



The University of the State of New York

The State Education Department

State Review Officer

www.sro.nysed.gov

No. 20-094

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:

Howard Friedman, Special Assistant Corporation 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. Petitioner (the parent) appeals from a decision of an impartial hearing officer (IHO) which determined that her son only required seven hours of special education teacher support services (SETSS) per week at a specific rate for the 2019-20 school year. Respondent (the district) cross-appeals from that portion of the IHO's decision which found that the educational services the Committee on Special Education (CSE) recommended for the student for the 2019-20 school year were not appropriate. The appeal must be sustained in part. 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 Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482), namely a local CSE that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; *see* 20 U.S.C. § 1414 [d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts related to IESPs, State

law provides that "[r]eview of the recommendation of the committee on special education may be obtained by the parent or person in parental relation of the pupil pursuant to the provisions of [Education Law § 4404]," which effectuates the due process provisions called for by the IDEA (Educ. Law § 3602-c[2][b][1]). Incorporated among the procedural protections of the IDEA and the analogous State law provisions is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

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

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). 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 in this matter received special education itinerant teacher (SEIT) services during the 2017-18 school year as a preschool student with a disability (Parent Exs. A at p. 2; F at

pp. 1, 3). In March 2018, a CSE convened to determine the student's eligibility for school-age special education programming and develop an IEP for the 2018-19 school year (see Parent Ex. B at p. 2; Dist. Ex. 5 at p. 1). The CSE determined that the student was eligible for special education as a student with a speech or language impairment and recommended that the student receive three periods per week of SETSS for English language arts (ELA) and two periods per week of SETSS for math, together with one 30-minute session per week each of individual and group speech-language therapy (Dist. Ex. 5 at p. 1).

On May 23, 2018 a Committee on Preschool Special Education (CPSE) convened to develop the student's IEP for the remainder of the 2017-18 school year and determine eligibility for 12-month programming for summer 2018 (Parent Ex. F at pp. 1, 3, 14). At that time, the student exhibited academic, speech-language, and social skill deficits (*id.* at pp. 3-4). For the remainder of the 2017-18 school year and summer 2018, the CPSE recommended that the student receive two hours per day of SEIT services and three 30-minute sessions per week of individual speech-language therapy (*id.* at pp. 13-14).

The parents filed a due process complaint notice, disagreeing with the March 2018 CSE's recommendation that "inexplicably and inappropriately terminated" the student's 1:1 SEIT services and instead recommended five periods per week of SETSS in a group and also asserting that they had not received a "school-aged" IEP for the 2018-19 school year (Parent Exs. A at p. 2; B at p. 2; Dist. Ex. 5 at p. 1). In an April 10, 2019 decision the IHO in that matter ordered the district to provide the student with 10 hours per week of 1:1 SEIT support at the market rate and three 30-minute individual speech-language therapy sessions per week for the 2018-2019 school year pursuant to the May 2018 CPSE IEP (Parent Exs. B at p. 2; F at pp. 13-14).¹

For the 2018-19 school year (kindergarten), the student was parentally placed in a nonpublic school (NPS) and received 10 hours of SEIT services and three 30-minute sessions per week of individual speech-language therapy (Tr. p. 88; Parent Ex. A at p. 4; Dist. Exs. 4 at p. 1; 5 at p. 1).²

On May 16, 2019, the CSE convened to develop the student's individualized education services program (IESP) for the upcoming 2019-20 school year (first grade) (Dist. Ex. 6). The CSE determined that the student was eligible for special education programming as a student with a speech or language impairment, and recommended that beginning in September 2019, he receive three periods per week of SETSS, two 30-minute sessions per week of individual speech-language therapy, and one 30-minute session per week of individual counseling (*id.* at p. 8).

A. Due Process Complaint Notice

The parent filed a due process complaint notice dated July 1, 2019 requesting an impartial hearing, in which she challenged the student's May 2019 IESP (Parent Ex. A). The parent asserted

¹ According to the parent the April 2019 IHO decision and order was not appealed (Parent Ex. A at p. 2).

² At the time of the April 8, 2019 district psychoeducational evaluation, the student was receiving services through pendency; however, the April 10, 2019 IHO decision awarded those services for the entirety of the 2018-19 school year (Parent Ex. B at p. 3; Dist. Ex. 5 at p. 1).

that the CSE failed to conduct sufficient assessments of the student prior to terminating the prior recommendations for 1:1 SEIT and 12-month services (*id.* at p. 2). More specifically, the parent asserted that the district did not review existing evaluative data with her, failed to conduct a classroom observation of the student, and did not assess the student's auditory processing and speech-language needs (*id.*). The parent further asserted that the CSE did not include a qualified district representative, did not consider the full continuum of services, failed to discuss the program recommendation with the parent, and that the CSE made its recommendations pursuant to district policy rather than the student's needs (*id.* at p. 3). The parent also asserted that the district failed to provide sufficient prior written notice of its decision to terminate all of the student's 1:1 SEIT instruction as well as the 12-month services (*id.* at p. 3). The parent asserted that the combined procedural errors led to an inappropriate educational recommendation for the student and precluded the parent from fully participating in the educational decision-making process (*id.*).

The parent also asserted that the IESP failed to provide sufficient services to address the student's academic, language, and social/emotional needs within the classroom environment (Parent Ex. A at p. 3). According to the parent the IESP did not include sufficient 1:1 instruction from a special education teacher (*id.*). In addition, the parent alleged the IESP contained improper present levels of performance, insufficient, inappropriate, vague, and unmeasurable goals, lacked sufficient management needs, and failed to recommend 12-month services (*id.*).

The parent proposed that the district be ordered to continue funding the services as found in the April 2019 IHO decision, including 10 hours of 1:1 SEIT services on a 12-month basis (Parent Ex. A at p. 4). Alternately, the parent requested a recommendation for and funding of 10 hours per week of 1:1 special education teacher services at an enhanced rate, two 30-minute sessions of individual speech-language therapy per week, and one individual, 30-minute session of counseling per week on a 12-month basis (*id.*).

B. Impartial Hearing Officer Decision

A hearing was held on July 25, 2019 concerning the student's placement and program for the pendency of the proceeding (Tr. pp. 1-19). In a corrected order on pendency, the IHO noted the parties' disagreement as to what constituted the student's pendency placement: the parent sought to incorporate the program and placement of both the unappealed April 10, 2019 IHO decision and the May 2019 IESP, while the district opposed that view of pendency, and instead asserted that pendency lied exclusively in the April 10, 2019 IHO decision, which provided for 10 hours of 1:1 SEIT services per week, and three, 30-minute sessions per week of 1:1 speech-language therapy (Corrected Interim Order on Pendency at pp. 2-3).³

The IHO determined that it was uncontested that the parties agreed to the placement awarded in the May 16, 2019 IESP and that it was also uncontested that the prior IHO's decision ordered the provision of SEIT services on a 12-month basis, together with speech-language therapy (Corrected Interim Order on Pendency at p. 10). The IHO then found that there is no authority under State or Federal regulations that preclude the continuation of elements of the prior decision

³ The original order on pendency was dated July 26, 2019 and is part of the administrative record. The corrected order was placed into evidence by the IHO as exhibit I. I will refer to the corrected order on pendency as such rather than IHO Ex. I to provide proper context.

in combination with the provisions contained in the IESP and decided the parent could accept some services from the April 2019 IHO decision and also accept the services recommended in the May 2019 IESP (*id.*). The IHO determined that based on the April 10, 2019 IHO decision, the student was eligible for both SEIT services and speech-language therapy on a 12-month basis, and the related services as recommended in the May 2019 IESP on a 10-month basis (*id.*).

The IHO ordered that the district provide the student with 10 hours per week of individual SEIT services at the market rate starting from July 1, 2019, and for the period of July 2 to August 30, 2019 the district was to provide three 30-minute sessions of individual speech-language therapy (Corrected Interim Order on Pendency at p. 11). For the 10-month school year, the IHO ordered the district to adjust the speech-language therapy down to twice weekly, and to provide one 30-minute session of individual counseling (*id.*).

The impartial hearing reconvened on August 22, 2019 and concluded on March 24, 2020, after seven days of proceedings (Tr. pp. 20-222). In a decision dated April 20, 2020, the IHO noted that there were three issues presented: the parent's request for 10 periods of SETSS, the parent's request for an enhanced rate for the provision of SETSS, and the request that SETSS be authorized on a 12-month basis (IHO Decision at pp. 1, 29).⁴

With respect to the issue of the appropriate number of hours of SETSS that the student required for the 2019-20 school year, the IHO contrasted the picture of the student as presented in a district psychoeducational evaluation that was conducted shortly before the CSE meeting against the testimony of the student's SEIT provider regarding his performance in the classroom (IHO Decision at pp. 29-32). Finding that "a student's performance in the classroom, on a daily basis, [wa]s a more representative assessment of academic functioning than a one-time evaluation measured under optimal circumstances," the IHO determined that the three hours of SETSS recommended in the May 2019 IESP was insufficient (*id.* at p. 32). The IHO then noted that results of the achievement testing conducted by the district could not be entirely disregarded and that as it "evidences a certain level of cognitive and academic ability," the IHO determined that the student required seven hours per week of SETSS rather than the 10 hours per week the parent requested (IHO Decision at p. 33).

Turning to the rate the SETSS provider was entitled to for services provided, the IHO found that the district failed to provide the student with a qualified SETSS provider, even for the three periods per week of SETSS recommended for the 2019-20 school year (IHO Decision at p. 33). The IHO also noted that the parent and her witness credibly testified as to the efforts to locate a SETSS provider for the 2019-20 school year from the district's approved provider list, having called 16 providers, and the unavailability of any of those providers, and therefore found the parent was entitled to "an enhanced rate P-3 SETSS provider" (*id.* at pp. 33-34). The IHO however also found that, "absent extraordinary circumstances," the enhanced rate may not exceed a fair market-based rate (*id.* at p. 34). The IHO found that notwithstanding the testimony of the parent's witness that the market rate for SETSS was in the range of the \$140 per hour sought by the SETSS provider, the IHO took judicial notice of the actual market rate for such services being in the range of \$80

⁴ The IHO's decision is not paginated and has no coversheet, therefore, citations to the decision are based on counting the pages.

to \$120 per hour, and that in this matter, the IHO determined that the rate to be awarded to the student's SETSS provider would be \$120 per hour (*id.* at pp. 34, 37).

With respect to the parent's assertion that the student required a 12-month program in order to prevent regression, the IHO determined that the student demonstrated an uncontested need for a 12-month program to prevent regression consistent with the testimony of his SEIT providers (IHO Decision at p. 37). The IHO also noted that 12-month services were also required to ensure the efficacy of the SETSS to the student prior to the 2019-20 school year (*id.*).

Finally, the IHO determined that, in the event that such services were not being provided to the student, the district had not raised an objection to the issuance of Related Service Authorizations (RSA's) for the provision of related services as contained in the May 16, 2019 IESP (IHO Decision at p. 37).

To remedy the district's failure to provide SETSS to the student on an equitable basis, the IHO ordered the district to pay the parent's SETSS provider at a rate of \$120 per hour for seven periods per week (IHO Decision at p. 37). The IHO also ordered the payment to be retroactive to the 2019-20 extended school year (*id.*). The IHO further ordered the district to issue RSAs for any of the related services that it may not have provided (*id.*).

IV. Appeal for State-Level Review

The parent, with the assistance of her educational advocate, appeals from the IHO decision and asserts that the IHO erred in arbitrarily awarding seven hours of SETSS rather than the 10 hours of SETSS the parent sought. The parent contends that the IHO wrongfully relied on the academic testing performed by the district in crafting a remedy rather than either relying on the testimony and documentary evidence presented by the parent or requiring the district to re-evaluate the student. The parent asserts that the IHO did not give the parent's witnesses and evidence the proper weight and utilized an improper legal standard. The parent further appeals from the IHO's decision to limit the rate for SETSS to \$120 per hour, asserting that the rate was arbitrarily below the district's enhanced rate and market rate. In particular, the parent objects to the IHO's finding regarding judicial notice and asserts the IHO's rate was not based on evidence in the hearing record and improperly shifted the burden of proof to the parent. To address the asserted errors, the parent requests that an SRO order the district to fund 10 hours of 1:1 SEIT services for the 2019-20 school year, at the rate of \$140 per hour.

In its answer and cross-appeal, the district generally responds to the parent's allegations and asserts that the IHO properly denied the parent's request for the district to fund the student's SETSS provider at a rate of \$140 per hour for 10 hours of SETSS per week.

The district requests that an SRO dismiss the parent's request for review due to nonconformance with the practice regulations, specifically, the failure to properly verify the request for review.

The district cross-appeals from the IHO's determination that the 2019-20 IESP was not appropriate due to the recommendation of only three hours of SETSS instruction. The district asserts that it offered related services to the student on an equitable basis, and that the CSE reviewed a sufficient amount of evaluative material, the results of those evaluations were included

in the IESP, and the recommendation of three hours per week of SETSS was supported by those evaluations.

Finally, the district asserts that the IHO erred in finding that the student should receive services on a 12-month basis. Specifically, the district asserts that the relevant State law only provides for IESP services during the 10-month, regular school year.

The district requests that an SRO reverse that portion of the IHO's decision which found that the May 2019 IESP was not appropriate as well as that portion of the IHO's decision which found that the district was required to provide 12-month services to the student through an IESP.

In an answer to the district's cross-appeal, the parent generally responds to the district's allegations with admissions, denials, or various combinations of the same and argues in favor of the IHO's determination that the May 2019 IESP did not provide the student with related services on an equitable basis. The parent acknowledges that the request for review did not include the advocate's contact information, but contends that it did not prevent the district from getting in touch with the parent's advocate to request an extension of the time to answer. In addition, the parent asserts that the request for review was properly verified, nevertheless the parent attached a new verification of the request for review to the answer to the district's cross-appeal.

In a reply to the parent's answer to its cross-appeal, the district requests that an SRO reject the parent's answer to its cross-appeal as untimely.

V. Applicable Standards

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

However, under State law, parents of a student with a disability who have privately enrolled their child in a nonpublic school may seek to obtain educational "services" for their child by filing a request for such services in the district of location where the nonpublic school is located on or before the first day of June preceding the school year for which the request for services is made (Educ. Law § 3602-c[2]).⁵ "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

⁵ 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]).

[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.*).⁶

VI. Discussion

A. Initial Matters

1. Compliance with Practice Regulations

The district requests that an SRO reject the parent's request for review and answer to its cross-appeal due to nonconformance with the practice regulations. Initially, the district asserts that the request for review failed to include the name or telephone number of the parent or advocate. Additionally, the district asserts that the parent failed to properly verify the request for review and failed to timely submit the answer to its cross-appeal. State regulations provide that "[a]ll pleadings and papers submitted to a[n] [SRO] in connection with an appeal must be endorsed with the name, mailing address, and telephone number of the party submitting the same or, if a party is represented by counsel, with the name, mailing address, and telephone number of the party's attorney" (8 NYCRR 279.7[a]). All pleadings must be signed by an attorney, or by a party if the party is not represented by an attorney (8 NYCRR 279.8[a][4]). Additionally, all pleadings shall be verified by a party (8 NYCRR 279.7[b]).

The parent asserts that even though the request for review was "not properly completed with the mailing address and telephone number of the Parent or their Advocate," this information was included in the Notice of Intention to Seek Review. Moreover, the parent contends that the district was not inhibited in any way in reaching the parent or advocate and cites to the district's request to the advocate for an extension of time to answer the day after receiving the request for review. Accordingly, while the lack of this information was an error, it does not provide a basis for rejecting the parent's pleading in this matter.

Turning to the verification of the request for review, the parent served a notice of intention to seek review on May 20, 2020 and the request for review on May 28, 2020 (*see* Req. for Rev. Aff. of Service; Notice of Intention and Case Info. Sheet Aff. of Service). Attached to the request for review are the parent's affidavit of verification which was signed and witnessed on May 4,

⁶ State guidance explains that providing services on an "equitable basis" means that "special education services are provided to parentally placed nonpublic school students with disabilities in the same manner as compared to other students with disabilities attending public or nonpublic schools located within the school district" ("Chapter 378 of the Laws of 2007—Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the Individuals with Disabilities Education Act (IDEA) 2004 and New York State (NYS) Education Law Section 3602-c," Attachment 1 at p. 11, VESID Mem. [Sept. 2007], available at <http://www.p12.nysed.gov/specialed/publications/policy/nonpublic907.pdf>). 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.*).

2020, an Authorization for Representation and Communication also signed and acknowledged before a notary on May 4, 2020, and an affidavit of verification signed by the parent's advocate on May 28, 2020 (see Req. for Rev.).

The parent through her advocate asserts that while she may have signed the affidavit of verification 24 days prior to the date of the request for review, she did so "with an understanding of the contents and form" of the request for review. It does not take much to imagine that the parent signed the authorization for representation form and, for convenience sake, signed the affidavit of verification at the same time, on May 4, 2020. However, the execution of a verification prior to the execution of the document being verified calls into doubt the veracity of such a verification. The verification is intended to ensure that the petitioner has read the request for review, knows the contents of the request for review, and attests that the contents of the request for review are true (8 NYCRR 279.7[b][1]). Under these circumstances, it is apparent that the parent's May 4, 2020 verification of the request for review was not proper.

The parent also asserts that the advocate's verification properly satisfied 8 NYCRR 279.9[b] of the State regulations.⁷ The advocate cites to 8 NYCRR 279.9[b] for the premise that her verification of the request for review is allowed. However, the section cited concerns the submission of hearing records to the Office of State Review and does not support the parent's assertion. Rather, State regulation explicitly requires that a request for review be verified by the oath of at least one of the petitioners with one exception that is not applicable here (see 8 NYCRR 279.7[b]).

Finally, the parent asserts that she has corrected any errors by signing and submitting a new verification. Upon review, attached to the parent's answer to cross-appeal is a verification of the request for review dated July 31, 2020, which is on the form set forth in State regulation and is signed and notarized, although it does not include the parent's full name but identifies her only as petitioner.

With respect to the timeliness of the parent's submission of her answer to the district's cross-appeal, the district correctly points out that the parent sought an extension to file her answer⁸ to the district's cross-appeal from July 1, 2020 to August 1, 2020, and that an SRO only granted an extension to July 29, 2020. According to the affidavit of service executed by the lay advocate, the lay advocate served the parent's answer to the district's cross-appeal on July 30, 2020, one day late. While an SRO has the discretion to reject pleadings that are untimely (see 8 NYCRR 279.8[a]), in this case, the district was not prejudiced in timely filing a reply to the parent's answer to cross-appeal, and therefore, I will not reject the parent's answer to the district's cross-appeal.

⁷ As the district correctly points out, the advocate's affidavit of verification attached to the request for review incorrectly states that the advocate is the petitioner (Req. for Rev. Aff. of Verification). Further, the Notice of Intention to Seek Review also incorrectly lists the parent's advocate as the petitioner rather than the parent (Notice of Intention to Seek Review and Case Review Sheet).

⁸ The district requested and was granted a one-week extension to serve a reply to the parent's answer to cross appeal.

I strongly caution the parent's advocate to adhere to the rules of practice before the Office of State Review in the future. In assisting the parent by filing the request for review, the lay advocate took on the responsibility to comply with the practice regulations (see e.g., Application of a Student with a Disability, Appeal No. 17-103). Although I exercise my discretion to accept the late verification and late answer filed in this matter, the lay advocate is cautioned that a continued pattern of noncompliance with the practice regulations could result in outright dismissal of future nonconforming pleadings by an SRO without a decision on the merits.

2. Provider Rates

The parent asserts that the IHO erred in placing a monetary cap of \$120 per hour on the services awarded. The administrative director of the agency that provided the student's SETSS testified as to the market rate for a non-district SETSS provider that the range for a SETSS provider in the area was between \$135-\$185 per session, and that the student's SETSS were charged at a rate of \$140 per hour (see Tr. pp. 133-136). Additionally, the administrative director testified that the student's SETSS were being provided for by the district through pendency, and that as the services were provided under pendency, the agency did not require the parent to sign a contract for the services (Tr. pp. 141-42). She further testified that the agency would only require the parent to sign a contract if the parent was not awarded everything she was seeking and the parent still wanted to continue the student's services at the same frequency (Tr. p. 143). Finally, she testified that absent a contract, the parent was not bound to reimburse or pay the agency for any services (Tr. pp. 141-42). The district did not provide any witnesses or documentary evidence relating to this issue. The IHO however, stated in the decision that the enhanced market rate for a monolingual SETSS provider was \$120 per session (IHO Decision at p. 34).

As previously noted in a recent determination at this level of administrative review, any notion of a public rate for independent SETSS instruction that may be sanctioned in a policy of the district is flawed and cannot be reasonably relied upon by either party, because the district is not authorized to contract for the provision of an independent special education teacher (see Application of a Student with a Disability, Appeal No. 20-087). Additionally, while school officials cannot deliver special education services called for by their educational programming in an unauthorized manner due at least in part to the requirements that school officials and employees remain accountable under the statutory and regulatory mechanisms put in place by state and federal authorities, they can be made to pay for a privately obtained parental placement, a process that is essentially the same as the federal process under IDEA. "Parents who are dissatisfied with their child's education can unilaterally change their child's placement during the pendency of review proceedings 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 Cty. Sch. Dist. Four v. Carter, 510 U.S. 7, 14 [1993] [Parents' failure to select a program known to be publicly approved in favor of an unapproved option is not itself a bar to reimbursement]). Accordingly, the parent's request for 10 hours per week of SETSS must be assessed under this framework, namely whether the district's IESP was inappropriate and, if so, were the 10 hours of SETSS obtained by the parent an appropriate unilateral placement of the student such that the cost of the SETSS is reimbursable to the parent or, alternatively, should be directly paid by the district

to the provider upon proof that the parent has paid for the services or is legally obligated to pay but does not have adequate funds to do so. As a result, the question of rate is somewhat beside the point as the cost of the SETSS, under the Burlington-Carter test, must be fully reimbursed or directly funded by the district unless, as a matter of equitable considerations, the costs sought to be reimbursed are excessive or otherwise should be reduced or, in the case of direct funding, the parent has not demonstrated a legal obligation to pay the costs and an inability to do so.

B. May 2019 IESP

Before discussing the adequacy of the May 2019 IESP, I note that both parties and the IHO tend to use the terms SEIT services and SETSS interchangeably, and while individuals may provide similar services irrespective of what they are labeled, using these terms as synonyms obscures rather than clarifies what special education services might be more appropriate for a student at different points in his or her education (see, e.g. Tr. pp. 139-40, 155-56, 169-72, 219-20; Parent Exs. E; I; Dist. Ex. 5 at p. 1). For instance, SETSS is not defined in the State continuum of special education services (see 8 NYCRR 200.6) and it is not defined in the hearing record in this case.⁹ State law defines SEIT services as "an approved program provided by a certified special education teacher . . . , at a site . . . , including but not limited to an approved or licensed prekindergarten or head start program; the child's home; . . . or a child care location" (Educ. Law § 4410[1][k]; 8 NYCRR 200.16[i][3][ii]; see "Special Education Itinerant Services for Preschool Children with Disabilities," Office of Special Educ. Field Advisory [Oct. 2015], available at <http://www.p12.nysed.gov/specialed/publications/2015memos/documents/SpecialEducationItinerantServicesforPreschoolChildrenwithDisabilities.pdf>; "Approved Preschool Special Education Programs Providing Special Education Itinerant Teacher Services," Office of Special Educ. [June 2011], available at <http://www.p12.nysed.gov/specialed/publications/SEITjointmemo.pdf>). In addition, SEIT services are "for the purpose of providing specialized individual or group instruction and/or indirect services to preschool students with disabilities" (8 NYCRR 200.16[i][3][ii] [emphasis added]). In this matter, the IHO ordered continuing the student's SEIT services through pendency during the 2019-20 (first grade) school year (Corrected Interim Order on Pendency at p. 10). In the due process complaint notice, the parent requested funding for 10 hours per week of SEIT services or in the alternative, 10 hours per week of funding for a 1:1 special education teacher (Parent Ex. A at p. 4). For the 2019-20 school year, the district recommended three hours per week of group SETSS (Dist. Ex. 6 at p. 8). Therefore, in this decision the analysis regarding the amount of services provided by a special education teacher that the student required will be limited to a discussion of SETSS.

In a cross appeal, the district contends that the IHO erred in finding that the May 2019 IESP was not appropriate and the district failed to offer the student equitable services for the 2019-20 school year. In accordance with state law a district of location's CSE must review the request

⁹ As has been noted by SROs in previous cases, in a case such as this where SEIT services are the main form of relief sought by the parent, but by regulation such services are typically not allowed for school-aged students whereas SETSS could be permissibly recommended for the student, it is not helpful that the hearing record lacks more testimony or evidence that clearly defines the contours and features of SETSS (versus SEIT services) as understood by the parties. However, whether denominated as SEIT services or SETSS, the substance of the relief sought in the instant matter is the provision to the student of educational services by a special education teacher who assists the student in addition to the classroom program.

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 the student with disabilities attending non-public 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 (Educ. Law § 3602-c[2][b][1]). As discussed in detail below, review of the evidence in the hearing record supports the IHO's determination that the student "required a greater degree of instructional support than the 3 hours of group SETSS offered by the [district] in his mainstream educational placement for the 2019-20 school year" (IHO Decision at p. 32).

1. Evaluative Information

At the time of the May 16, 2019 CSE meeting that developed the IESP in dispute, the student was attending a kindergarten class of 16 students in an NPS and receiving 10 hours of SEIT services per week and three 30-minute sessions per week of individual speech-language therapy (Dist. Exs. 4 at p. 1; 5 at p. 1; 6 at p. 2). The May 2019 IESP and prior written notice reflects that the CSE considered a March 2019 SEIT progress report, an April 2019 psychoeducational evaluation report, and an April 2019 social history update (Dist. Exs. 6 at pp. 2-4; 8 at p. 1; see Dist. Exs. 2; 4; 5). The March 2019 SEIT progress report indicated that the student learned best when materials were presented in a hands-on manner and often required one-to-one or very small group instruction to ensure that he stayed focused (Dist. Ex. 2 at p. 2). The progress report noted the student often "space[d] out" when he was not actively involved in the lesson, frequently needed a "fidget" or putty during circle time so as not to lose focus, and required reminders to use "whole-body listening" (id.).¹⁰ According to the progress report, the student needed consistent repetition to fully understand lessons and, while he preferred small group instruction, he had a hard time with small group activities because of his lack of strong communication skills (id.). The SEIT relayed in her progress report that the student had a "hard time" listening to and processing what his peers were saying and often lost track of what the group was doing (id.). The progress report further noted that the student had difficulty focusing in a distracting, noisy environment which added to his difficulty with cooperative learning activities (id.).

The March 2019 SEIT progress report indicated that the student had made "significant" progress during the 2018-19 school year but continued to need academic assistance particularly in the areas of phonemic awareness, decoding/encoding, and addition/subtraction (Dist. Ex. 2 at p. 1). At the time of the progress report, the student was performing at an early kindergarten level in both mathematics and reading (id.). With respect to mathematics the progress report indicated that the student was able to recognize, identify, and draw common shapes, create patterns, order objects by size, and identify the next number in a sequence (id.). The student had made progress in counting objects with 1:1 correspondence up to 20, yet he had "some" difficulty with the concepts of addition and subtraction and required manipulatives to successfully complete and understand his work (id. at pp. 1-2). However, the student was able to add/subtract using a ten frame, yet in

¹⁰ While a "fidget" is not defined in the hearing record, it is generally known as a self-regulating tool to help with focus, attention, calming, and active listening.

the absence of manipulatives he had difficulty determining which number represented the greater value (id. at p. 2). With regard to reading, the progress report noted the student was able to recite the alphabet, key words and letter sounds by rote, and could identify the letter name and sounds for most consonants and all short vowels when presented individually, which was considered to be "great" progress from the beginning of the year (id.). Nonetheless, the student had not yet mastered the digraphs (sh, ch, th, etc.) that he had been previously taught, and he presented with difficulty blending sounds accurately in CVC words, often resorting to guessing words based on the initial sound in the word or the context of the situation/story (id.). While the progress report indicated that finger tapping helped the student blend CVC words when they were presented as separate sounds, he had difficulty independently decoding words presented as a single unit and required one-on-one support to ensure he could follow along in the class reading groups (id.). Further, the progress report noted that the student's phonemic awareness skills were compromised, which negatively impacted his decoding and the student had difficulty with word retrieval that affected his ability to summarize stories and/or answer questions related to the topic (id.).

With respect to writing, the March 2019 SEIT progress report indicated that the student had progressed from producing crude uppercase letters to independently writing his name properly, but demonstrated difficulty spelling orally presented words, finding it hard to separate the sounds properly and, as a result, he often guessed (Dist. Ex. 2 at p. 2). Although the student was reported to perform better when instructed to tap out the sounds of the words and then choose a magnetic letter tile that corresponded to the sounds he tapped, the report indicated that even with these instructions the student often required assistance when encoding (id.).

The March 2019 SEIT progress report indicated that, with regard to social development, the student understood and followed the expected behaviors of the classroom conscientiously and expected the same from his peers (Dist. Ex. 2 at p. 3). Further, the SEIT reported that the student had made significant progress in his social development moving from solitary or parallel play to playing with small groups of 2-4 students for as long as 10 minutes (id.). The SEIT indicated that she worked with the student during snack and lunch time to facilitate small group conversations and the student had progressed from being uncomfortable engaging with peers, only doing so when directly addressed, to being comfortable to initiate conversation with peers (id.). However, the student was reported to have difficulty listening to his peers without interrupting and often went off-topic during conversations with them (id.).

With respect to the student's motor skills, the March 2019 SEIT progress report indicated that the student formed the letters of the alphabet, but without using standard conventions which made his writing appear messy (Dist. Ex. 2 at p. 3). The student reportedly needed reminders about the proper way to hold his pencil but demonstrated good coordination and balance with gross motor skills (id.). The student was able to access playground equipment, and ride and steer a tricycle appropriately but he was noted to "stuff his food down" and jump/hop fast without regard to the rhythm of the music (id.).

In her March 2019 progress report the SEIT recommended the continuation of the 10 hours of SEIT support to address the student's "significant academic and social delays" (Dist. Ex. 2 at p. 4). She provided a number of goals to target the student's needs regarding reading, handwriting, comprehension, mathematic word problems, and addition/subtraction using quantities of 10 or less (id.).

The May 2019 CSE also considered the results of the April 2019 psychoeducational evaluation of the student conducted by the district's school psychologist (Dist. Exs. 5 at pp. 1, 5; 8 at p. 1). The school psychologist noted that the student cried for a few seconds initially but once the tasks were presented the student was "highly cooperative throughout the remainder of the assessment" (Dist. Ex. 5 at p. 2). The April 2019 psychoeducational evaluation report indicated that the student spoke in full, articulate sentences, initiated conversation, and followed directions with clarification requested only twice (id.). The school psychologist noted that the student shifted in the chair but was attentive to all tasks presented (id.).

The school psychologist administered the Wechsler Preschool and Primary Scale of Intelligence-Fourth Edition (WPPSI-IV) to the student, which yielded a full scale IQ of 100 (50th percentile), and verbal comprehension and fluid reasoning index standard scores of 99 and 97, respectively (47th and 42nd percentiles) (id.). The report indicated that the student's subtest scores ranged from the 25th percentile (picture memory) to the 75th percentile (block design) indicating that his subtest performance was "typical to above average" (Dist. Ex. 5 at pp. 2-3). The school psychologist noted that with respect to the student's full-scale IQ of 100, he did not present with any significant strengths or weaknesses among the index or subtest scores (id. at p. 3).

The school psychologist also administered the Wechsler Individual Achievement Test-Third Edition (WIAT-III) to assess the student's academic achievement (Dist. Ex. 5 at pp. 2-4). Results indicated that the student's early reading skills were in the average range with a score of 101 (53rd percentile) although the report noted that the student had not mastered matching rhyming words and ending sounds (id. at p. 3). With respect to mathematics, the student's composite score of 98 (45th percentile) indicated that the student performed comparably whether computing independently or responding to orally presented word problems with visual aids (id. at pp. 3-4). The school psychologist noted numerous skills the student demonstrated including counting, identifying or writing numbers one to ten, using one-to-one correspondence, adding basic facts, and identifying operational symbols for addition or subtraction (id. at p. 4). The April 2019 psychoeducational evaluation report also identified that the student understood several concepts such as most, same, more/less than, he could identify shapes, read picture graphs and sequence numbers, measured inches and solved one step visually aided word problems with subtraction among other things (id.). However, the student did not read calendars or solve patterns (id.).

The April 2019 psychoeducational evaluation report reflected that the student's written language standard score of 104 (61st percentile) also fell in the average range, and the student wrote six letters of the alphabet in sequential order within 30 seconds, and the remainder of the alphabet as well (with one omission) when given additional time (Dist. Ex. 5 at p. 4). The student wrote his first name, all four initial letters from orally presented words, and two of six spelling words on the spelling subtest (id.). Regarding oral language skills, the report indicated that the student spoke in complete sentences, initiated conversation, and followed directions with minimal clarification (id.). With respect to the student's fine and gross motor integration skills, the report noted that the student displayed legible handwriting, and safely walked, with no fine or gross motor delays noted or reported (id.). With respect to social/emotional functioning, the April 2019 psychoeducational evaluation report indicated that the student was highly cooperative and sociable, displayed a happy affect, was attentive, and presented with prevalent eye contact (id.). The school psychologist concluded that the student was cognitively functioning in the average

range as compared to same aged peers and performed consistently within the average range in all the assessed academic areas (id.).

The May 2019 CSE also reviewed an April 2019 social history update, in which the parent reported that the student had made "tremendous improvement" that school year although he still was "slower with learning" and had difficulty retaining information and grasping material as his workload increased (Dist. Ex. 4 at p. 1). She further reported that the student's SEIT services helped the student focus, and strengthened and reinforced information (id.). Additionally, although reading, writing, and math were hard for the student, the parent reflected teacher and school reports that the student was "ready to move on next year but with services in place" (id.).

2. SETSS

Turning to the May 2019 CSE meeting, the school psychologist who conducted the April 2019 psychoeducational evaluation also served as the district representative, and the other participants included the NPS director, speech therapist, regular education teacher, special education teacher, and the parent (Tr. pp. 55-56; Dist. Exs. 5 at p. 5; 6 at p. 12). Specific to the student's academic skills, according to the CSE meeting notes, the teacher reported the student had "mastery of letters [and] sounds, blends CVC words [and] [had] a good hold on sight words (40 total)" (Dist. Ex. 7 at p. 1). Additionally, the student answered questions from a story and made inferences and needed visual aids (id. at pp. 1-2). The meeting notes also reflected reports that the student made connections in small or large group settings, knew numbers 1-10, had 1:1 correspondence skills, added and subtracted basic facts, wrote his name with good alignment and spacing, copied "fine" and wrote words although he did not yet generate sentences (id. at p. 2). The director shared that classrooms at the NPS were language-based and utilized scaffolding and breaking down of information (id.).

Regarding the April 2019 psychoeducational evaluation, the school psychologist stated that the evaluation report was discussed at the CSE meeting and she indicated that the student had performed consistently in the average range in all areas that were assessed (Tr. p. 57; see Dist. Ex. 7 at p. 3). The school psychologist testified that the May 2019 CSE reviewed the March 2019 SEIT progress report which showed that the student had "a lot of skills" and was a "very capable young man" in reading, writing, and mathematics (Tr. p. 58; see Dist. Exs. 2; 7 at p. 3). Specifically, the school psychologist testified that this conclusion was based on the SEIT's report that the student could recognize, identify and draw common shapes, create patterns, and understand how to order objects (Tr. p. 59). Additionally, she considered the SEIT's report that the student could form and recognize numbers to 20 and had made significant progress in his ability to count objects with 1:1 correspondence, although he had some difficulty with addition and subtraction, needing manipulatives to complete those tasks (id.). With respect to reading the school psychologist referenced the student's ability to recite the alphabet key words and letter sounds by rote, his demonstrated progress in recognizing letters and their sounds, but noted that the student had not mastered all phonics skills as he had difficulty with digraphs and CVC words (Tr. pp. 59-60).

At the time of the March 2019 SEIT progress report the student was in kindergarten, and the school psychologist opined that given the student's skills as described in the report, he was "[a]bsolutely on par" with where he should be at the kindergarten level (Tr. p. 60). Despite the

results of the April 2019 psychoeducational assessment which indicated that the student consistently performed in the average range, the May 2019 CSE recommended that the student receive three hours of group SETSS per week in a separate location, in addition to speech-language therapy and counseling (Tr. pp. 168-169; Dist. Ex. 6 at p. 8). The school psychologist testified that the SETSS were recommended because although developmentally students were not expected to be able to decode at their age, this was an expectation based on "core curriculum" standards (Tr. p. 169). Therefore, although decoding was not an age-appropriate skill, according to the school psychologist it was "unfortunately" what was "expected in kindergarten, to start reading and to develop decoding skills" so the CSE recommended SETSS sessions "to hone on those skills" (Tr. pp. 168-69). The school psychologist testified that the recommendation was appropriate to meet the student's needs, and that the goals included in the March 2019 SEIT progress report could be addressed through the services recommended in the May 2019 IESP (Tr. pp. 64-65).¹¹

Despite the school psychologist's opinion that three hours per week of group SETSS was appropriate to meet the student's needs, the evidence in the hearing record supports the conclusion that the student required more services provided by a special education teacher than the May 2019 CSE recommended. Specifically, a review of the May 2019 IESP present levels of performance shows that the April 2019 cognitive and academic achievement test results were reflected, as was some information from the March 2019 SEIT progress report, the April 2019 psychoeducational evaluation report, and his classroom teacher (compare Dist. Ex. 2 and Dist. Ex. 5, with Dist. Ex. 6 at pp. 2-4). However, the present levels of performance did not reflect the SEIT progress report with respect to the student's needs which regularly manifested in the classroom but were not necessarily reflected in the formal evaluations administered to him (compare Dist. Ex. 2 at pp. 1-3, with Dist. Ex. 6 at pp. 3-4).

For example the May 2019 IESP did not reflect information from the March 2019 SEIT progress report—prepared by a provider who worked directly with the student in the classroom—which indicated that the student exhibited processing difficulties that affected his ability to learn in the classroom without support (compare Dist. Ex. 2 at p. 1, with Dist. Ex. 6 at pp. 3-4). Reports of the student's difficulty independently decoding words presented as a single unit, his need for one-on-one support to ensure that he followed along in the class reading groups, and that the student's phonemic awareness skills were compromised which negatively impacted his decoding skills were also not reflected in the May 2019 IESP (compare Dist. Ex. 2 at p. 2, with Dist. Ex. 6 at p. 3). Nor did the May 2019 IESP reflect the student's writing needs as described in the SEIT progress report, which noted that when spelling the student often guessed and that even with instructions to use strategies the student often required assistance when encoding (compare Dist. Ex. 2 at p. 2, with Dist. Ex. 6 at p. 3). With respect to the student's learning style the May 2019 IESP did not include the SEIT's observations that the student needed reminders to use "whole body listening" and consistent repetition in order to fully understand lessons, that he had difficulty listening to and processing what his peers were saying, that he lost track of what the group is doing,

¹¹ The school psychologist testified that the parent agreed with the recommendation for three periods of SETSS per week but that she had concerns about the student going into a larger class and needing supports (Tr. pp. 65-67; Dist. Ex. 7 at p. 2). She did not recall the parent expressing concerns about the reduction in SETSS nor did she recall the director of the student's NPS or the classroom teacher's opinion regarding the student's need for 10 hours of SETSS (Tr. pp. 69-70).

and had difficulty focusing in a distracting, noisy environment which added to his difficulty with cooperative learning activities (compare Dist. Ex. 2 at p. 2, with Dist. Ex. 6 at pp. 3-4).

The May 2019 CSE meeting notes indicated that the parent expressed her concerns about the student being in a larger class without the academic support that he received in his language-based kindergarten class and also that the student did not recall information taught in class and needed review (Dist. Ex. 7 at pp. 2-3). The parent testified that she and his teacher, speech therapist, and the NPS director felt that the student needed to continue his services based on how they viewed the progress that the student was beginning to make (Tr. pp. 150-51). She continued that they all believed the student needed the extra support and therefore, they did not agree with the school psychologist's recommendation to reduce the SETSS from ten to three hours per week (Tr. p. 151). The parent testified that they indicated that the student needed the extra support, one-on-one, in order to succeed (id.). Further, the parent stated that they disagreed with the recommendation for SETSS in a group outside the classroom because the student was having difficulty at his current school and for the next school year he would be going to a bigger, general education school where she questioned "without all th[ose] extra supports, how was he going to manage?" (Tr. pp. 151-53).

In contrast to the information provided to the CSE by NPS staff whose knowledge of the student's in-school performance formed the basis for their opinion, the school psychologist testified that the March 2019 psychoeducational evaluation was conducted in a one-to-one testing environment without distractions pursuant to the testing protocol and she did not observe the student in any other environment such as the classroom (Tr. pp. 67-68). With respect to the student's attention skills, the school psychologist testified that while evaluating the student in a one-on-one setting, the student performed nicely, was attentive, on task, sociable, and despite the initial hesitancy, proceeded to task and was very cooperative, thereby opining that the "capability is there" (Tr. pp. 173-74).¹²

I am mindful that the present levels of performance need not include every assessment or impression of the student's educational functioning and performance. However, where, as here, a significant reduction in services is recommended and the needs addressed by the reduced service demonstrably continue as per provider reports, the failure to acknowledge the continued existence of the needs in the IEP or explain why a reduction in services is appropriate undermines the district's case. Indeed, despite evaluative findings that the student performed in the average range with respect to his cognitive functioning and academic achievement in a one-to-one evaluative setting, the evidence in the hearing record did not show that the district had countervailing information to balance the reports from his in-school providers concerning his significant needs in the classroom, and was remiss in not attempting to obtain information, such as a classroom observation, to identify how the student performed in the actual learning environment given the discrepancy between the student's performance during the psychoeducational evaluation and in the classroom and, concomitantly, to assess accurately whether the recommended reduction in services

¹² The school psychologist testified that "a child will perform better in a one-to-one setting" but that "significant attentional difficulties" would be "prevalent" even in the one-to-one setting (see Tr. pp. 173-74). She noted that the student did not require prompting, redirection or "even one-on-one" but affirmed that despite there being no signs of significant distraction there might have been "more subtle areas of distraction" she may not have noticed in the one-to-one setting (Tr. pp. 174-75).

was sufficient to meet the student's functional and academic needs in the classroom. Absent an observation of the student's performance in the classroom, the district was unable to sufficiently put forth evidence that the student did not need the level of support described in the March 2019 SEIT progress report and discussed by NPS staff during the CSE meeting, and had a limited basis by which to recommend a reduction in SETSS and complete removal of such support from the classroom in favor of the provision of SETSS in a separate location. Although the student was making progress, his basic need for one-on-one support for focus and attention, review, reteaching, reading and writing remained consistent with the previous year. Therefore, the hearing record supports a finding that the district's recommendation for three hours per week of group SETSS in a separate location did not provide the student with equitable services for the 2019-20 school year.

C. Equitable Services

As noted above, having determined that the district's recommendation for three hours per week of group SETSS was not appropriate, I must next address the appropriateness of the parent's unilateral action in providing the student with ten hours per week of 1:1 instruction by a special education teacher.

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).

Since the district itself recommended three hours of SETSS per week, albeit in a separate location, much of the parties' arguments unsurprisingly center around the IHO's award of seven hours per week of SETSS rather than the ten hours per week requested by the parent and delivered to the student by the agency. As a reduction from full reimbursement may be considered where a unilateral placement provides services beyond those required to address a student's educational needs (C.B. v. Garden Grove Unified Sch. Dist., 635 F.3d 1155, 1160 [9th Cir. 2011]), the amount of services the student required will be addressed in tandem with the substantive appropriateness of those services.

Therefore, it is proper to consider the documentary and testimonial evidence in the hearing record which occurred after the May 2019 CSE meeting as additional support for determining whether the 10 hours of SETSS obtained by the parent constituted an appropriate unilateral placement, including the testimony from the program director of the agency that provided the SEIT services (director), the SEIT who provided the student's services during the 2019-20 school year, the district's school psychologist, the December 2019 SEIT progress report, and the October 2019 and March 2020 present levels of performance.

The director testified that her agency provided the student's SEIT services during the 2018-19 and 2019-20 school years, and she had reviewed all the daily session notes, spoken to the providers on a regular basis, and observed the student in the classroom (Tr. pp. 86, 88, 92-93). According to the director, the student struggled "on a number of levels," including "his inability to attend and focus, as well as his very slow pace in learning new things" and "accomplishing tasks in school" (Tr. pp. 90-91). She stated that when new concepts were introduced it took the student "about an extra week for him to learn those concepts," noting that with "a reading concept, math concept, writing activities, across the board, he really struggles" and that he required "an extra week of reteaching and relearning" (Tr. pp. 91, 96). Additionally, the director indicated the student required visual aids and a multisensory presentation in order to learn the concepts being taught in the classroom and to do them independently (Tr. p. 96). With respect to the student's ability to attend she testified that the student demonstrated difficulty in that area accompanied by a low frustration tolerance which "greatly" impacted his ability in the classroom, noting that when things became challenging for him the student "shut[] down" (Tr. p. 91). The director testified that in addition to the student's "really slow-pace," his shutting-down behavior "really impact[ed] his ability to learn in the classroom without the one-on-one support" that was being provided (*id.*). She stated that the SEIT services were provided one-to-one because the student required that level of support in the classroom as he struggled to keep up with the rest of the class because he was "significantly slower" and needed "a lot" of redirection, refocusing, incentives, and positive reinforcement (Tr. p. 93).

The director attested that at the start of the 2019-20 school year (first grade) the student was reading at the Fountas and Pinnell Level "B," which was considered to be a mid-kindergarten level, and was struggling to keep up with the class due to low frustration tolerance, and difficulty with decoding, fluency, and sight words (Tr. p. 95).¹³ In mathematics, the student's "strong point," he was reportedly "holding his own" in the classroom doing simple addition, but had difficulty getting all the work done, staying on task, and completing the assignment (Tr. pp. 95-96). With regard to writing, the director testified that the student "really, really struggle[d]" in terms of forming letters, keeping pace, maintaining focus, and completing tasks requiring redirection, and

¹³ According to the Fountas and Pinnell Instructional Level Expectations for Reading, meeting expectations for reading at Level B is reflective of performance during the first interval of the kindergarten school year (November-December) (Parent Ex. J at p. 1). The chart also indicated that at the beginning of the school year, first grade students who achieved a reading level below a "C" were designated as not meeting expectations and needing intensive intervention (*id.*).

that "a lot of times" he needed to leave the classroom to work one-on-one to eliminate visual distractions and reduce pressure (Tr. pp. 96-97).¹⁴

To address the student's needs the director testified that the SEIT provided a "multisensory approach and a lot of just reading with fluency," and "a lot of practice, that one-on-one individual reading, [and] reviewing books" (Tr. p. 97). As the director described it, the SEIT brought in a "wide variety of books that have a lot of visuals" because the student required pictures to understand what was going on in the story (*id.*). The SEIT also reportedly used a whiteboard and a chalk board to work on blending and sight words, particularly those sight words that most of the class was 90-100 percent successful with, but this student was successful with 70 percent of the time (Tr. pp. 97-99, 110-111). With respect to mathematics the director testified that the student received instruction using a multisensory instruction and a lot of visuals, support with word problems, and although he was keeping up with the class at the beginning of the year he was struggling with new concepts which required "a lot" of review and repetition (Tr. p. 98). In the area of writing the director stated that the SEIT provided positive reinforcement and breaks, and that she took the student out of the classroom to allow him to "focus one-on-one on the writing that he ha[d] to get done" (Tr. pp. 98-99).

Regarding progress, the director testified that since the beginning of the school year "with the 10 hours of support" he received, the student's reading had progressed to a Fountas and Pinnell Level E, "which [was] the beginning of 1st grade level" although his sight word skills were "only 70 percent" that slowed down the student's fluency (Tr. p. 99). She stated that while the student required "a lot of practice" he had "gotten over that hump where he d[id]n't want to pick up a book" as he previously used to "slump over" but now he sat down and wanted to read (*id.*). Regarding mathematics the director testified that the student was making progress with the support of multisensory one-on-one teaching, but he struggled with new concepts of double-digit addition and subtraction (Tr. p. 100). She also stated that in the area of writing, the student made progress and was better able to form letters with less prompting, but that he needed prompting to keep up the pace and make sure he completed the assignments (*id.*). Although the student was making progress in writing, it was difficult for him to keep up with his peers (Tr. pp. 98-99).

On a social/emotional level, the director testified that during the 2018-19 school year the student had been at a different, smaller school that had a special education teacher and "many more assistants" than his then current placement (Tr. pp. 100-01). She stated the student initially had difficulty interacting, but that with support he was making progress (*id.*). The director indicated that the student struggled when "things d[id]n't go his way" and may have appeared to his peers as abrasive or aggressive but it was more a reflection of the nature in the way he spoke (Tr. p. 101). She stated that the student was making progress interacting with peers having benefited from role playing, social stories, modeling, and working through coping strategies (*id.*). The director concluded that the student required 10 hours of SETSS per week in order to make progress due to

¹⁴ The director testified that the student's deficits were identified using assessments referred to in testimony as the "Bater Phonemic Awareness Assessment" and the "Kavience Math Screening" as well as informal assessments (Tr. pp. 109-110). Those assessment and screening results were not included in the hearing record (*see* Tr. pp. 111-12). However, the director testified that the SEIT reports did not need to include the standardized assessment results because they otherwise gave a "really good sense of how [the student was] functioning in the classroom" (Tr. pp. 112-13; *see* Parent Exs. E; I; Dist. Ex. 2).

his significant delays related to fluency and ability to learn new concepts, and that during the 2019-20 school year even with that level of support he was "barely" keeping up with his class (Tr. pp. 105, 108-09).

In addition to the testimony of the director, the hearing record included two reports that reflected the student's functional performance at school: a December 2019 SEIT progress report and the SEIT's October 2019 and March 2020 notes, which provided a substantial description of the student in the school setting during the 2019-20 school year with respect to academics, learning style, focus, and attention (Parent Exs. E; I).

The SEIT's October 2019 notes indicated that with respect to reading the student was at Level B and only able to read 10 of 52 words from the first-grade sight word list and 6 out of 41 words from the kindergarten list (Parent Ex. I at p. 1).¹⁵ The notes indicated that the student's fluency was "extremely weak" and his accuracy was 85 percent (id.). When prompted to tap out the words the student's decoding skills for basic CVC words was good, but he had difficulty sounding out other words that were "decodable," and due to his limited sight word bank, led to a lack of fluency (id.). The SEIT's notes indicated that the student was able to segment sounds although at a slower pace than his grade level, and his sound symbol relationship was fair, but when looking at CVC words with some short vowels he often said the wrong sound and his accuracy was inconsistent (id.). At that time, the student's "reading grade equivalent [was] that of a student" at the end of kindergarten and using the "Bader Assessment," the student read a pre-K level passage and a kindergarten level passage, taking a long time to do so and answering only 80 percent of the comprehension questions accurately (id.).¹⁶

The December 2019 SEIT progress report indicated that the student's phonemic awareness skills were "mostly on par with his peers due to the SEIT support" he received and he had mastered identifying initial sounds for the entire alphabet but still struggled with final sounds (Parent Ex. E at p. 2). The student was on Level B and often become overwhelmed, requiring the one-to-one SEIT support for reassurance to get through a book (id.).¹⁷ Reportedly, the student was heavily dependent on the images in readers to help with his reading and it was "evident he need[ed] ample reading opportunities in a one-on-one setting with his SEIT to help increase his reading skills" (id.). The December 2019 SEIT progress report reiterated, as in the October SEIT notes, that the

¹⁵ In testimony the SEIT indicated that the reading levels referred to were from Fountas and Pinnell as reported by his classroom teacher (see Tr. pp. 190-91, 205-06). According to the notes, "ideally" the teacher would like students entering first grade to be "at no less than" a Level C (Parent Ex. I at p. 1).

¹⁶ The SEIT testified that she disagreed with the findings of the April 2019 psychoeducational evaluation report that the student entered the 2019-20 school (first grade) with reading skills in the average range (Tr. pp. 198-99). When asked why she believed the student was performing in the low average range for reading she opined that the discrepancy was likely due to the more optimal environment of the one-on-one testing setting versus the classroom setting where she conducted "a lot" of her testing, and the student needed to generalize his skills and perform naturally (Tr. pp. 199-200).

¹⁷ The SEIT testified that the classroom teacher indicated that there was only one other student in the class on level B and that three students were on level C but most were either on level G, D, or F (Tr. p. 195). The SEIT remarked that the student was in the lowest range of the class despite having intervention throughout the summer working one-on-one with a SEIT to keep up his reading skills (Tr. pp. 195-96).

student's decoding skills and limited sight word bank impacted reading fluency (compare Parent Ex. E at p. 2, with Parent Ex. I at p. 1). As the time the December 2019 SEIT progress report was prepared, the student's reading skills remained at a kindergarten level and he required one-to-one SEIT support and instruction to help him acquire grade level reading skills (Parent Ex. E at p. 2).

The SEIT's notes indicated that by March 2020 the student's phonemic awareness skills were on par with his peers, he had "made great strides in reading," and with continued practice in a one-on-one setting with this SEIT had progressed from Level B to Level F, which he read with 98 percent accuracy (Parent Ex. I at p. 2). The notes reflected that the student continued to need to strengthen his comprehension skills, which kept him from moving to a Level G with the majority of the class (id.). The student reportedly continued to require reassurance and support to get through a book, depended heavily on images in readers, and needed ample opportunities in a one-on-one setting to help increase reading skills and fluency (id.). The student reportedly showed improvement from October 2019 regarding his ability to read sight words but still fell below average in the class, reading 31 out of 41 words on the first-grade list and 44 out of 52 on the kindergarten list (id.). His teacher reportedly indicated that the student's word bank was not "extensive" and that on the "Bader Assessment" the student only answered four out of seven questions correctly from a timed first-grade level passage (id. at pp. 2-3).

With respect to mathematics, the SEIT's notes indicated that in October 2019 the student was performing at the beginning first-grade level in all areas but required repetition of instruction and information as well as extra time to process the question and formulate an answer (Parent Ex. I at p. 1). The December 2019 SEIT progress report indicated mathematics was the student's favorite subject and for the first time that school year his pace was on par with his peers, he seemed to enjoy the work, and participated nicely but depended heavily on visual cues and needed an "extra few seconds to calculate his answers" (Parent Ex. E at p. 1). The December 2019 SEIT progress report noted that while the student was mostly on level with his peers in mathematics, he often required the one-on-one SEIT support to refocus and redirect him in the classroom (id. at p. 2). The SEIT's notes indicated that by March of 2020 the student's mathematics skills were in the "lower average" range for the class (Parent Ex. I at p. 2). According to the notes, the student had learned double digits in December 2019 with an extra week of one-on-one direction and review to bring him up to par with the class, but when reassessed in March 2020 he had forgotten most of the double digits that he had appeared to have previously mastered (id.). The SEIT's March 2020 notes indicated that the student was struggling to grasp the concept of subtraction and although the majority of the class grasped the concept after two lessons the student required one-on-one direct instruction with visual cues, extra time, and often modified work because he had difficulty keeping up with his peers (id.).¹⁸ Reportedly the student's pace was "very slow," and "[i]n addition to him needing an extra few seconds to calculate his answers" the student also got tired, shut down, and was unable to complete his work (id.).¹⁹ The SEIT indicated that throughout mathematics lessons

¹⁸ Consistent with her report the student's SEIT testified that at the beginning of the 2019-20 school year the student was on par, for the most part (low-average), in mathematics but as the year went on and the work went up the student started "to fall a little farther behind" (Tr. p. 192).

¹⁹ The SEIT's notes indicated that in March 2020 on a timed mathematics fluency task the student was unable to complete more than three equations in a minute because according to the SEIT, he did not perform well under pressures or handle failure well, so as soon as he reached a harder equation he completely shut down and would

the student had a hard time keeping up with his peers and completing his work requiring modifications from the teacher (id.).

In the area of writing, the SEIT's October 2019 notes, consistent with her testimony, indicated that the student's writing skills were weak, his pace was slow, and he tired easily when writing which resulted in him running out of time before finishing the writing assignment (compare Tr. p. 193, with Parent Ex. I at p. 1). Reportedly, the student required "constant redirection and prompts from both the classroom teacher and the [SEIT]" and at times, modified work in order for him to complete the assignment (Tr. pp. 193-94; Parent Ex. I at pp. 1-2). The December 2019 SEIT progress report noted the student's struggles with, and avoidance of, writing tasks and described his meticulous nature but very slow pace (Parent Ex. E at p. 2). The SEIT indicated that the student continued to need constant one-on-one redirection from both the classroom teacher and SEIT and modified writing assignments (compare Parent Ex. E at p. 2, with Parent I at p. 1). The SEIT opined that in conjunction with the student's weak reading skills, the progression to expressive writing and creating responses to literature would make the student's struggle to keep up with his peers even more difficult (Parent Ex. E at p. 2). The SEIT's March 2020 notes indicated that writing remained the student's hardest subject area, noting his difficulty in recalling proper letter formation, continued letter/number reversals and struggle to formulate ideas and put them down on paper (Parent Ex. I at p. 3). According to the notes, the student wrote at a slow rate, found it "laborious," and tired easily when expected to write (id.). Despite "excessive lessons on how to create ideas" and put them into writing, the student was reported to struggle to complete the assignment without direct instruction and support, and often ran out of time before completing the work (id.).

Turning to reports about the student's learning style and attention skills during the 2019-20 school year, the December 2019 SEIT progress report indicated that the student was functioning in the lower range academically of his class in most areas, was easily distracted, presented with difficulty transitioning, and moved at a slower rate than the pace of the class, which lead him to fall behind in his work and miss out on new concepts and skills (Parent Ex. E at p. 1). According to the report, the student demonstrated difficulty sitting at his desk, often moved around and climbed on top of the desk, and appeared to "zone out a lot" when the teacher was speaking (id.).²⁰ The report described the student as a kinesthetic and visual learner who benefited from visual cues or hands-on manipulatives (id. at p. 3). When instruction was auditory only, the student tended to "zone out" and fidget in his seat and the teacher often suggested that the SEIT take the student outside the classroom to complete his work in an environment that provided minimal distraction (id.). In the separate location the student's pace reportedly quickened and he was then able to get the work done more efficiently (id.). Based on the student's performance at the time, the SEIT

not continue the work (Parent Ex. I at p. 2). When the task was modified by taking the student to a quieter location and giving him reassurance that there was no time pressure and that it was ok to make mistakes, he still did not move through the task fluently, completing only five equations in one minute as opposed to the class average of 14 in a minute for addition and 11 for subtraction (id.).

²⁰ The SEIT testified that the student tended to wander, had difficulty staying in his seat, was often very lethargic, and his stamina was not as strong as his peers—clarifying that it was not behavioral, but that he "really maxe[d] out" (Tr. pp. 200-01).

recommended that the student continue to receive 10 hours of one-on-one SEIT support in the classroom and his related services to address the student's social/emotional needs (id.).

Turning to the parent's objection to the IHO's use of the results of the district's psychoeducational evaluation as a basis to reduce the number of SETSS hours awarded, the director opined that the student was better able to complete tasks in the evaluation's one-on-one setting, but stated that the student struggled in the classroom setting and if observed in the classroom "you would see how he really [was] delayed in terms of his ability to function" (Tr. p. 110). Further, the director noted that evaluations were a snapshot of how the student functioned at that specific time and under those circumstances, but that in general in the classroom setting, the student struggled in terms of keeping up and maintaining classroom function, which she both witnessed and received reports on regarding the student's difficulties (Tr. p. 111). She indicated that she spoke with the student's classroom teacher who reported the student struggled to keep up with the class and he required one-on-one support, teaching, and review in order to make progress (id.). Despite the student's average-range academic achievement performance on the April 2019 psychoeducational evaluation, the student's ongoing, in-class academic performance and needs as described above supports a finding that the 10 hours of SETSS the student received during the 2019-20 school year were appropriate, and that a reduction to seven hours was not supported by the evidence in the hearing record.

Finally, the district asserts that the IHO's determination that the student should receive SETSS on a 12-month basis was in error because services provided by the district pursuant to section 3602-c (1)(a) are limited to services provided in programs operated during the course of a regular school year as opposed to the summer months and, accordingly, the May 2019 CSE properly recommended 10-month services for the student in the May 2019 IESP. Although the district is correct that State guidance has indicated that Education Law § 3602-c does not require school districts to provide dual enrollment services to students with disabilities during the summer, unlike a district's obligation during the course of the regular school year, within an IESP (see "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 3206-c," VESID Mem. [Sept. 2007], available at <http://www.p12.nysed.gov/specialed/publications/policy/documents/chapter-378-laws-2007-guidance-on-nonpublic-placements.pdf>), State guidance also directs that for such dually enrolled (that is parentally placed) nonpublic school students who qualify for 12-month services there is a need for an IESP for the regular school year and an IEP for 12-month services programming, resulting in a 10-month IESP and a 6-week IEP ("Questions and Answers on Individualized Education Program (IEP) Development, The State's Model IEP Form and Related Documents," at pp. 39-40, Office of Special Ed. [Apr. 2011], available at <http://www.p12.nysed.gov/specialed/formsnotices/IEP/training/QA-411.pdf>). Accordingly, if the student required 12-month services to prevent regression, the district was required to provide him with an IEP for the summer months which was appropriate to address his needs.²¹

²¹ State regulations require that students "shall be considered for 12-month special services and/or programs in accordance with their need to prevent substantial regression" (8 NYCRR 200.6[k][1]; see 8 NYCRR 200.1[eee]). "Substantial regression" is defined as "a student's inability to maintain developmental levels due to a loss of skill

Here, the hearing record supports a finding that the student needed 12-month services to prevent regression and, therefore, the IHO correctly determined that SETSS provided on a 12-month basis was appropriate. Specifically, the agency director testified that the student received SEIT services during the summer of 2019 at the camp he attended where the SEIT worked with the student on phonemic awareness and getting the student ready for school in terms of reading (Tr. pp. 103-04).²² The director stated that even with the support of the SEIT over the summer the student still entered the 2019-20 school year at a level B and opined he would have struggled even more without that summer support which was "essential" for him to make progress in the 2019-20 school year (Tr. p. 104). The director testified that the student required one-on-one 12-month support to keep up, maintain, and make progress as he regressed when there is a break in school, "a lot back to square one" (Tr. pp 108, 118). She noted the student struggled to get up to speed and get back to where he previously was stating that while the student was keeping up with his peers at the beginning of the year in terms of mathematics those skills were now a bit more delayed (id.). She testified that it took a few weeks to get back to his previous performance as he has difficulty with retention of concepts that were taught, and the concepts needed to be retaught (Tr. p. 118). She noted it was a two-fold issue, one of attention and ability to maintain focus as well as the need to reteach previously learn concepts that were lost to the break (Tr. pp. 118-19). Noting the student required extra support to learn concepts she opined it was "vital" that he gets the support over the summer in order to make sure he will be available and able to learn in September (Tr. p. 108).

As described in detail above, the hearing record contains substantial evidence that in the classroom setting the student presented with a slower than typical learning style, and academic, frustration tolerance, and attention needs such that his receipt of 10 hours per week of SETSS on a 12-month basis to provide individual multisensory instruction, prompting, reteaching, and relearning during the 2019-20 school year was appropriate to meet his needs. Accordingly, the parent has met her burden that the 10 hours of SETSS she obtained for the student for the 2019-20 12-month school year constituted an appropriate unilateral placement for which she is entitled to either direct funding or reimbursement unless equitable considerations weigh against that relief.

or knowledge during the months of July and August of such severity as to require an inordinate period of review at the beginning of the school year to reestablish and maintain IEP goals and objectives mastered at the end of the previous school year" (8 NYCRR 200.1[aaa]). State guidance indicates that "an inordinate period of review" is considered to be a period of eight weeks or more ("Questions and Answers Extended School Year 2017," Office of Special Educ. [Feb. 2017], available at <http://www.p12.nysed.gov/specialed/applications/ESY/esy-2017/documents/questions-and-answers-extended-school-year-2017.pdf>). District courts in New York have followed the eight-week standard set forth in guidance when determining whether substantial regression has occurred (D.D.-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *15-*16 [E.D.N.Y. Sept. 2, 2011]; see F.L. v. Bd. of Educ. of Great Neck Union Free Sch. Dist., 274 F. Supp. 2d 94, 125 [E.D.N.Y. 2017]). In New York, the school year begins on July 1 (Educ. Law § 2[15]).

²² The agency director testified that the student's previous placement was considered a general education setting even though the main teacher was a special educator and noted it was a multisensory approach to learning and although it was a "regular curriculum" it was not necessarily as rigorous as the curriculum at the 2019-20 placement (Tr. p. 103).

D. Equitable Considerations

As an initial matter, there is no evidence in the hearing record that the parent has expended any funds for which she is entitled to be reimbursed with respect to the provision of SETSS to the student. The absence of any evidence that the parent has a claim for reimbursement brings the matter into that subset of more complicated cases in which the financial injury to the parent and the appropriate remedy are less clear. The Second Circuit Court of Appeals has held that a direct payment remedy is an appropriate form of relief in some circumstances, and that "[i]ndeed, where the equities call for it, direct payment fits comfortably within the Burlington–Carter framework" (E.M. v. New York City Dep't of Educ., 758 F.3d 442, 453 [2d Cir. 2014]; see also Mr. and Mrs. A. v. New York City Dep't of Educ., 769 F. Supp. 2d 403, 430 [S.D.N.Y. 2011] [finding it appropriate to order a school district to make retroactive tuition payment directly to a private school where equitable considerations favor an award of the costs of private school tuition but the parents, although legally obligated to make tuition payments, have not done so due to a lack of financial resources]). However, the hearing record is also devoid of any evidence that the parent is legally obligated to pay the agency or provider for SETSS provided to the student. Rather, the agency director testified that the district was funding the 10 hours of SETSS per week pursuant to pendency, the agency did not have a contract with the parent and, absent a contract between the parent and agency, the parent had no financial obligation to the agency or provider (Tr. pp 141-43). Similarly, the hearing record does not contain any documentary evidence of a contract between the parent and the agency or of any financial obligation on the part of the parent for payment of SETSS costs. As there is inadequate proof that the parent has expended any funds to pay for SETSS for the 2019-20 school year or is legally obligated to do so, it is not appropriate equitable relief in these circumstances to require the district to either reimburse the parent for the costs of SETSS or to directly fund SETSS under the relevant legal standards discussed above.

VII. Conclusion

Therefore, having determined that the evidence in the hearing record supports finding that the district did not offer appropriate equitable services for the student for the 2019-20 school year, that the parent's request for 10 hours per week of 1:1 instruction by a special education teacher was appropriate, and that the IHO's award of seven hours per week of SETSS was not supported by the hearing record, but having also found that equitable considerations do not support an award to the parent of either reimbursement of the costs of SETSS or direct funding of SETSS, the necessary inquiry is at an end.

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

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS APPEAL IS DISMISSED.

IT IS ORDERED that the portion of the IHO's decision dated April 20, 2020 which determined that 10 hours of weekly SETSS was an inappropriate unilateral placement is reversed; and

IT IS FURTHER ORDERED that the portion of the IHO's decision dated April 20, 2020 that awarded direct funding by the district to the student's SETSS provider at a rate of \$120 per hour for seven SETSS periods per week on a 12-month basis retroactive to the 2019-20 extended school year is also reversed.

Dated: **Albany, New York**
 September 9, 2020

CAROL H. HAUGE
STATE REVIEW OFFICER