



The University of the State of New York

The State Education Department

State Review Officer

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No. 25-062

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

Appearances:

Liz Vladeck, General Counsel, attorneys for respondent, by Emily A. McNamara, 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 that respondent (the district) fund the costs of her son's special education teacher support services (SETSS) delivered by Succeed Educational Support Services, LLC (Succeed) for the 2023-24 school year. The district cross-appeals, arguing that the IHO lacked subject matter jurisdiction to adjudicate the parent's claims. 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 student, as part of the same due process proceeding, has been the subject of a prior State-level administrative appeal, which remanded the matter back to the IHO for further proceedings (see IHO Ex. IV). The current appeal arises from the IHO's decision after remand

and is based primarily on the same hearing record that was available at the time of the initial appeal; accordingly, the parties' familiarity with the facts and procedural history through the prior administrative appeal is presumed and will only be repeated as relevant to this appeal.

Briefly, in October 2022 and March 2024, CSEs convened, determined that the student was eligible for special education as a student with a learning disability, developed IESPs, and recommended that the student receive four periods per week of SETSS in a group (delivered in Yiddish) and one 45-minute session per week of counseling (delivered in Yiddish) (see Parent Ex. B at pp. 1, 5-6; IHO Ex. I at pp. 1, 8).^{1, 2} During the 2023-24 school year, the student attended a nonpublic school where he received SETSS delivered by Succeed (see Parent Ex. A at p. 1; see generally Parent Ex. E).^{3, 4}

By due process complaint notice, dated May 14, 2024, the parent—assisted by a lay advocate with "Prime Advocacy, LLC" (Prime Advocacy)—alleged that the district failed to implement the services recommended in the student's October 2022 and March 2024 IESPs, which she asserted constituted a failure to offer the student a free appropriate public education (FAPE) for the 2023-24 school year (see Parent Ex. A at pp. 1-2). As relief, the parent sought direct funding of the costs of the SETSS and counseling services she unilaterally-obtained for the student from Succeed, as well as a bank of compensatory services for those services the student did not receive during the 2023-24 school year (id. at p. 3).

On June 20, 2024, the district filed a motion to dismiss, alleging that the IHO did not have subject matter jurisdiction over the parent's implementation claim (see generally Mot. to Dismiss).

A. Proceedings Leading to Remand

On June 27, 2024, the parties proceeded to an impartial hearing before an IHO with the Office of Administrative Trials and Hearings (OATH) and concluded the proceedings on that day

¹ The student's eligibility for special education as a student with a learning disability is not in dispute (see 34 CFR 300.8[c][10]; 8 NYCRR 200.1[zz][6]). The October 2022 CSE recommended group counseling for the student, and the March 2024 CSE recommended that the student's counseling be delivered on an individual basis (compare IHO Ex. I at p. 8, with Parent Ex. B at p. 6).

² On a district form executed by the parent on May 17, 2023, the parent informed the district that the student would be parentally placed in a nonpublic school at her own expense, and she wanted the district to provide the student with special education services for the 2023-24 school year (see Parent Ex. G). Later that same year in a letter dated September 27, 2023, Prime Advocacy (on behalf of the parent), notified the district that the district had "failed to assign a provider" to deliver special education services to the student for the 2023-24 school year (Parent Ex. D). The letter further indicated that if the district failed to "fulfill the mandate," the parent would be "compelled to unilaterally obtain the mandated services through a private agency at an enhanced rate" (id.).

³ Succeed is a limited liability company and has not been approved by the Commissioner of Education as a school or company with which districts may contract to instruct students with disabilities (see NYCRR 200.1[d]; 200.7).

⁴ On or about November 1, 2023, the parent electronically executed a document proffered at the impartial hearing as a contract for services with Succeed (see Parent Ex. C at pp. 1-6; IHO Ex. II at p. 1).

(see June 27, 2024 Tr. pp. 1-45).⁵ During the impartial hearing, the IHO first addressed the district's motion to dismiss for lack of subject matter jurisdiction (see June 27, 2024 Tr. p. 5). The IHO afforded each party an opportunity to be heard on the jurisdiction issue and advised that he would reserve decision and address it in his findings of fact and decision (see June 27, 2024 Tr. p. 9). Then, the IHO ruled on documentary evidence (see June 27, 2024 Tr. pp. 13, 16-19, 23-29). The IHO declined to admit two of the parent's proposed exhibits—exhibit H and exhibit I—because the parent failed to disclose them to the district five days before the impartial hearing (see June 27, 2024 Tr. pp. 22, 24, 29).⁶

In a decision dated July 2, 2024 (July 2024 IHO decision), the IHO found that the district failed to offer the student a FAPE for the 2023-24 school year, the parent failed to meet her burden of proving the appropriateness of the unilaterally-obtained services, and equitable considerations did not favor the parent's requested relief (see IHO Ex. III at pp. 5-6, 9). More specifically, the IHO noted that, while the parent produced the IESPs at issue, the contract between the parent and the provider, the 10-day notice, time sheets, and a June 1 letter, the hearing record was devoid of any evidence regarding the work the SETSS provider actually did with the student, the provider's qualifications and certifications, goals for the student or progress made, or any testimony regarding the services for which the parent sought funding (id. at p. 6). With respect to equitable considerations and for "completeness of the record," the IHO determined that the parent's contract with Succeed lacked essential terms to establish the parent's financial obligation and that, had the contract established financial obligation, he would have reduced the award by 10 percent (or \$144.00 per hour) due to the parent's failure to provide the district with 10-day notice of her intent to unilaterally-obtain services (id. at pp. 7-9 & 9 n.15). In light of the foregoing, the IHO dismissed the parent's due process complaint notice with prejudice (see id. at p. 9).

The parent appealed and the district cross-appealed the July 2024 IHO decision. An SRO issued a decision on the parties' appeals on November 12, 2024, remanding the matter to the IHO with the instruction to admit parent exhibits H and I and to determine whether, with the additional evidence, the parent sustained her burden to establish the appropriateness of the SETSS and counseling services the parent unilaterally-obtained from Succeed using the Burlington/Carter legal standard and, based thereon, to determine the extent to which the parent may be entitled to the requested relief (see IHO Ex. IV at pp. 11-13).

B. Impartial Hearing Officer Decision After Remand

Following remand, the IHO conducted an impartial hearing on December 4, 2024, but without an appearance on behalf of the district (see Dec. 4, 2024 Tr. pp. 1-3). The IHO explained the purpose of the impartial hearing on remand and noted that the parent had now disclosed documentary evidence that differed from the disclosure originally proffered at the impartial hearing held in June 2024 (see Dec. 4, 2024 Tr. pp. 3-4). Consistent with the instructions on remand, the IHO admitted parent exhibit H and parent exhibit I into the hearing record as evidence,

⁵ At the impartial hearing, the parent withdrew her request for the district to fund the student's recommended counseling services, and only sought funding for "four hours of SETSS" as relief (June 27, 2024 Tr. pp. 4-5).

⁶ The proposed parent exhibits consisted of a "supervisor affidavit" and a "progress report" (June 27, 2024 Tr. pp. 22, 24).

as well as readmitting the previously disclosed evidence from the prior proceeding into the hearing record as evidence (see Dec. 4, 2024 Tr. pp. 4-5). The parent's representative asked the IHO whether the parent could enter an affidavit from a different individual at that time because the previous affiant, a supervisor, was "currently out" on parental leave; the IHO denied the parent's request, and referred specifically to the instructions for remand, which indicated that the IHO was to admit parent exhibit H and parent exhibit I into the hearing record (see Dec. 4, 2024 Tr. pp. 5-6). No further impartial hearing dates were scheduled, and the IHO did not enter any additional testimonial or documentary evidence into the hearing record, other than entering parent exhibit H and parent exhibit I.

After remand, the IHO issued a decision on December 20, 2024 (December 2024 IHO decision), in which he initially discussed the background of the matter by summarizing the parent's allegations, the procedural history, the July 2024 IHO decision, the appeal to the Office of State Review, and the proceedings during the impartial hearing date held after the remand (see IHO Decision at pp. 2-3). Overall, the IHO adopted the "findings from [his] original" July 2024 IHO decision regarding the district's failure to offer the student a FAPE for the 2023-24 school year (id. at p. 3).

In particular, the IHO set forth findings of fact, which chronologically described the events in this matter through the March 2024 CSE meeting to develop the student's IESP (see IHO Decision at p. 4). With respect to a FAPE, the IHO noted that the district had not raised any affirmative defenses related to the State's dual enrollment statute, such as the June 1 notice or any other lack of notice (id. at p. 5). The IHO found that the district did not implement the student's special education services recommended in either the October 2022 IESP or the March 2024 IESP, and therefore, failed to offer the student equitable services for the 2023-24 school year and failed to offer the student a FAPE (id. at p. 6).

Turning to whether the parent sustained her burden to establish the appropriateness of the unilaterally-obtained services for the student, the IHO initially indicated that the parent had provided testimonial and documentary evidence to establish the appropriateness of said services (see IHO Decision at pp. 6-7). More specifically, the IHO examined testimony by the educational supervisor at Success (educational supervisor), which had now been entered into the hearing record as evidence, i.e., parent exhibit H (id. at p. 7). Overall, the IHO opined that the educational supervisor's testimony "generally echoed the language in the progress report, which stated that [the s]tudent's struggles in reading and math and further reported that 'scaffolding, re-directing, modeling, encouragement, praise, and repetition' [we]re used to help grasp concepts" (id.). The IHO indicated that, although the parent's evidence "included references to various strategies and techniques, . . . the record nevertheless fail[ed] to establish how or when any of these strategies [wa]s used with [the s]tudent, what goals these strategies [we]re intended to address, or how [the s]tudent ha[d] responded to these interventions" (id.).

Next, the IHO examined the progress report newly entered into the hearing record as evidence (see IHO Decision at p. 7). The IHO first noted that the progress report was neither signed nor dated and, in a footnote, indicated that, although the parent identified the date of the progress report as "'2023-2024,'" the descriptor was "unhelpful" and the hearing record did not contain any other evidence to determine when it had been prepared, other than noting the student's "grade on the first page of the report" (id. at p. 7 & n.12). Upon review, the IHO indicated that the

progress report included a "reference to a Fountas and Pinnell assessment," but did not identify when the assessment took place (id. at p. 7). The IHO also indicted that, regardless of when the progress report was prepared, the hearing record was devoid of evidence to establish the student's performance at the start of the 2023-24 school year, or with regard to any other time frame, making it essentially impossible to determine if the student made progress (id.). In addition, the IHO noted that the educational supervisor's description of the student's grade levels in reading and writing were "grossly subjective and not a true measure of [the s]tudent's levels of performance" (id.). The IHO also found that the educational supervisor's testimony and the information in the progress report were "inconsistent with the IESPs" the parent sought to implement (id. at pp. 7-8). For example, the IHO pointed out that both the October 2022 IESP and the March 2024 IESP described mathematics as an area of relative strength for the student; the October 2022 IESP did not include any annual goals in mathematics; and the March 2024 IESP included one annual goal in mathematics to address "fractions, mixed numbers, decimals, percentages, and graphs" (id. at p. 8). However, in contrast, the IHO noted that the progress report in the hearing record described the student's mathematics skills as "two grades below grade level" and the student was working on "addition, subtraction, and the multiplication table" (id.). The IHO also noted that the annual goals for mathematics in the March 2024 IESP differed from the goals the student was reportedly working on as reflected in the progress report (i.e., addition, subtraction, and multiplication and division skills) (id.). In light of these inconsistencies, the IHO found that the parent failed to establish that Succeed was providing services to the student that were specially-designed instruction to meet the student's needs, or even parenthetically, "what [the student's] needs truly were during the 2023-2024 school year" (id.). Additionally, the IHO found that, in light of the "lack of credible evidence" concerning the student's "levels of performance," "any actual progress" the student made, or evidence concerning the "details regarding the materials, strategies, or specially designed instruction techniques that [the] SETSS provider used to address [the s]tudent's defects," the parent failed to sustain her burden to establish the appropriateness of Succeed's services that were specially-designed to meet the student's needs (id.). For these reasons, the IHO found that the parent was not entitled to be reimbursed for the costs of the student's SETSS delivered by Succeed during the 2023-24 school year (id.).

As a final point, the IHO addressed equitable considerations (see IHO Decision at pp. 8-12). Here, the IHO indicated that, consistent with the district's arguments, the parent's contract with Succeed did not delineate the services to be delivered to the student, other than one paragraph that referenced appendix A, which listed the services to be provided as those consistent with the frequencies and durations set forth in the student's "'last agreed upon IEP/IESP/[IHO decision]" (id. at p. 9). The IHO also noted that the contract indicated that Succeed would deliver services on a 10-month basis, from September 2023 through June 2024 (id.). According to the IHO, appendix A listed various services and rates therein, including "'Special Education Services'"—not SETSS specifically—and that Succeed charged \$215.00 per hour for individual services and \$160.00 per hour for a group (id.). The IHO further indicated that the parent's electronic signature appeared on two pages of the contract, but that it was not dated (id.).

For the foregoing reasons, the IHO found that the parent had not established a financial obligation with regard to the services purportedly delivered by Succeed during the 2023-24 school year (see IHO Decision at p. 9). More specifically, the IHO determined that the "contract at issue [wa]s intentionally vague and based on a review of the contract, it [wa]s impossible to determine the extent of [the p]arent's financial liability" (id.). Additionally, the IHO noted that the contract

did not identify the "particular IESP or program or any specific services to be provided," and the issue was further complicated in this matter because the hearing record reflected "two IESPs in effect for [the s]tudent during the 2023-2024 school year" and each IESP "recommended multiple services" (id. at pp. 9-10). Notably, the IHO indicated that, although the parent represented at the impartial hearing that she was "not seeking [counseling services] through these proceedings, that representation in and of itself d[id] not clarify whether [the p]arent was contracting with [Succeed] for SETSS and [counseling] or solely for SETSS" (id. at p. 10). Accordingly, the IHO determined that, "by not specifying the services to be provided or the frequency or duration of said services, . . . , the contract d[id] not create a clear financial obligation" for the parent, or, therefore, for the district (id.).

Next, the IHO distinguished the contract in this matter with an SRO's finding in another decision, which the parent's representative had argued at the impartial hearing on remand (see IHO Decision at p. 10). The IHO indicated that, in comparison, the contract in this matter did not identify the services to be provided, the frequency of those services, or whether the services would be delivered individually or in a group setting (id.). The IHO determined that, notwithstanding language in the contract indicating that the parent understood that she would remain financially obligated for the services provided, this contract language was "illusory," especially since the parent would not have been aware—based on the contract language—whether she was obligating herself to pay for an individual rate (i.e., \$215.00 per hour), a group rate (i.e., \$160.00 per hour), the number of hours of services, or whether Succeed would also provide the student with counseling services (id.). Given these facts, the IHO found it "incredible that [the p]arent agreed to the 'blank check' established by this contract and rather f[ou]nd that the contract was prepared for the purposes of later litigating this case" to seek funding from the district (id.). Overall, the IHO concluded that, even if the parent had sustained her burden to establish the appropriateness of the SETSS, the parent would not be entitled to reimbursement or funding due to the lack of financial obligation (id.).

Next, the IHO found that the parent failed to timely provide the district with a 10-day notice of intention to unilaterally-obtain services (see IHO Decision at pp. 10-11). The IHO indicated that the parent had submitted a "document [that] was dated September 27, 2023" and drafted on the lay advocate's letterhead (id. at p. 11). However, the IHO found that the "document did not indicate if, when, or how this notice" was provided to the district (id.). According to the IHO, this was "noteworthy, as it differ[ed] from the proof [that the p]arent provided with respect to their 'June 1 letter'" (id.). For example, the IHO determined that the June 1 letter had included "both the form itself as well as the email to which the form was attached" (id.). In addition, the IHO noted that the parent's 10-day notice did not inform the district that she intended to seek funding from the district for the costs of the unilaterally-obtained services (id.). The IHO found that, even if the "substance" of the 10-day notice was deemed sufficient, and the "delivery of said letter was not at issue," he would nonetheless conclude that the parent failed to provide the district with "any actual notice, given that the letter was dated September 27, 2023," and evidence in the hearing record—the timesheets from Succeed—reflected that "services started on September, 13, 2023, two weeks earlier" (id.). Given that the parent did not provide the district with notice before the student's services began, the IHO indicated that a "reduction of any award ordered would be warranted" (id.).

As a final issue, the IHO turned to the delivery of SETSS to the student by Succeed (see IHO Decision at p. 11). The IHO initially indicated that, based on the IESPs at issue, SETSS had been recommended as a group service (id.). However, in closing arguments, the parent's representative requested SETSS funding at the individual rate, or at \$215.00 per hour as set forth in the contract (id.). The IHO noted that the educational supervisor testified that the student received individual SETSS due to his "distractibility and inability to focus (as opposed to an appropriate group being unavailable)" (id.). As an example of the student's distractibility, a situation was described when "another student walked into the room" during the student's session and "it took a long time to redirect" the student (id.). The IHO did not find that this example persuasively established that the student could not "function in a group setting," particularly given that the student's IESPs called for instruction within a "mainstream classroom to learn content firsthand, and [had] even established group goals to work on peer interactions" (id.). Furthermore, the IHO noted that, while SROs have found that parents should be "afforded some leeway in the provision of services," this was not applicable to the matter at hand because the student, here, was not "receiving services on a 1:1 basis for lack of options" (id.). Instead, the student was receiving individual SETSS in "contravention of reasonable and appropriate recommendations" and Succeed was "capable of providing services in a group setting but cho[se] not to" (id.). Thus, the IHO concluded that, had the parent established the appropriateness of the SETSS delivered by Succeed, any award "would [have] be[en] based on the contractual group rate" of \$160.00 per hour because the student should have been receiving SETSS in a group setting (id.).

In conclusion, the IHO indicated that, while no award was being ordered as a result of the parent's failure to sustain her burden to establish the appropriateness of the SETSS from Succeed, the parent—had she sustained her burdens of proof with regard to appropriateness and financial obligation—would nonetheless have received only partial reimbursement or funding, at a rate not to exceed the group rate of \$160.00 per hour reduced by another 20 percent for the failure to provide a 10-day notice (or \$128.00 per hour) (see IHO Decision at pp. 11-12 & 12 n.18). Consequently, the IHO dismissed the parent's request for funding of SETSS from Succeed for the 2023-24 school year with prejudice (id. at p. 12).

IV. Appeal for State-Level Review

The parent appeals, with the assistance of a lay advocate from Prime Advocacy, alleging that the IHO erred by finding that she failed to sustain her burden to establish the appropriateness of the SETSS delivered to the student by Succeed during the 2023-24 school year. The parent also argues that the IHO erred by finding that equitable considerations did not weigh in favor of her requested relief.

In an answer, the district responds to the parent's allegations and generally argues to uphold the IHO's decision in its entirety. As for its cross-appeal, the district argues that the parent's claims must be dismissed because the IHO lacked subject matter jurisdiction to adjudicate the parent's implementation claims.⁷

⁷ In the previous decision, Application of a Student with a Disability, Appeal No. 24-346, the SRO specifically addressed the district's subject matter jurisdiction arguments asserted at that time, and while finding that the IHO had not addressed the district's motion to dismiss, the district's arguments on appeal were not persuasive and the

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

SRO dismissed the district's cross-appeal that had been asserted solely on the issue of subject matter jurisdiction (see IHO Ex. IV at pp. 1, 5-9, 13). The district is reminded that the law of the case doctrine "posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case" (Perreca v. Gluck, 262 F. Supp. 2d 269, 272 [S.D.N.Y. 2003], quoting Arizona v. California, 460 U.S. 605, 618 [1983]). "Administrative agencies are no more free to ignore the law of the case doctrine than are district courts" (Ankrah v. Gonzales, 2007 WL 2388743, at *7 [D. Conn. July 21, 2007]). The doctrine of the law of the case is intended to avoid retrial of issues that have already been determined within the same proceeding (People v. Evans, 94 N.Y.2d 499, 502-04 [2000] [noting that law of the case has been described as "'a kind of intra-action res judicata'"]; see Lillbask v. State of Conn. Dep't of Educ., 397 F.3d 77, 94 [2d Cir. 2005]; Cone v. Randolph Co. Schs. Bd. of Educ., 657 F. Supp. 2d 667, 674-75 [M.D.N.C. 2009]; see generally Application of a Child with a Disability, Appeal No. 98-73 [noting that a pendency determination by an SRO would not be reopened during the proceeding once it was decided]). For the law of the case doctrine to be a bar, the issue must have been actually considered and decided by the higher court (see Ms. S. v. Regl. Sch. Unit. 72, 916 F.3d 41, 47 [1st Cir. 2019]). Consequently, the district's cross-appeal regarding subject matter jurisdiction will not be addressed in this decision.

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

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—Unilaterally Obtained Services

In this matter, 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 Succeed 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 unilaterally-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

other students with disabilities attending public or nonpublic schools located within the school district" ("Chapter 378 of the Laws of 2007—Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the Individuals with Disabilities Education Act (IDEA) 2004 and New York State (NYS) Education Law Section 3602-c," Attachment 1 (Questions and Answers), VESID Mem. [Sept. 2007], available at <https://www.nysed.gov/special-education/guidance-parentally-placed-nonpublic-elementary-and-secondary-school-students>). The guidance document further provides that "parentally placed nonpublic students must be provided services based on need and the same range of services provided by the district of location to its public school students must be made available to nonpublic students, taking into account the student's placement in the nonpublic school program" (*id.*). The guidance has recently been reorganized on the State's web site and the paginated pdf versions of the documents previously available do not currently appear there, having been updated with web based versions.

the 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]).¹⁰ 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 v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998]). Citing the Rowley standard, the Supreme Court has explained that "when a public school system has defaulted on its obligations under the Act, a private school placement is 'proper under the Act' if the education provided by the private school is 'reasonably calculated to enable the child to receive educational benefits'" (Carter, 510 U.S. at 11; see Bd. of Educ. v. Rowley, 458 U.S. 176, 203-04 [1982]; 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).

¹⁰ 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 Succeed (Educ. Law § 4404[1][c]).

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).

A. Student Needs

A brief discussion of the student's special education needs provides context to resolve the issue on appeal, namely whether the SETSS delivered to the student by Succeed were appropriate to address those needs during the 2023-24 school year.

According to the student's October 2022 IESP, the results of academic achievement testing to assess the student's basic mathematics, reading, and spelling skills revealed that the student's ability to "solve simple math[ematics] problems" fell within the average range; his spelling skills were described as "exceptionally low, within the [fir]st percentile; and his ability to read basic words fell within the below average range (second percentile) (IHO Ex. I at p. 2).¹¹ In reading comprehension, the student performed within the average range (id.). The IESP also reflected that the student had poor handwriting, reversed letters when spelling his own name, and was observed to have an immature pencil grip (id.). The IESP further reflected the student's strengths as his mathematics abilities and noted that he was a well-behaved student with intellectual abilities ranging from the low average range to the above average range (id.). The parent had raised concerns about the student's "reading abilities, handwriting, and spelling," which were "exceptionally low to below average range" in testing (id.). As reflected in the IESP, the student's performance in these areas was "well below expected grade level and his potential as indicated by his . . . verbal comprehension standard care of 108 (70th percentile)," and that such "findings were

¹¹ Although not reflected in the student's October 2022 IESP, evidence in the hearing record indicates that, based on the results of achievement testing conducted in December 2020 when the student was in second grade, the student exhibited "[p]oor skills for letter-word identification, reading comprehension, spelling, applied math[ematics] problems, and calculations" (Parent Ex. B at p. 1).

indicative of a diagnosis of a learning disorder with impairment in reading, spelling, and written expression (dyslexia)" (*id.*).

With regard to the student's physical development, the October 2022 IESP indicated that, based on a neuropsychological assessment, the student's scores were "typical of individuals diagnosed with attention deficit disorder, combined presentation" (IHO Ex. I at p. 3).¹² The parent had reported, at that time, that the student exhibited "distractibility on tasks requiring sustained attention"; the IESP further noted that behavioral observations were "notable for mild hyperactivity" (*id.*). To address the student's management needs, the October 2022 CSE recommended the following strategies and supports: multisensory approach to learning, preferential seating close to the instructor, verbal and visual cues, prompting and redirection as needed, repetition, breaking down instructions, visual aids, and testing accommodations (*id.*).

In describing the effect of the student's needs on his involvement and progress in the general education curriculum, the October 2022 CSE indicated in the IESP that the student's learning disability "manifest[ed] as social, and academic deficits," and SETSS would "continue to provide [the student] with reinforcement of concepts that he struggle[d] with, such as reading and spelling which [we]re areas of relative weakness" (IHO Ex. I at p. 3). In addition, the IESP indicated that it was "important" for the student to be "in the general education classroom to learn content firsthand and to develop academic independence to the maximum extent possible" and that support within the classroom would "consist of repetition, instruction broken down, visual aids, and testing accommodations" (*id.*).

The student's needs are also described in the direct testimony by affidavit of, the educational supervisor from Succeed (Parent Ex. H). The educational supervisor testified that, based on "teacher observation and informal assessments," the student's reading and reading comprehension skills were two to two and one-half "grades below that of his peers," and his "accuracy and fluency require[d] much attention and support" (*id.* ¶ 9).¹³ Additionally, the educational supervisor described the student as having "trouble reading multi-syllabic words, digraphs and long vowel sounds"; the student's reading was "very slow which directly affect[ed] his comprehension"; he could answer simple "wh" questions only with prompting and redirection; he could not answer "higher level inferential comprehension questions"; and he "ha[d] trouble sequencing events in a story correctly" (*id.*). In the area of writing, the educational supervisor

¹² While the October 2022 IESP did not indicate when the neuropsychological evaluation of the student took place, the student's March 2024 IESP reflected that it had occurred in July 2022 (*see* Parent Ex. B at p. 1). Evidence in the hearing record reflects that the neuropsychological evaluation of the student yielded cognitive scores in the average and high average range of intellectual ability, with the exception of processing speed skills, which fell within the low average range (*id.*). More specifically, the student obtained a full-scale intelligence quotient (IQ) within the average range (63rd percentile), with "strong performances in visual spatial domains (87th percentile)," and verbal comprehension skills that "ranged from the average to the high average range, with better performance on a task of work knowledge (Vocabulary = 84th percentile) than verbal comprehension where he was required to explain common behaviors (Comprehension = 50th percentile)" (*id.*). According to the neuropsychological evaluation, the student's scores supported a diagnosis of specific learning disorders" (*id.*).

¹³ According to the educational supervisor's testimony, she understood that the student's March 2024 IESP was the "last agreed upon" program for the student, which included a recommendation for four "60 periods" of SETSS to be delivered in Yiddish (Parent Ex. H ¶ 12).

testified that the student's skills were "not on par," and he "display[ed] difficulty in following multi-step directions and instructions and starting and finishing a task independently," which resulted in his "struggle[] to complete a writing task accurately, [and] independently" (id. ¶ 10). The student's writing was described as "immature as he c[ould] only write short basic sentences," his "spelling [wa]s extremely poor and he use[d] inventive spelling to compensate" (id.). In mathematics, the educational supervisor testified that the student "struggle[d] with grade level skills" and his "foundational math skills [we]re lacking," including his ability to complete addition and subtraction problems requiring borrowing and regrouping, as well as his ability to independently solve mathematics problems (id. ¶ 11).¹⁴

In an unsigned and undated "SETSS Teacher Progress Report" (SETSS progress report) bearing the SETSS provider's typed name, it was reported that the student was in fifth grade at that time and attended a nonpublic school (see Parent Ex. I at pp. 1, 4). Given the lack of a specific date on the SETSS progress report, it is not possible to discern whether the document described the student's needs as of the beginning of the student's fifth grade year or the end (see id. at p. 1). Further, although the progress report set forth the provider's typed name, it is not clear who prepared the report. For example, the report referred to the "[p]rovider" in the third person and, at times, refers to "providers" plural (id. at pp. 1-2). The provider did not testify to offer clarity regarding the development of the progress report and the educational supervisor did not discuss

Despite the questions as to the progress report's reliability and relevance in terms of the timing of the description of the student, the student's needs as described therein will be summarized in brief. In reading, the SETSS progress report reflected that, based on a "Fountas and Pinnell assessment," the student was "reading on Level N with 80 [percent] accuracy"; he struggled to decode multisyllabic and new words; he struggled to read words containing "digraphs, diphthongs, and vowel pairs"; and, due to focusing issues, reading with fluency and accuracy were difficult for the student (id. at p. 2).¹⁵ It was also reported that, due to his difficulty decoding, the student struggled to focus on comprehension and had difficulty answering higher level inferencing questions and comparing and contrasting the characters (id.). In writing, the SETSS progress report indicated that the student's "writing level [wa]s very immature," indicating that he only wrote short sentences, could not write a paragraph, and needed "a lot of repetition, prompts, and direct instruction to assist him" (id.). Additionally, the SETSS progress report indicated that the student's spelling was "inventive," and he "guesse[d] how to spell words" (id.). The SETSS progress report reflected that, "[a]ccording to classwork, [the student] [wa]s performing two grades below grade level" in mathematics, and he needed assistance to "acquire long addition skills," compute addition and subtraction word problems, and learn multiplication tables 1 through 10 (id. at p. 1). Socially, the SETSS progress report indicated that the student "display[ed] good social

¹⁴ Although the IHO questioned the inconsistencies in the description of the student's math needs as compared to the October 2022 IESP, I do not find the inconsistency to be determinative because, even if the student demonstrated weaknesses in math as reflected in the parent's evidence, the totality of the evidence is lacking with regard to the delivery of the services in a manner to allow the student to access the general education curriculum.

¹⁵ The evidence did not explain what "Level N" referred to in comparison to the student's age or grade level (see generally June 27, 2024 Tr. pp. 1-46; Dec. 4, 2024 Tr. pp. 1-11; Parent Exs. A-E; G-I; Dist. Exs. 1-3; IHO Exs. I-IV).

skills" but also that he exhibited low self-esteem, "low mood, bullying, and social challenges" (id. at p. 3).

B. Specially-Designed Instruction—SETSS from Succeed

The parent contends that the IHO erred by finding that individual SETSS were not appropriate to meet the student's needs. The parent argues that she must not be held to the same standard as a school district when unilaterally obtaining services to implement the IESP. In addition, the parent asserts that the SETSS progress report supports the need for individual services. The parent also asserts that a unilateral placement need not have goals or evaluations similar to that of an IEP. Additionally, the parent argues that the IHO erred by finding that the SETSS were not appropriate because the IHO, himself, pointed to the strategies and techniques used by the SETSS provider to address the student's needs.

In this matter, the parent unilaterally obtained SETSS for the student during the 2023-24 school year. 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).

In an effort to sustain her burden to establish the appropriateness of the SETSS from Succeed, the parent entered testimonial and documentary evidence into the hearing record, which included a document on Succeed letterhead entitled "Timesheet" reflecting, as the IHO found, that the student began receiving SETSS from Succeed at his nonpublic school on September 13, 2023 (Parent Ex. E at p. 1). Review of the timesheet shows that one provider delivered the student's SETSS, usually from 3:30 p.m. to 4:30 p.m., although on a few occasions his sessions were held at other times during the school day (i.e., 10:00 a.m., 11:15 a.m.) and for shorter lengths of time (i.e. 4:10 p.m. to 4:30 p.m.) (id. at pp. 1-4). The educational supervisor at Succeed testified that the student's SETSS provider held a Master's degree in special education and was certified by New York State to work with students with disabilities (see Parent Ex. H ¶¶ 1, 8). The educational supervisor also testified that the student was mandated to receive four 60-minute sessions of SETSS per week in Yiddish, which, as reflected in the timesheet, Succeed began delivering to the student on an individual basis on September 13, 2023 (id. ¶¶ 6-7). The educational supervisor testified that she began as the student's "SETSS supervisor" on October 9, 2023 (id. ¶ 6).

To address the student's identified reading needs, the educational supervisor testified that the SETSS provider "use[d] various techniques such as, echo reading, assisted reading, repeated reading and sentence pyramids, to target his reading accuracy and fluency"; and she "use[d]

workbooks, meta-cognitive activities, scaffolding, encouragement, guidance, repetition, modeling, role-playing, reading programs, reinforcements, and incentives" to improve his "decoding [and] reading and reading comprehension skills" (Parent Ex. H ¶ 9). She added that the student "display[ed] significant cognitive improvement and longer focus duration when taught in a 1:1 v[ersu]s a group [or] classroom setting" (*id.*). The educational supervisor testified that the SETSS provider "help[ed] [the student] focus on his writing using direct instruction and encouragement" (*id.* ¶ 10). For mathematics, according to the educational supervisor, during instruction the SETSS provider "focus[ed] on basic addition, subtraction and multiplication concepts," and used repetition and visual aids to help the student "understand various problem-solving methods" (*id.* ¶ 11).

According to the SETSS progress report, the student received four 60-minute sessions of SETSS per week "in a pull-out model" to address his reading and mathematics weaknesses (Parent Ex. I at p. 1). Regarding specially designed instruction, the SETSS progress report indicated that the provider used the "reading programs" and "methods" to address the student's reading delays and to increase his comprehension skills, and she also used "a lot of modeling, direct instructions, repetition, role-playing, reinforcement, and praise" (*id.* at pp. 1-2). To address the student's writing needs, the SETSS provider "use[d] a lot of practice," redirection, and "incentives to help [the student] be motivated to work harder and try to spell correctly when taking tests and writing assignments" (*id.* at p. 2). According to the report, in mathematics, the SETSS provider "use[d] a lot of praise, prompts, cues, modeling, and reinforcements" to support the student, as well as "redirections and incentives" due to his "weak focusing" (*id.* at p. 1). Additionally, the SETSS provider reported breaking down "math examples" into smaller steps to assist with computation, and using "[s]caffolding," encouragement, and repetition to help the student "grasp the basic concepts he lack[ed]" (*id.*).

Although the progress report included goals to address the student's needs in reading writing, and math, it appears that the goals were recommended for the student for the 2024-25 school year and, therefore, do not reflect what skills the provider targeted with the student during the 2023-24 school year (Parent Ex. I at pp. 3-4).

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]).

By itself, the SETSS progress report indicates that the services provided to the student addressed identified areas of weakness in reading, writing, and math. However, due to the issues noted by the IHO relating to the reliability of the progress report—such as the progress report not being dated and not identifying who authored the report—the report alone is not sufficient to support a finding that the SETSS delivered to the student were appropriate to meet his needs. Further, the educational supervisor testified that Succeed supplied its providers with "access to online software to facilitate the tracking of goals, schedule sessions, detailed session notes, plan lessons, performance, and upload the student's documents" in addition to "assessment tools so that they c[ould] periodically assess their student's performance and measure the student's progress"

(Parent Ex. H ¶ 14). However, the hearing record is devoid of the "detailed session notes," or assessments of the student's progress referenced by the educational supervisor (Parent Ex. H ¶ 14; see generally June 27, 2024 Tr. pp. 1-46; Dec. 4, 2024 Tr. pp. 1-11; Parent Exs. A-E; G-I; Dist. Exs. 1-3; IHO Exs. I-IV).

Furthermore, as noted above, the timesheets for the 2023-24 school year shows that the student predominantly received SETSS in the later afternoon and, as there was no class schedule entered into the hearing record, it is unclear whether these services were delivered as part of the student's school day or after school (see Parent Ex. E). Pertinently, the hearing record does not include any information regarding the curriculum at the student's nonpublic school or the instruction the student received from his nonpublic school outside of the SETSS. Nor does the hearing record include information describing the way in which the SETSS supported the student in the general education classroom. This is notwithstanding that, according to the SETSS progress report, the student "need[ed] constant prompting, motivation and incentives to excel in his studies," and also "need[ed] redirecting at all levels, due to his poor attention and focusing" (Parent Ex. I at p. 1). The educational supervisor indicated that, due to the student's poor attention, the SETSS sessions were "conducted in a one-on-one setting" due to the student's "low attention span" and because he became "easily distracted" (Parent Ex. H ¶ 7). According to the educational supervisor, the student could not "make sufficient progress learning in a group" (id.). As an example, the educational supervisor explained that, if another student entered the room while the student was in the "middle of a learning session, it t[ook] a long time to redirect him and get him back on track" (id.). Additionally, the educational supervisor indicated that the student "display[ed] significant cognitive improvement and longer focus duration when taught in a 1:1 v[ersus] a group/classroom setting" (id. ¶ 9).

However, the hearing record is devoid of information regarding how the student's attention needs and difficulty focusing were addressed during instruction in the student's nonpublic school classroom outside of the four hours per week when he received individual, pull-out SETSS, or any other indication that the SETSS provider was in contact with nonpublic school classroom staff to coordinate efforts on the student's behalf (see generally June 27, 2024 Tr. pp. 1-46; Dec. 4, 2024 Tr. pp. 1-11; Parent Exs. A-E; G-I; Dist. Exs. 1-3; IHO Exs. I-IV). Without such information, it is not possible to ascertain whether the student received special education support in the classroom to enable him to access the general education curriculum or whether the SETSS supported his classroom functioning. Given that, by definition, specially designed instruction is the adaptation of instruction to allow a student to access a general education curriculum so that the student can meet the educational standards that apply to all students, the evidence in the hearing record is insufficient to demonstrate that the student's program was appropriate to meet his needs. As the IHO noted, given the notation in the October 2022 IESP regarding the importance of the student's participation in the general education classroom to learn content and to develop academic independence to the maximum extent possible (see IHO Ex. I at p. 3), the lack of information regarding the student's functioning in the general education classroom raises questions regarding the appropriateness of the SETSS (see Application of a Student with a Disability, Appeal No. 24-436; see also Application of a Student with a Disability, Appeal No. 548 [finding that the parent failed to prove the appropriateness of unilaterally obtained SETSS where the hearing recorded included no evidence regarding the curriculum at the student's general education nonpublic school or the instruction the student received there]).

Finally, as the district argues, although the October 2022 IESP and the SETSS progress report indicated that the student demonstrated social/emotional needs, the IESP recommended counseling services, and the contract with Succeed stated that the agency would provide services consistent with "the last agreed upon [IESP]" and listed counseling as an available service, the hearing record does not indicate that Succeed provided the student with counseling services (see IHO Ex. I at pp. 2, 8; Parent Exs. C at p. 6; I at p. 3).

Based on the foregoing, under the totality of the circumstances, there is insufficient basis to disturb the IHO's determination that the parent did not provide sufficient evidence to show that the SETSS delivered to the student by Succeed during the 2023-24 school year appropriately addressed the student's special education needs.

VII. Conclusion

Having found that the evidence in the hearing record supports the IHO's determination that the parent failed to sustain her burden to establish the appropriateness of the SETSS delivered to the student during the 2023-24 school year, the necessary inquiry is at an end and there is no reason to reach the issue of whether equitable considerations supported the parent's requested relief (see M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]).

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

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

**Dated: Albany, New York
July 22, 2025**

**SARAH L. HARRINGTON
STATE REVIEW OFFICER**