



The University of the State of New York

The State Education Department

State Review Officer

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No. 21-101

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:

Gulkowitz Berger, LLP, attorneys for the petitioner, by Shaya M. Berger, Esq.

Judy Nathan, Interim Acting General Counsel, attorneys for respondent, by Theresa Crotty, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request that respondent (the district) fund the costs of eight hours per week of privately-obtained special education teacher support services (SETSS) at an enhanced rate for the 2020-21 school year. The district cross-appeals from the IHO's decision to the extent that the IHO did not deny the parent's requested relief based on the parent's failure to demonstrate a financial obligation to the private agency for the SETSS delivered to the student during the 2020-21 school year. The appeal must be sustained in part. The cross-appeal must be sustained in part.

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 Committee on

Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts 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 achieved all developmental milestones within the normal range with no significant delays reported, but he received speech-language therapy to aid with articulation; as a young child, the student was quick to anger, had trouble understanding the perspectives of others and was prone to temper tantrums (Dist. Ex. 2 at p. 1). The parent reported that the student displayed challenging behaviors at home since he was a young child and often acted in a stubborn or aggressive manner (id.).

The student was the subject of a prior impartial hearing concerning the 2018-19 school year (2018-19 proceeding) (see Parent Ex. B). As part of the 2018-19 proceeding, an IHO issued an interim decision, dated May 16, 2019, which found that the student was "deemed eligible for special education services retroactive to September 1, 2018 through conclusion of litigation," consisting of the following bilingual Yiddish services on a weekly basis for the 12-month school year: five hours of individual SETSS, two 30-minute sessions of group (2:1) counseling, and two 30-minute sessions of group (2:1) speech-language therapy (id. at p. 1). As part of the interim decision, the IHO in that matter also ordered the district to fund independent educational evaluations (IEEs) of the student (id.).¹

During the 2019-20 school year, the student attended a general education parochial school (nonpublic school) (Dist. Ex. 2 at p. 2). The district conducted a psychoeducational evaluation of the student on September 5, 2019 (Dist. Ex. 3).² In addition, on December 26, 2019, a neuropsychological IEE of the student was completed (Dist. Ex. 2).³ According to the neuropsychological evaluation, the parent reported that the student was very sociable and enjoyed positive relationships with his peers but that, beginning around spring 2019, the student's academic performance began to decline and the student complained that he did not understand the material that was being presented by his teachers (id. at pp. 1-2). The student experienced difficulties across all academic areas and demonstrated issues with attention span, distractibility, and following instructions (id. at p. 2). As set forth in the psychoeducational evaluation, the parent reported in September 2019 that the student displayed significant oppositional and defiant behaviors in school and at home and that the mother was eager to intervene before his behaviors became "completely unmanageable" (Dist. Ex. 3 at p. 1). Both the student's teacher and the principal at the nonpublic school reported that they were "highly alarmed" by the student's behaviors and that, historically,

¹ According to the parent's attorney, the parent brought the 2018-19 proceeding "on her own" and he "believe[d]" that she withdrew her complaint in that matter "at the end of the year" (Tr. p. 5). It is unclear from the hearing record if the parent's attorney was referring to the end of the 2018-19 or the 2019-20 school year.

² According to the district's event log, for the 2019-20 school year, a CSE convened on October 28, 2019 to conduct an initial review of the student's eligibility for special education and developed an IESP for the student (see Dist. Ex. 5 at pp. 4-5); however, the IESP purportedly developed at that meeting was not included in the hearing record.

³ The December 2019 neuropsychological evaluation report indicated that the student was in fifth grade at the nonpublic school at the time of the evaluation; however, the September 2019 psychoeducational report indicated that the student was in third and fourth grade and the May 2020 IESP indicated that the student was a fourth grader at the nonpublic school (Dist. Exs. 1 at p. 1; 2 at pp. 1-2; 3 at p. 1). During the impartial hearing, the parent testified that, in May 2020, the student was in fifth grade in English and sixth grade in Hebrew (Tr. p. 130).

the student began each school year performing adequately on his tests and presented as engaged and eager during lessons, but as the school year continued, he became increasingly defiant (*id.*). At the time of the neuropsychological evaluation in December 2019, the student's mother reported that the student had not been attending school on a regular basis for the few weeks prior and that he had been significantly calmer without the academic pressure that school placed upon him (Dist. Ex. 2 at p. 1).

On May 19, 2020, a CSE convened to conduct an annual review and develop the student's IESP for the 2020-21 school year (Dist. Ex. 1). Having determined the student was eligible for special education as a student with a learning disability, the CSE recommended that the student receive three periods of SETSS in a group per week with the language of service being Yiddish and two 30-minute individual sessions of counseling per week with the language of service being Yiddish (Dist. Ex. 1 at pp. 1, 7).⁴ In addition, the IESP included 10 annual goals and several supports for the student's management needs (*id.* at pp. 4-6).

A "services agreement" between the parent and a private agency, AIM Educational Support Services (AIM), dated July 14, 2020 indicated that AIM would provide 1:1 SETSS to the student from July 15, 2020 until June 30, 2021 at a cost of \$165 per hour for services rendered (Parent Ex. H at p. 1). The notice stated that the amount of service hours that would be provided to the student would be decided by the parent, AIM, the child's supervisor, and the SETSS provider (*id.*). Further, the agreement noted that compensation and reimbursement would be paid by the district to AIM for services provided but that the parent agreed, if the district did not pay or provided incomplete funding for the services rendered by AIM, the parent was responsible for the cost of the services (*id.*).

According to a log kept by the parent, between August 25, 2020 and September 1, 2020, she contacted 10 special education teachers in an attempt to arrange for delivery of the mandated SETSS for the student from a district-approved teacher but was unable to find a teacher with availability (Parent Ex. E).

A. Due Process Complaint Notices and Impartial Hearing

In a due process complaint notice dated September 14, 2020, the parent alleged that the district failed to offer or provide the student with an appropriate special education program on an equitable basis for the 2020-21 school year (Parent Ex. A). The impartial hearing convened on November 18, 2020, and the parties and the IHO completed the pendency portion of the impartial hearing on November 25, 2020, after the second date of proceedings (*see* Tr. pp. 1-30). In an interim decision, dated November 25, 2020, the IHO found that the parties were in agreement that the student's pendency placement consisted of the program contained in the May 2019 interim decision that arose from the 2018-19 proceeding (IHO Ex. II at pp. 3, 6-7; *see* Tr. pp. 27-28; Parent Ex. B). Thus, the IHO found that the student was entitled to the following services on a weekly basis during the pendency of the proceedings: five hours of individual sessions of bilingual Yiddish SETSS per week; two 30-minute individual sessions of bilingual Yiddish counseling per week;

⁴ The student's eligibility for special education as a student with a learning disability is not in dispute (*see* 34 CFR 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

and two 30-minute individual sessions of bilingual Yiddish speech-language therapy per week (IHO Ex. II at p. 7).⁵

The impartial hearing continued on December 14, 2020, on which date the parent's attorney stated the parent's intent to file either a second due process complaint notice for consolidation or an amended due process complaint notice (Tr. pp. 33-34; see Tr. pp. 31-47). Thereafter, the parent amended her due process complaint notice on December 30, 2020 (Parent Ex. C). The parent alleged that the district failed to provide adequate SETSS to the student for the 2020-21 school year, "including by failing to provide a special education provider" (id. at p. 1). The parent claimed that the student required "an increase of [SETSS] to meet his academic needs and to make meaningful academic gains" (id.). She asserted that he required "at least 8 periods per week of SETSS" and related services of the type and frequency as set forth in the May 2019 interim decision from the 2018-19 proceeding (id.). In addition, the parent alleged that she had been unable to locate a provider to work with the student at the district standard rates for the 2020-21 school year and that this was due in part to the significant help that the student needed and due in part to the unavailability of providers (id. at p. 1).

The parent claimed that she found a provider who was willing to provide the student with SETSS for the 2020-21 school year but at a higher rate than was standard for the district (Parent Ex. C at p. 1). For relief, the parent sought district funding of at least eight periods per week of SETSS at an enhanced rate for the entire 2020-21 school year (id. at p. 2). In addition, the parent requested an award of all related services included in the May 2019 interim decision from the 2018-19 proceeding "and related services authorizations for such services if required by the parent" (id.).

The impartial hearing continued for three additional days of proceedings, concluding on March 18, 2021 (see Tr. pp. 48-177).

B. Impartial Hearing Officer Decision

In a decision dated March 25, 2021, the IHO determined that the May 19, 2020 IESP offered the student appropriate special education services on an equitable basis for the 2020-21 school year, finding that the IESP set forth the areas of student need and services to address those needs (IHO Decision at pp. 12, 17).⁶ The IHO noted that, while the CSE including the parent believed the student likely needed speech-language therapy services, "this need was not detailed enough to warrant services to be included in the IESP" (id. at p. 12). Additionally, the IHO indicated that the testimony of the district special education teacher showed that she reviewed materials relative to the student and made appropriate recommendations based upon the available information, which included recommendations for SETSS and counseling (id. at pp. 12-13). The IHO found no evidence that the district members of the committee failed to consider the parent's

⁵ The IHO indicated that pendency would commence as of the date of the due process complaint notice on September 1, 2020 (IHO Ex. II at p. 7); however, the parent's due process complaint notice was dated September 14, 2020 (Parent Ex. A at p.1).

⁶ The IHO decision is not paginated; for the purposes of this decision, the pages will be cited by reference to their consecutive pagination with the cover page as page one (see IHO Decision at pp. 1-18).

position that the student required five to eight sessions of SETSS per week instead of three or that such an increase in the frequency of SETSS was warranted (*id.* at p. 13). In sum, the IHO found that the May 2020 IESP "was appropriately developed and offered the Student appropriate services" for the 2020-21 school year (*id.*).

As to the district's implementation of the May 2020 IESP, the IHO found that the district offered no evidence that it made an "effort" to arrange for an available provider to deliver the student's SETSS as required by State law (IHO Decision at p. 14).

With respect to the private SETSS delivered to the student by AIM during the 2020-21 school year, the IHO found that the district was required to fund five hours per week of SETSS for most of the 2020-21 school year pursuant to pendency (IHO Decision at p. 14). For the remainder of the 2020-21 school year, the IHO determined that the parent's "utilization of" the private agency, AIM, to deliver the services was "reasonable under the circumstances" (*id.*). However, the IHO found that the student was entitled to three sessions of SETSS per week, noting that there was no evidence offered during the impartial hearing as to why AIM delivered SETSS at a frequency of up to ten hours per week (*id.* at pp. 14, 15). Noting that the district did not offer evidence of an "acceptable" rate, the IHO indicated he was "left to determine" a reasonable rate (*id.* at p. 14). Relying on approved rates published by the State Education Department for various services and noting the lack of evidence tying the requested \$165 per hour rate to the student's needs, the IHO found a rate of \$130 per session to be appropriate (*id.* at pp. 15-17).

Based on the foregoing, the IHO ordered the district to fund three periods of direct, group Yiddish SETSS per week at a rate of up to \$130 per session, as well as individual sessions of Yiddish counseling per week (IHO Decision at p. 17).

IV. Appeal for State-Level Review

The parent appeals, asserting that the IHO erred in his findings related to the frequency of SETSS the May 2020 CSE should have recommended and the amount to be awarded as payment to the teacher the parent located to provide SETSS to the student. The parent asserts that the IHO's decision, as to both issues, had no factual or legal basis and must be reversed.

With respect to the frequency of services, the parent asserts that the student was previously entitled to five periods per week of SETSS by order of an IHO, which was an order the district never appealed and was also used as the basis for an order on pendency in this case without appeal. The parent argues that, therefore, the district had the burden to prove that the May 2020 CSE's determination to change the student's mandate to three periods per week was appropriate. The parent contends that the district failed to meet this burden in that it offered no evidence as to why a reduction in SETSS was warranted. The parent points to evidence that the district felt the student's program was lacking for reasons related to the student's speech-language needs yet failed to recommend speech-language therapy for the student. The parent also cites evidence that the student entered the 2020-21 school year academically delayed. Thus, the parent argues that the

evidence in the hearing record showed that the May 2020 CSE should have recommended five periods per week of SETSS.⁷

As to the rate for the private SETSS, the parent argues that the hearing record showed that the agency charged \$165 per hour and that, other than noting its objection, the district did not contest the rate. Therefore, the parent asserts that the IHO erred in reducing the rate to \$130 per session.

In an answer, the district responds to the parent's allegations and argues that the IHO's decision that the May 2020 IESP offered the student appropriate services on an equitable basis should be upheld. The district also interposes a cross-appeal, arguing that the IHO erred by not denying the parent's requested relief on the basis that the evidence in the record did not show that the parent was financially obligated for the costs of the SETSS delivered by AIM during the 2020-21 school year. The district also argues that the parent did not show an inability to front the costs of the services. The district asserts that the parent's request for district funding of the SETSS delivered by AIM should be denied or, in the alternative, that the district should be required to reimburse the parent rather than directly pay the agency.

In an answer to the district's cross-appeal, the parent denies the district's allegations. In addition, the parent argues that, since the district is obligated to fund the private SETSS delivered to the student for the entire 2020-21 school year pursuant to pendency, "there no longer remains any open issue on appeal."

V. Applicable Standards

A board of education must offer a free appropriate public education (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]).⁸ "Boards of education of all school districts of the state shall furnish

⁷ During the impartial hearing, the parent maintained that the student had required eight or more hours per week of SETSS (see Parent Ex. C at p. 1); however, on appeal, she alleges that the evidence supports that the student required five periods of SETSS per week.

⁸ State law provides that "services" includes "education for students with disabilities," which means "special educational

services to students who are residents of this state and who attend nonpublic schools located in such school districts, upon the written request of the parent" (Educ. Law § 3602-c[2][a]). In such circumstances, the district of location's CSE must review the request for services and "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an [IEP]" (Educ. Law § 3602-c[2][b][1]). The CSE must "assure that special education programs and services are made available to students with disabilities attending nonpublic schools located within the school district on an equitable basis, as compared to special education programs and services provided to other students with disabilities attending public or nonpublic schools located within the school district (*id.*)⁹ Thus, under State law an eligible New York State resident student may be voluntarily enrolled by a parent in a nonpublic school, but at the same time the student is also enrolled in the public school district for the purpose of receiving special education programming under Education Law § 3602-c, services for which a public school district may be held accountable through an impartial hearing.

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E. v. New York City Dep't of Educ., 694 F.3d 167, 184-85 [2d Cir. 2012]).

VI. Discussion

A. Scope of Review and Mootness

State regulation governing practice before the Office of State Review requires that the parties set forth in their pleadings "a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately," and further specify that "any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer" (8 NYCRR 279.8[c][2], [4]; see 8 NYCRR 279.4[a]). Further, an IHO's decision is final and binding upon the parties unless appealed to a State Review Officer (34 CFR 300.514[a]; 8 NYCRR200.5[j][5][v]).

Here, neither party appeals the IHO's determination that the district failed to implement the student's SETSS for the 2020-21 school year (see IHO Decision at p. 14). In addition, neither

programs designed to serve persons who meet the definition of children with disabilities set forth in [Education Law § 4401(1)]" (Educ. Law § 3602-c[1][a], [d]).

⁹ State guidance explains that providing services on an "equitable basis" means that "special education services are provided to parentally placed nonpublic school students with disabilities in the same manner as compared to other students with disabilities attending public or nonpublic schools located within the school district" ("Chapter 378 of the Laws of 2007—Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the Individuals with Disabilities Education Act (IDEA) 2004 and New York State (NYS) Education Law Section 3602-c," Attachment 1 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.*).

party appeals the IHO's determinations that the student was entitled to five hours of individual sessions of bilingual Yiddish SETSS per week pursuant to pendency and that, to satisfy its pendency obligation, the district was required to fund the parent's private services (IHO Decision at p. 14; IHO Ex. II at p. 7). As such, these findings have become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

As to the parent's position that the matter is now moot given that the parent has received all of the relief sought pursuant to pendency, a dispute between parties must at all stages be "real and live," and not "academic," or it risks becoming moot (Lillbask v. State of Conn. Dep't of Educ., 397 F.3d 77, 84 [2d Cir. 2005]; see Toth v. City of New York Dep't of Educ., 720 Fed. App'x 48, 51 [2d Cir. Jan. 2, 2018]; F.O. v. New York City Dep't of Educ., 899 F. Supp. 2d 251, 254 [S.D.N.Y. 2012]; Patskin v. Bd. of Educ. of Webster Cent. Sch. Dist., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *12 [E.D.N.Y. Oct. 30, 2008]; J.N. v. Depew Union Free Sch. Dist., 2008 WL 4501940, at *3-*4 [W.D.N.Y. Sept. 30, 2008]; see also Coleman v. Daines, 19 N.Y.3d 1087, 1090 [2012]; Hearst Corp. v. Clyne, 50 N.Y.2d 707, 714 [1980]). In general, cases dealing with issues such as desired changes in IEPs, specific placements, and implementation disputes may become moot at the end of the school year because no meaningful relief can be granted (see, e.g., V.M. v. N. Colonie Cent. Sch. Dist., 954 F. Supp. 2d 102, 119-21 [N.D.N.Y. 2013]; M.S. v. New York City Dep't of Educ., 734 F. Supp. 2d 271, 280-81 [E.D.N.Y. 2010]; Patskin, 583 F. Supp. 2d at 428-29; J.N., 2008 WL 4501940, at *3-*4; but see A.A. v. Walled Lake Consol. Schs., 2017 WL 2591906, at *6-*9 [E.D. Mich. June 15, 2017] [considering the question of the "potential mootness of a claim for declaratory relief"]). Administrative decisions rendered in cases that concern such issues that arise out of school years since expired may no longer appropriately address the current needs of the student (see Daniel R.R. v. El Paso Indep. Sch. Dist., 874 F.2d 1036, 1040 [5th Cir. 1989]; Application of a Child with a Disability, Appeal No. 07-139; Application of the Bd. of Educ., Appeal No. 07-028; Application of a Child with a Disability, Appeal No. 06-070; Application of a Child with a Disability, Appeal No. 04-007).

However, a claim may not be moot despite the end of a school year for which the student's IEP was written, if the conduct complained of is "capable of repetition, yet evading review" (see Honig v. Doe, 484 U.S. 305, 318-23 [1988]; Toth, 720 Fed. App'x at 51; Lillbask, 397 F.3d at 84-85; Daniel R.R., 874 F.2d at 1040). The exception applies only in limited situations (City of Los Angeles v. Lyons, 461 U.S. 95, 109 [1983]), and is severely circumscribed (Knaust v. City of Kingston, 157 F.3d 86, 88 [2d Cir. 1998]). It must be apparent that "the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration" (Murphy v. Hunt, 455 U.S. 478, 482 [1982]; see Knaust, 157 F.3d at 88). Many IEP disputes escape a finding of mootness due to the short duration of the school year facing the comparatively long litigation process (see Lillbask, 397 F.3d at 85). Controversies are "capable of repetition" when there is a reasonable expectation that the same complaining party would be subjected to the same action again (Weinstein v. Bradford, 423 U.S. 147, 149 [1975]; Toth, 720 Fed. App'x at 51; see Hearst Corp., 50 N.Y.2d at 714-15). To create a reasonable expectation of recurrence, repetition must be more than theoretically possible (Murphy, 455 U.S. at 482; Russman v. Bd. of Educ. of Enlarged City Sch. Dist. of City of Watervliet, 260 F.3d 114, 120 [2d Cir. 2001]). Mere speculation that the parties will be involved in a dispute over the same issue does not rise to the level of a reasonable expectation or demonstrated probability of recurrence (Russman, 260 F.3d at 120; but see A.A.,

2017 WL 2591906, at *7-*9 [finding that the controversy as to "whether and to what extent the [s]tudent can be mainstreamed" constituted a "recurring controversy [that] will evade review during the effective period of each IEP for the [s]tudent"]; see also Toth, 720 Fed. App'x at 51 [finding that a new IEP that did not include the service requested by the parent established that the parent's concern that the prior IEP would be repeated was not speculative and the "capable of repetition, yet evading review" exception to the mootness doctrine applied]). Generally, courts have taken a dim view of dismissing a Burlington/Carter reimbursement case as moot because all of the relief has been obtained through pendency (see, e.g., New York City Dep't of Educ. v. S.A., 2012 WL 6028938, at *2-*3 [S.D.N.Y. Dec. 4, 2012]).

Here, as summarized above, the student's placement for the pendency of this proceeding was established by the IHO's interim decision, dated November 25, 2020, which in turn found that, based on the parties' agreement, pendency lay in the May 2019 interim decision that arose from the 2018-19 proceeding and consisted of five hours of individual SETSS per week, as well as counseling and speech-language therapy services (IHO Ex. II at pp. 3, 6-7; see Tr. pp. 27-28; Parent Ex. B). In addition, in his final decision, the IHO indicated that AIM was entitled to payment and that the district's obligation to pay for the SETSS had been established in the interim decision on pendency (IHO Decision at p. 14). The parent alleges that "[u]pon information and belief," the district "has implemented" the November 2020 interim decision on pendency by funding the parent's "chosen provider at the rate they charge because [the district] has no other provider available and no other way to implement the pendency order" (Answer to Cross-Appeal ¶ 3). Absent evidence to substantiate the parent's allegations asserted "[u]pon information and belief," this appeal cannot be dismissed as moot, particularly given the courts' views on dismissing a reimbursement case as moot based on pendency and the likelihood of the controversy reoccurring. Accordingly, I decline to dismiss the appeal as moot.

B. May 2020 IESP

Turning to the merits, the parent argues that the IHO erred in finding that the May 2020 CSE's recommendation for SETSS at a frequency of three periods weekly, along with counseling services, was sufficient to meet the student's needs.

In order to determine whether the recommendation for three periods of SETSS per week was sufficient to meet the student's needs, a discussion of the student's present levels of performance and needs at the time of the May 2020 CSE meeting is necessary.

According to a prior written notice dated June 4, 2020, the May 2020 CSE considered a May 16, 2019 social history, a September 18, 2019 psychoeducational report, an October 1, 2019 classroom observation, a December 26, 2019 neuropsychological report, and a May 19, 2020 parent interview (Dist. Ex. 4 at p. 1).¹⁰ According to the CSE attendance sheet, attendees at the

¹⁰ The September 2019 psychoeducational report as well as the December 2019 neuropsychological report are included in the hearing record; however, the other documents noted on the prior written notice are not included in the hearing record (see Dist. Exs. 2 at pp. 1-4; 3 at pp. 1-6; 4 at p. 1). The present levels of performance portion of the May 2020 IESP includes information from the 2019 psychoeducational and neuropsychological reports (compare Dist. Ex. 1 at pp. 1-3, with District Ex. 2 at pp. 3-4, and Dist. Ex. 3), but also includes information from a "SETSS progress report" that is not in the hearing record and is not listed in the prior written notice as a report

May 2020 CSE meeting included a district related service provider/special education teacher, a district general education teacher, the parent, and a district school psychologist who also served as the district representative, all whom participated by telephone (Dist. Ex. 1 at pp. 9-10).

The May 19, 2020 IESP indicated that the student attended fourth grade at the nonpublic school and that the parent had declined provider/school participation and no current school progress reports were available (Dist. Ex. 1 at p. 1).¹¹ The IESP noted that, according to the parent, the student received SETSS but inconsistently and, further, his attendance at school was "not the greatest" because of his behavior issues (*id.*). Further, the IESP reflected the parent's view, based on the neuropsychological evaluation report, that, if the student continued to have behavior issues, "they should follow up with medication and speak to a psychiatrist" (*id.*). In addition, the IESP noted that the student presented with some anxiety and had been "seeing someone in school" with whom the student "did not click" and the parent's view that "it was not helping with his issues" (*id.*). The parent indicated that she would keep the May 2020 CSE informed once a speech evaluation/report was made available (*id.*).¹²

The May 2020 IESP included information about the student from the 2019 neuropsychological evaluation, including that the student had been experiencing academic difficulties and displaying aggressive and manipulative behaviors and that cognitive testing showed overall function to be intact with the student performing in the average range on most measures of processing speed, visual-spatial abilities, fluid reasoning, and working memory (Dist. Ex. 1 at p. 1; *see* Dist. Ex. 2 at p. 3). According to the IESP, the neuropsychological evaluation reported that the student's executive function was largely within normal limits, that symptoms of anxiety as well as difficulty sustaining attention were noted throughout the testing session, and that, while the student's overall cognitive profile should be robust enough to support his academic function, he was still facing challenges in that realm (*id.*). The IESP reported the evaluator's view that, in light of the student's history of requiring language therapy as a young child, as well as supplemental tutoring when learning to read, it was likely that there was an underlying language deficit that was not fully addressed that was having an impact on the student's ability to perform well academically (*id.*). Additionally, the IESP reflected the evaluator's report that the student's symptoms of anxiety and attention deficits made it more difficult for him to focus and stay on task in the classroom, further compounding his academic difficulties, and that the interaction of the student's frustration in the classroom setting combined with attentional issues, anxiety, as well as suspected language deficits, led him to act in an aggressive and disruptive manner at times and demonstrate difficulty with self-regulation (*id.*).

used in the CSE's decision-making (*see* Dist. Exs. 1 at pp. 1-4; 4 at p. 1).

¹¹ The May 2020 IESP noted that no current progress reports were available; however, the IESP described student reading, writing, mathematics, and social skills based on a "SETSS Progress Report" (Dist. Ex. 1 at pp. 1-3). A SETSS progress report was not included in the hearing record.

¹² According to the district special education teacher, the district agreed to fund "an independent speech evaluation, which was never completed" because the parent had a difficult time finding an evaluator (Tr. p. 62). The district special education teacher stated that the district offered to conduct the evaluation or "contract[] it out for her" but asked the parent "to put it in writing" (Tr. pp. 62, 89).

The IESP also included a summary of the student's needs according to a SETSS progress report, including that, with respect to reading, the student was very easily motivated by tangible awards and "read a lot if encouraged by a reward" (Dist. Ex. 1 at p. 1). In addition, the IESP noted the SETSS provider's view that the student needed much training to help reach his grade level and that this was due to the student not getting the full attention he needed in class in order for him to focus, learn, and show his best capabilities, but also somewhat due to the student's behavior which made him unable to focus (*id.*). The IESP stated the SETSS provider's opinion that "[l]ots of practice and more individualized instruction" would help the student read at an age-appropriate level (*id.*). With respect to writing skills, the IESP indicated that, according to the SETSS progress report, the student demonstrated "a weakened ability to write," identified and used nouns, verbs, and transition words in a sentence, and often got distracted and confused when orally transcribing what words he wanted written, causing his written task to be incomprehensible (*id.*). In addition, the IESP reported information from the progress report that the student demonstrated mathematics skills at a beginning of third grade level and was working on subtracting 2-digit numbers and multiplying 2-digit numbers (*id.* at p. 2).

The May 2020 IESP included results of cognitive and academic standardized testing conducted in June 2018 and noted that the student's full-scale IQ was in the low average range (Dist. Ex. 1 at p. 2).¹³ In addition, the IESP indicated that the student's verbal comprehension was in the borderline range; fluid reasoning as well as working memory were in the low average range; and visual-spatial and processing speed tested in the average range (*id.*). With respect to the student's results on academic testing, the IESP noted that the student's performance in math fluency was in the very low range; reading comprehension, word reading, pseudoword reading, spelling, addition, subtraction, and basic reading were in the low range; numerical operations was in the below average range; and multiplication was in the average range (*id.*).¹⁴

With respect to the student's academic achievement, functional performance, and learning characteristics, the May 2020 IESP included information from a 2018 psychoeducational evaluation and stated that the student was able to communicate in English, although his sentence structure reflected the fact that he thought in Yiddish and then translated into English (Dist. Ex. 1 at p. 2).¹⁵ The IESP stated that the psychologist believed the student's foundational academic skills, as well as receptive language skills, were significantly weaker than "[the student] let[] on" and that a more comprehensive examination of language and communication skills could be

¹³ Although the IESP indicated that testing results and the psychological narrative were taken from a June 2018 psychological evaluation, the cognitive testing results and narrative are consistent with the September 2019 psychological evaluation report (compare Dist. Ex. 1 at p. 2, with Dist. Ex. 3 at pp. 2-3). The June 2018 academic testing results reflected in the IESP are slightly different than the results included in the September 2019 psychological evaluation report (compare Dist. Ex. 1 at p. 2, with Dist. Ex. 3 at pp. 4-5). Notably, the June 2018 results indicated that the student's math fluency was very low and his basic reading was low, while the September 2019 testing results indicated that the student's math fluency was low and his basic reading very low (compare Dist. Ex. 1 at p. 2, with Dist. Ex. 3 at pp. 4-5).

¹⁴ In another section of the May 2020 IESP, the student's basic reading composite was reportedly in the very low range (compare Dist. Ex. 1 at p. 2, with Dist. Ex. 1 at p. 4).

¹⁵ As noted above, this narrative is consistent with information found in the September 2019 psychological evaluation (Dist. Ex. 3 at pp. 2, 4).

considered (id.). Further, the IESP noted that, according to a "Psych Report," the student was cooperative and responded appropriately to all he was asked to do, understood task demands and completed all the work appropriately, and tried to solve difficult items and demonstrated patience and perseverance (id.). The IESP indicated that the parent expressed concerns about the student's behavior and his English reading and writing and that the student was "not performing well in his Yiddish studies because of his behavior" (id.).

With respect to social development, the May 2020 IESP indicated that, according to a "Psych report," the mother had reported "a great deal of difficulty with [the student's] behavior," the principal of the student's nonpublic school reported that staff had tried many different programs, strategies, and approaches with the student, the principal expressed he was highly alarmed by the student's behaviors, and the principal and teacher from the nonpublic school were highly interested in helping the student as well as helping the student's family learn how to manage the student's oppositional and defiant stance (Dist. Ex. 1 at p. 3). Next, the IESP included information from a SETSS progress report that the student's social behavior was the main cause for him being behind in his classes academically, that the reason for him not being successful in school was his absences, and that "authority, including his parents" were "really afraid of him" (id.). Further, according to the IESP, the progress report stated that the student needed to be taught "ways to overcome his struggles between peers, parents, and friends" (id.). The IESP included information from the September 2019 psychoeducational evaluation report that none of the student's defiance or oppositional behavior was present during an evaluation, which the evaluator opined may have been due to the fact that the student appeared to do well in novel settings (Dist. Ex. 1 at p. 3; see Dist. Ex. 3 at p. 2). Further, the May 2020 IESP indicated that the parent reported that the student had missed school days and had not had the same exposure as the other children which had affected his behavior (Dist. Ex. 1 at p. 3). Additionally, the parent reported that the family was seeing a psychiatrist privately but not often and that the student had been seen once per week starting after the holidays (id.). The IESP included information from the parent that the student did not want to go to school or that he complained that his stomach hurt and that he missed a lot of days of the school towards the end of the year last school year (id.). In addition, the IESP indicated that as per a neuropsychological evaluation report, the student engaged in private therapy to help with developing regulatory skills and that the parent requested an increase in counseling (id.). According to the IESP, a "Psych" report recommended that programs be set in place to effectively manage the student's challenging behaviors (id.).

The May 2020 IESP indicated that, with respect to physical development, the student was in good health but had started to have tics in his neck (Dist. Ex. 1 at p. 3). The IESP noted that, if the student's attention continued to be an issue, that the parents should consult his doctor to discuss pharmacological options (id.). Additionally, the IESP indicated that the student's visual-spatial skills as well as his processing speed skills were well developed, that the student enjoyed outdoor physical activities, and that no physical development concerns were reported by the parent (id.).

As supports for the student's management needs, the May 2020 CSE recommended strategies including praise and encouragement/positive feedback, pre-warnings, behavioral incentives, breaks, positive reinforcement, focus on strengths, repetition, provision of models, prompts, review/model, tabletop activities, scaffolded lessons, differentiated instruction, multi-sensory activities, use of manipulatives, and requests for feedback to ensure understanding (Dist. Ex. 1 at p. 4). In addition, the IESP indicated that, as per a neuropsychological report, the CSE

recommended that language laden material should be broken down into manageable chunks, figurative language should be avoided when presenting information to the student, specific language should be used, and text translations should be direct and not context dependent (id.).

Regarding the effect of the student's needs on involvement and progress in the general education curriculum, the May 2020 IESP included information from a "Psych" report that the student struggled with reading in both languages, and obtained a basic reading composite within the very low range, performed within the low range on addition and subtraction, and presented with foundational academic skills, receptive language skills, and social/emotional skills below expected levels for his age (Dist. Ex. 1 at p. 4).

The May 2020 CSE developed annual goals that targeted increasing the student's cognitive skills and his ability to attend during lessons, complete tasks, and follow directions (Dist. Ex. 1 at p. 5). In addition, the CSE included annual goals that targeted the student's need to improve reading skills, to increase expressive organization skills, to improve decoding and vocabulary skills, and to increase reasoning and inferential skills (id.). Other annual goals targeted the student's need to build on strategies to deal with anxiety and build on improving communication of emotions as well as to follow class rules, respond in a cooperative, non-disruptive manner during class activities, and to follow teacher directions (id.). Additional goals targeted the student's need to improve his understanding of mathematical concepts and operations, to improve math problem solving skills with respect to solving two-step word problems, and to improve the student's math skills to a fourth-grade level (id. at p. 6).

In addition to the May 2020 CSE's recommendation for the student to receive three periods of SETSS in a group per week, the CSE recommended the student receive two 30-minute individual sessions of counseling per week, with Yiddish being the language for both services (Dist. Ex. 1 at p. 7). A June 2020 prior written notice indicated that the May 2020 CSE considered as another option for the student a general education placement but that this was rejected due to the parent's placement of the student in a nonpublic school, at her own expense, and her seeking equitable services from the district (Dist. Ex. 4 at p. 2).

The parent testified that she believed the student needed between five and eight hours of SETSS per week and that she shared her view with the CSE but the district members of the committee "didn't want to . . . hear of it" (Tr. pp. 122-23). The district special education teacher who attended the May 2020 CSE meeting testified that the district had previously considered the student's eligibility and had "not give[n] services" but that, subsequently, she observed the student and "noticed there was a little something off academically" (Tr. pp. 61-62; see Dist. Ex. 1 at p. 9). She testified that the CSE put SETSS and counseling in place because the student's social/emotional and behavioral needs were "consistently" highlighted by the staff at the nonpublic school, the evaluation reports, and the parent (Tr. p. 62). She seemed to acknowledge that the parent "asked for an increase" but did not specify that she was speaking of the frequency of SETSS (see id.). In addition, the special education teacher noted that the student had only been exposed to the English language for two years in formal academics and that, academically, he had not been formally exposed to all facets of education that he would need to be successful on standardized testing such as that administered as part of the psychoeducational and neuropsychological evaluations that the CSE considered (Tr. pp. 66; see also Tr. pp. 74-77). It appears, therefore, that, according to the teacher, the CSE did not believe that the student required more SETSS based on

a view that the evaluative information before it did not accurately represent the student's needs (see Tr. pp. 66-67). However, there is no indication in the hearing record that the members of the CSE sought a bilingual evaluation of the student, but, instead, as summarized above, the CSE relied on the neuropsychological and psychoeducational evaluations to describe the student's present levels of performance in the IESP.

The teacher also opined that the student "should be getting speech" and that "everything that's being written" reflected that the student exhibited "a speech-language vocabulary delay as well" but indicated that "with no evaluation in place," the CSE could not "determine that" (Tr. pp. 62-63, 90). As noted above, the CSE was purportedly waiting for the parent to obtain an independent speech-language evaluation (see Tr. pp. 62, 89); however, it is the district's obligation to evaluate the student in all areas of suspected disability (see 8 NYCRR 200.4[b][3]) and the district may not rely on a parent's stated intentions to obtain an IEE to avoid this requirement. The special education teacher also testified that, according to the "evaluation results" from the neuropsychological report set forth in the May 2020 IESP, the student's "underlying language deficits" had not been addressed, which was "impacting [the student's] ability to perform academically" in that the "suspected language deficits [were] causing him to act aggressive and destructive" (Tr. p. 68). The special education teacher noted several aspects of the evaluative information that she viewed as supporting the student's need for speech-language therapy (i.e., the student's scores on tests evaluating verbal and reading comprehension), which tends to undermine her original statement that the CSE could not determine whether the student would benefit from the service without a formal speech-language evaluation (see Tr. pp. 67-68). The teacher then concluded that "SETSS [wa]s not going to rectify [the student's] acting out and him not wanting to do the work" and that, therefore, the CSE felt the recommendations were appropriate (Tr. p. 69).

Overall, the district did not offer a reasonable explanation for its recommendations and failed to meet its burden to show that the May 2020 CSE's recommendations were reasonably calculated to enable the student to receive educational benefit, particularly in light of the lack of a recommendation for speech-language therapy or some other service to address his aggressive and destructive behaviors, which the district special education teacher conceded the student required (see Tr. pp. 62-63, 68). As such, the IHO's finding that the May 2020 IESP was appropriate is not supported by the evidence in the hearing record.

C. Unilaterally-Obtained SETSS

Having found that the district failed to meet its burden to show that the IESP was appropriate, I next turn to the parent's requested relief. However, first, an additional comment about the IHO's final and binding determination that the district did not implement the student's IESP is warranted in order to provide a framework for the relief sought. In particular, the IHO found that, although the State Education Law places the responsibility for implementation of the services set forth in an IESP on the district, "at no point during the impartial hearing did the district offer any evidence that it attempted to select or assigned a SETSS provider to deliver the services required by the student's IESP" (IHO Decision at p. 14). The IHO seemed to find that this case was of the variety in which the district's initial failure to provide SETSS compelled the parent to engage in self-help and undertake the untenable task of determining how much services mandated by the IESP should cost. To the extent this is the case, such a de facto delegation from the district to the parent of the obligation to find a SETSS provider to implement the IESP at an acceptable rate is

manifestly unreasonable because it is the district's nondelegable responsibility to ensure that services are delivered, whether in accordance with an IESP, an IEP, or pursuant to the stay put rule, and cost is not a permissible reason to defer or avoid the obligation to implement a student's services (see Application of a Student with a Disability, Appeal No. 20-087; Educ. Law § 3602-c[2][a]; [7][a]-[b] [providing that "[b]oards 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" and that the cost for services is recoverable from the district of residence, either directly with the consent of the parent for a district of location to share information or through the Commissioner of Education and the State Comptroller]).¹⁶

While districts 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, districts 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], cert. denied sub nom., Paulino v. NYC Dep't of Educ., 2021 WL 78218 [U.S. Jan. 11, 2021], reh'g denied sub nom., De Paulino v. NYC Dep't of Educ., 2021 WL 850719 [U.S. Mar. 8, 2021]; see Florence Cty. Sch. Dist. Four v. Carter, 510 U.S. 7, 14 [1993] ["Parents' failure to select a program known to be approved by the State in favor of an unapproved option is not itself a bar to reimbursement."]). Thus, as a practical matter this kind of dispute can really only be effectively examined using a Burlington/Carter unilateral placement framework because the administrative due process system was not designed to set rate-making policies for what has grown into a completely unregulated cottage industry of independent special education teachers that parents within the New York City Department of Education are increasingly reliant upon, an industry that is not authorized by the State in the first place.¹⁷ The attempts that I have seen thus far that do not use a Burlington/Carter analysis have tended to lead to chaos.

Accordingly, the parent's request for district funding of five hours per week of SETSS must be assessed under this framework; namely, having found that the district failed to offer or provide appropriate equitable services, the issue is whether the five hours of SETSS obtained by the parent from AIM constituted 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

¹⁶ Parents are required to cooperate with the provision of services by producing a child for services properly arranged for by the district.

¹⁷ The State Education Department only permits local educational agencies to contract for the use of teachers and personnel in private settings that have been approved by the Commissioner of Education, and upon such approval the State's rate setting unit routinely addresses the issue of establishing local rates that districts may pay such private entities (see <http://www.oms.nysed.gov/rsu/>).

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.¹⁸

Here, the appropriateness of the SETSS delivered to the student by AIM during the 2020-21 school year is not seriously in dispute in this matter as it is the same type of service recommended on the May 2020 IESP. Accordingly, I next turn to the questions of the parent's financial obligation, whether the private SETSS were excessive in frequency or cost, and the parent's ability to pay.

1. Equitable Considerations—Excessiveness of Services or Rate

The parent asserts that the IHO erred in ordering district funding of only three periods per week of SETSS delivered by AIM rather than five hours and in reducing the rate for such services to \$130 per hour instead of the \$165 per hour that the agency charged.

The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]; L.K. v. New York City Dep't of Educ., 674 Fed. App'x 100, 101 [2d Cir. Jan. 19, 2017]).

Among the factors that may warrant a reduction in tuition under equitable considerations is whether the frequency of the services or the rate for the services were excessive a (see E.M. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014] [noting that whether the amount of the private school tuition was reasonable is one factor relevant to equitable considerations]). The IHO may consider evidence regarding whether the rate charged by the private agency was unreasonable or regarding any segregable costs charged by the private agency that exceed the level

¹⁸ Although not raised on appeal, I note that the parent did not provide the district with a 10-day notice letter. Indeed, reimbursement for a unilateral placement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to their removal of the student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). While the parent's request for relief is denied on other grounds, the parent should be advised going forward of the purpose of the required 10-day notice letter and the traditionally equitable context in which such letter is considered (see S.W. v New York City Dep't of Educ., 646 F. Supp. 2d 346, 361-63 [S.D.N.Y. 2009] [finding that parents of students enrolled in private school were not exempted from 10-day notice requirements]).

that the student required to receive a FAPE (see *L.K. v. New York City Dep't of Educ.*, 2016 WL 899321, at *7 [S.D.N.Y. Mar. 1, 2016], *aff'd in part*, 674 Fed. App'x 100 [2d Cir. Jan. 19, 2017]).

Here, while the district defended the May 2020 CSE's recommendation for three periods per week of SETSS, it did not argue that five hours was excessive or even inappropriate. Moreover, the hearing record includes a December 2020 special education progress report completed by the student's teacher from AIM that delivered the student's SETSS during the 2020-21 school year, which states that five hours per week of SETSS was not enough to address the student's needs and that the student would benefit from up to ten hours per week, including push-in services "to advance socialization and maximize peer modeling" and pull-out services "for specific skill-based instruction in academic and social/behavioral skills" (Parent Ex. G at pp. 1, 3). While perhaps ten hours would be unnecessary for the student (particularly if the student also received speech-language therapy and counseling services), the evidence in the hearing record does not demonstrate that the five hours weekly of SETSS for which the parent seeks district funding was excessive.

As to the rate, the hearing record does not include evidence that the rate charged was excessive. Although the district expressed its objection to the rate charged by AIM, it did not offer any evidence of a reasonable rate for SETSS to compare to the rate of \$165 per hour. Accordingly, there is no basis for a finding that the rate of \$165 was excessive.

2. Parent's Financial Obligation

As to the parent's financial obligation to AIM for the costs of the SETSS delivered, the district argues that the "services agreement" between the parent and AIM was not a contract. On July 14, 2020, the parent executed a "services agreement" with AIM for the delivery of 1:1 services to the student between July 15, 2020 and June 30, 2021 (Parent Ex. H). As the district notes, a representative from AIM did not sign the agreement, however, the signature of the parent—the party to be bound if enforcement were to be sought—is sufficient to create an enforceable agreement. The district also takes issue with the services agreement to the extent it does not specify the amount of SETSS that would be delivered. Indeed, the agreement states that "[t]he amount of service hours that will be provided for [the student] will be decided by the parent, AIM, the child's supervisor and the provider servicing [the student]" (see Parent Ex. H). The Second Circuit Court of Appeals has held that some blanks that the parties did not fill in in a written agreement would not render an entire contract void and indicated that in the case before it that "the contract's essential terms—namely, the educational services to be provided and the amount of tuition—were plainly set out in the written agreement, and we cannot agree that the contract, read as a whole, is so vague or indefinite as to make it unenforceable as a matter of law" (*E.M.*, 758 F.3d at 458). Likewise, in the present matter, the educational services (SETSS) to be delivered are specified and the rate for the services is identified (\$165 per hour) (Parent Ex. H). Further, the evidence in the hearing record shows that AIM performed its obligations under the agreement by providing the student with SETSS during the 2020-21 school year. Specifically, the evidence shows that AIM provided the student with five hours of SETSS per week during summer 2020 and continued to

deliver SETSS to the student for the 10-month portion of the 2020-21 school year (Tr. pp. 151-52; Parent Ex. F at p. 1).¹⁹

Finally, as the district notes, the parent testified that she believed the district would pay AIM for the SETSS services delivered and that she would not owe the agency anything (Tr. p. 156). The agreement states that: "Compensation and reimbursement shall be paid from the New York City Department of Education to AIM Further for services provided. However, [the parent] agrees that if the [district] does not pay or pay in complete the services to AIM Further, the parent is fully responsible for the cost of services to AIM Further Inc." (Parent Ex. H). Even assuming that the parent's testimony was inconsistent with the agreement, the parent's misunderstanding could not alter such terms or relieve her from being held financially responsible for the costs of the services (see E.M., 758 F.3d at 456-57 [faulting the IHO and the SRO for going beyond the written contract and relying on extrinsic documentary evidence that suggested that the parent was not obligated to pay the private school]).

Based on the foregoing, the evidence in the hearing record supports a finding that the parent was financially obligated to fund the costs of the SETSS delivered to the student by AIM during the 2020-21 school year and the district's arguments to the contrary are without merit.

3. Direct Funding

As a final matter, the district argues that, if it is found that the district must fund the costs of the SETSS delivered by AIM, it should not be required to directly pay AIM.

With regard to fashioning equitable relief, courts have determined that it is appropriate under the IDEA to order a school district to make retroactive tuition payment directly to a private school where: (1) a student with disabilities has been denied a FAPE; (2) the student has been enrolled in an appropriate private school; and (3) the equities favor an award of the costs of private school tuition; but (4) the parents, due to a lack of financial resources, have not made tuition payments but are legally obligated to do so (Mr. and Mrs. A. v. New York City Dep't of Educ., 769 F. Supp. 2d 403, 406 [S.D.N.Y. 2011]; see E.M., 758 F.3d at 453 [noting that "the broad spectrum of equitable relief contemplated [by] the IDEA encompasses, in appropriate circumstances, a direct-payment remedy" [internal quotation marks omitted]). The court held that "[w]here . . . parents lack the financial resources to 'front' the costs of private school tuition, and in the rare instance where a private school is willing to enroll the student and take the risk that the parents will not be able to pay tuition costs—or will take years to do so—parents who satisfy the Burlington factors have a right to retroactive direct tuition payment relief" (Mr. and Mrs. A., 769 F. Supp. 2d at 428; see also A.R. v. New York City Dep't of Educ., 2013 WL 5312537, at *11 [S.D.N.Y. Sept. 23, 2013]).

¹⁹ According to an affidavit from an administrator from AIM, the agency provided the student with ten hours per week of SETSS from September 15, 2020 through June 20, 2021 (Parent Ex. F); however, the parent testified that the student received five hours per week of SETSS as of September 2020 (Tr. pp. 140-41). A December 2020 progress report completed by the student's teacher from AIM reflected that the student's "[m]andate" was five hours per week but that he received between five and ten hours per week (Parent Ex. G at p. 1). On appeal, the parent only seeks district funding of the costs of five weekly hours of SETSS.

Here, since the parent selected AIM as the agency to deliver the student's SETSS, and her financial status is at issue, it is the parent's burden of production and persuasion with respect to whether she had the financial resources to "front" the costs of the services and whether they are legally obligated for the student's tuition payments (Application of a Student with a Disability, Appeal No. 12-036; Application of a Student with a Disability, Appeal No. 12-004; Application of the Dep't of Educ., Appeal No. 11-130; Application of the Dep't of Educ., Appeal No. 11-106; Application of a Student with a Disability, Appeal No. 11-041).

As discussed above, the parent has established a financial obligation for the costs of the SETSS delivered to the student (see Parent Ex. H). However, according to an affidavit from the AIM administrator, the parent has not made any payments (Parent Ex. F). Here, there is no evidence in the hearing record regarding the parents' financial resources, such as a copy of a recent tax return or evidence regarding the parent's assets, liabilities, income, or expenses. Given the lack of information in the hearing record regarding the parent's financial resources, I decline to order the district to directly fund the student's tuition. However, to the extent the district is required to fund the services delivered by AIM pursuant to pendency as the IHO found (which finding the district did not appeal), the district is required to directly pay AIM. As to the remainder, the district will be required to reimburse the parent for the costs of five hours per week of SETSS delivered by AIM during the 2020-21 school year upon the parent's submission of proof of payment.

VII. Conclusion

As discussed above, the evidence in the hearing record does not support the IHO's determination that the May 2020 IESP offered the student appropriate services on an equitable basis. Moreover, the IHO's finding that the district failed to implement the student's SETSS for the 2020-21 school year is final and binding on the parties. Given the determination that the district failed to provide the student with appropriate services on an equitable basis, the IHO erred in ordering the district to fund three periods of SETSS per week at a rate of \$130 per hour rather than the five hours of SETSS per week at the rate of \$165 per hour for which the parent sought district funding, absent a finding that the frequency of or rate for the unilaterally-obtained services was excessive. Further, as the hearing record supports a finding that the parent was financially obligated to AIM and that neither the amount of services nor the rate charged by AIM were excessive, the parent is entitled to district funding of the costs of five hours per week of SETSS delivered to the student by AIM during the 2020-21 school year at the rate of \$165. Nevertheless, as there is insufficient basis in the hearing record to support a finding that the parent could not afford to front the costs of the services, the district is ordered to reimburse the parent, rather than directly pay AIM, for the costs of the services, upon receipt of proof of payment.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision, dated March 25, 2021, is modified by reversing that portion which ordered the district to directly pay AIM for the costs of three periods per week of SETSS delivered to the student during the 2020-21 school year at the rate of \$130.

IT IS FURTHER ORDERED that the district shall reimburse the parent for the costs of five hours per week of SETSS delivered to the student by AIM during the 2020-21 school year at the rate of \$165 upon receipt of proof of payment.

Dated: **Albany, New York**
 July 22, 2021

CAROL H. HAUGE
STATE REVIEW OFFICER