decision at p. 16). Review of the hearing record shows that the parent testified that for speech-language therapy, the student was "at risk of aspiration and choking" and the student "require[d] [speech-language therapy] combined with feeding instruction to improve his diet" (Parent Ex. W at ¶ 14).⁹ Although the NYTPS director testified that the student's speech-language provider worked with students with feeding concerns, the hearing record does not indicate how feeding instruction was worked on with the student. However, parents need not show that a unilateral placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65), the program as a whole must still be "reasonably calculated to enable the child to receive educational benefits" (Carter, 510 U.S. at 11, 13-14, quoting Rowley, 458 U.S. at 203-04) when considered under the totality of the circumstances and under the circumstances presented here, the lack of a description as to how the providers worked on feeding with the student does not result in finding that the services provided to the student were not appropriate to meet his identified needs.

Turning to the IHO's finding that the hearing record lacked "objective evidence of progress" (IHO Decision at p. 16). While a relevant factor to be considered in determining whether a unilateral placement is appropriate (Gagliardo, 489 F.3d at 115, citing Berger, 348 F.3d at 522 and Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]), it is well settled that a finding of progress is not required for a determination that a student's unilateral placement is adequate (Scarsdale Union Free Sch. Dist. v. R.C., 2013 WL 563377, at *9-*10 [S.D.N.Y. Feb. 4, 2013] [noting that evidence of academic progress is not dispositive in determining whether a unilateral placement is appropriate]; see M.B. v. Minisink Valley Cent. Sch. Dist., 523 Fed. App'x 76, 78 [2d Cir. Mar. 29, 2013]; D.D-S. v. Southold Union Free Sch. Dist., 506 Fed. App'x 80, 81 [2d Cir. Dec. 26, 2012]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 486-87 [S.D.N.Y. 2013]; C.L. v. Scarsdale Union Free Sch. Dist., 913 F. Supp. 2d 26, 34, 39 [S.D.N.Y. 2012]; G.R. v. New York City Dep't of Educ., 2009 WL 2432369, at *3 [S.D.N.Y. Aug. 7, 2009]; Omidian v. Bd. of Educ. of New Hartford Cent. Sch. Dist., 2009 WL 904077, at *22-*23 [N.D.N.Y. Mar. 31, 2009]; see also Frank G., 459 F.3d at 364).

Nonetheless, the hearing record shows evidence of the student's progress with the home instruction provided. The August 2024 SETSS progress report related that the student had mastered short term goals for identifying the weather using visual cues; using his AAC device to identify himself and to get assistance; following the steps to call 911; following a physical prompt

⁹ It is worth noting that the hearing record shows that the student relied on a G-tube "for a large percentage of his nutrition and liquids" (Parent Ex. F at p. 2). However, as of the January 2024 OT progress report, the student was described as being able to "feed[] himself with minimal to moderate spillage and close supervision to ensure safe spacing throughout the meal" (Parent Ex. H at p. 3).

to reduce self-stimulatory behaviors; following a verbal prompt to reduce self-stimulatory behaviors; using hands appropriately to gain attention; displaying "safe hands;" reducing the frequency of g-tube pulling with redirection, verbal prompts with physical prompts; tolerating outdoor noises with exposure and redirection; reducing the need to grab when given redirection; maintaining an upright position when walking; vocalizing to gain attention; tapping an arm to gain attention; using an AAC device to gain attention, make a request, and display information; and folding socks with assistance (Parent Ex. F at p. 2-3). He was also making progress using his AAC device to identify his address and in his ability to match pants with a shirt (id. at p. 3).

The August 2024 speech-language therapy progress report noted that the student demonstrated improvement in his speech sound and syllable segmentation in words through consistent auditory feedback, tactile prompts, and visual models (Parent Ex. G at p. 3). He verbally requested preferred toys/activities and labeled nouns within his environment and by locating symbols of interest on his device (id.). He tended to revert to physical means (ex: tapping clinician's hand) rather than using his device or verbal means; however, when redirected to use his SGD or verbalize, he increasingly attempted to do so (id.). The progress report indicated the student's understanding of what, where, and who questions and ability to respond with 1-2 relevant words was emerging with continued practice (id.). He independently attempted to spell words via the "search" function on his SGD device to initiate communication and to locate context-specific vocabulary (id.). According to the student's August 2024 speech-language therapy report, the student's performance varied "based on his level of impulsivity, interest/attention, self-stimulatory actions, and regulation," but he continued to show "steady progress, motivation, and increased engagement across the majority of sessions" (id.).

The September 2024 PT report addressed the student's progress with PT and identified that the student had "demonstrated consistent progress since starting [PT]" (Parent Ex. I at p. 1). He could ascend/descend ten flights of stairs with contact guarding, and was more consistent with heel strike with less foot dragging with the use of ankle braces (id.). According to the PT annual report, the student could move from sit to stand independently but on occasion still fell backwards or dropped onto the floor due to unsteadiness, coordination deficits, inadequate standing balance, behavioral issues, and poor safety awareness (id. at p. 2). He had difficulty standing up from the floor and was unable to sequence the steps in proper order (id.). The PT report stated that the student had made progress toward his ambulation goals and was able to ambulate "about 60 [percent] of the distance with contact guard and supervision on a flat surface" (id.). He still needed handheld minimal assistance to prevent falls on uneven surfaces (id.). The PT report noted that although the student had made progress toward his annual goals, they had not yet been mastered (id.).

The parent also testified that the student made steady progress with services provided by NYTPS and Optimized Independence, and had "improved independence in daily living skills," "developed greater tolerance toward sensory input, and the frequency of his maladaptive behaviors in public places ha[d] significantly decreased" (Parent Ex. W at ¶ 15).

Based on the foregoing, given the totality of the circumstances, the evidence in the hearing record supports the parent's argument that the unilaterally obtained home instruction services were

appropriate to meet the student's needs. Consequently, the IHO's determination that the parents did not meet their burden to prove the appropriateness of the unilateral placement must be overturned.

B. Equitable Considerations

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

The IHO indicated that had she found the unilaterally obtained services appropriate, she would not have awarded funding for the entire school year because the services contracts could be cancelled at any time (IHO Decision at p. 17).

Review of the services contracts shows that the parents contracted for the delivery of a specified amount of weekly services for the entirety of the 2024-25 school year (Parent Exs. Q-T). This is not a scenario where the frequency or duration of the student's services were fluid or unpredictable. Although the services were contracted for at hourly rates, the contracts all call for a specified amount of educational programming for the entirety of the school year such that it would reasonably be expected that the student will have received the same program for the duration of the 2024-25 school year. Although, the service contracts included provisions for cancellation, these provisions are not an automatic reason to deny funding under equitable considerations.

Additionally, the hearing record does not support finding that there are any additional equitable bars to the parents' requested relief. The parent submitted timely notice of her intent to unilaterally obtain at home services (see Parent Ex. C). Further, weighing against the district, the district failed to convene a CSE meeting or evaluate the student prior to the 2024-25 school year and accordingly, the parents' decisions must be assessed as they had to obtain services for the student.

Based on the above findings, the program obtained by the parent was appropriate; and therefore, the parents are entitled to funding for the services for the entirety of the 2024-25 school year.

VII. Conclusion

Overall, the IHO erred in finding the educational program obtained by the parent was not appropriate to meet the student's identified needs. As discussed above, the hearing record supports finding that the unilaterally obtained services met the student's unique needs and constituted an appropriate program for the student. Additionally, as there are no equitable bars, the parents are entitled to funding for the educational program through the end of the 2024-25 school year.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO decision dated November 26, 2024 is modified to reflect that the services obtained for the 2024-25 school year from NYTPS and Optimized Independence were appropriate for the student; and

IT IS FURTHER ORDERED that the district is ordered to fund 20 hours per week of SETSS, two 45-minute sessions per week of speech-language therapy, and two 45-minute sessions per week of OT provided to the student by NYTPS during the 2024-25 school year at the contracted for rates, as well as three 45-minute sessions per week of PT provided to the student by Optimized Independence during the 2024-25 school year at the contracted for rate, following the presentation of proof of the delivery of services.

Dated: **Albany, New York**
 July 10, 2025

STEVEN KROLAK
STATE REVIEW OFFICER