The University of the State of New York

The State Education Department
State Review Officer
www.sro.nysed.gov

No. 21-138

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 petitioner, by Shaya M. Berger, Esq.

Judy Nathan, Interim Acting General Counsel, attorneys for respondent, by Nathaniel Luken, 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 declined to award the parent all of the relief requested for the denial of equitable services by respondent (the district) for the 2019-20 school year. The 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 programing 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 evidence in the hearing record is sparse with respect to the student's educational history. Reportedly, the student "attended a special education program for several years" (Dist.

Ex. 4 at p. 1; see Parent Ex. C at p. 2). During the impartial hearing, the parent indicated that, prior to the 2019-20 school year, the student attended a nonpublic specialized school and she "believe[d]" he had an "IEP" (i.e., an individualized education program) (Tr. pp. 64-65). According to the hearing record, for the 2019-20 school year, the student was parentally placed at a general education parochial school (Tr. pp. 66-67; Dist. Exs. 1; 4 at p. 1).

In a letter to the district dated October 4, 2019, the parent indicated that the student "was getting service[s]" pursuant to an "IEP" and that she "would like to switch to IESP" for the 2019-20 school year since the student was attending a parochial school (Dist. Ex. 1). In addition, the parent requested that the student be evaluated for occupational therapy (OT) (id.).

The district conducted a psychoeducational evaluation of the student on November 27, 2019, the results of which were set forth in a report dated December 8, 2019 (Dist. Ex. 4). According to the evaluation report, the student was "referred for an assessment of his intellectual strengths and weaknesses and overall social-emotional functioning to determine need for support services" (id. at p. 1).

A CSE convened on January 13, 2020, found the student eligible for special education as a student with a speech or language impairment, and developed an IESP for the student with a projected implementation date of January 28, 2020 (Dist. Ex. 2 at p. 1).[1] The CSE recommended that the student receive five periods per week of group special education teacher support services (SETSS) in a separate location with the service to be provided in Yiddish, as well as related services including two 30-minute sessions of individual speech-language therapy per week in Yiddish and one 30-minute session of group counseling per week in Yiddish (id. at p. 9).

In a prior written notice dated January 15, 2020, the district summarized the program recommended by the January 2020 CSE (Dist. Ex. 3). The prior written notice also noted that an IESP was being provided because the parent had indicated she was placing the student in a non-public school, at her expense, and was seeking equitable services (id. at p. 1).

The hearing record includes a statement signed by the student's father, indicating that he reached out to five SETSS providers between January 15 and January 19, 2020 and they were either not available or had a full case load (Parent Ex. E).

On January 28, 2020, the district issued an authorization for the parent to locate an independent SETSS provider (Parent Ex. B). The form directed the parent to a website for a list of eligible providers and set forth contact information for someone with the district that the parent could contact to assist in locating a provider (id. at p. 1). The authorization form indicated that SETSS could be provided for a maximum of five hours per week "and could not continue beyond a total of 180 hours, or beyond 6/30/2020" (id.).

On the same day, January 28, 2020, the parent signed a contract with Succeed, Inc. (Succeed) for the provision of SETSS to the student for the 2019-20 school year (Parent Ex. D). The contract specified the rate for SETSS as $175 per hour and indicated that if the district did not

[1] The student's eligibility for special education as a student with a speech or language impairment is not in dispute (see 34 CFR 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

pay for the provision of the services, the parent "agree[d] to pay the fees associated with the provision of services" (id.).

According to an affidavit sworn to by a representative from Succeed, a teacher with the agency provided the student with ten hours per week of SETSS beginning January 28, 2020 through June 30, 2020, consisting of 18 weeks of services for a total of 180 hours of services (Parent Ex. G).

A. Due Process Complaint Notice

In a due process complaint notice dated May 4, 2020, the parent alleged that the student was recommended for five hours per week of SETSS and received an authorization form to receive a total of 180 hours of SETSS for the 2019-20 school year but that the parent had not been not able to locate a SETSS provider to work with the student at the rate allowed by the district (Parent Ex. A at p. 1). According to the parent, the district did not provide SETSS to the student and the parent was able to locate a SETSS provider, but "at a rate higher than the standard [district] rate" (id.). The parent also alleged that the district failed to provide the student with a FAPE in that it did not hold a timely CSE meeting, develop a timely education program, or provide a special education provider (id.).

As relief, the parent requested five periods per week of bilingual Yiddish SETSS at an enhanced rate for the entire 2019-2020 school year and that the district be directed to fund those services by directly paying the agency that had been providing them to the student (Parent Ex. A at p. 2).

B. Impartial Hearing and Impartial Hearing Officer Decision

The impartial hearing convened on October 2, 2020 and concluded on April 26, 2021 after five days of proceedings (see Tr. pp. 1-77).[2] After entering the parties' exhibits into the record, the IHO and counsel for the parties attempted to clarify the issues to be addressed (Tr. pp. 32-46). Upon being asked why the student should receive services from the beginning of the school year, instead of 60 days from the October 4, 2019 letter as argued by the district, counsel for the parent indicated the parent did not understand why it would take seven weeks for the district to conduct the evaluation and then indicated that the parent's October 2019 letter "should be treated as a ten-day notice" (Tr. pp. 41-43). After further discussion, counsel for the parent seemed to agree, but did not yet want to concede, that the correct time frame would be "within 60 days of the referral for review of the student with a disability" (Tr. pp. 45-46). Later during the hearing, the parent's attorney asserted that the request for an IESP was not a referral under which the 60-day timeline would apply but was a request for an amendment to the IEP (Tr. pp. 58-59). The parties were then given the opportunity to present post-hearing briefs on this issue (Tr. pp. 59-60).

[2] At the proceedings held on October 2, 2020, November 30, 2020, January 12, 2021, and March 10, 2021, the parties updated the IHO as to the status of their settlement negotiations and ultimately indicated that settlement discussions had broken down, so a date for the substantive hearing was scheduled and held on April 26, 2021 (see Tr. pp. 1-77).

The parent submitted a post-hearing brief further explaining the position stated by her counsel during the hearing that the October 4, 2019 letter was a request for an amendment of an IEP, such that the 60-day timeline specified in State regulation for a referral for review would not apply (IHO Ex. II). According to the parent, the regulation regarding a referral for review only applied to annual reviews, not to requests to amend an IEP (id.).

The district also submitted a post-hearing brief (IHO Ex. III). In its brief, the district countered the parent's assertions, arguing that the CSE was required to convene annually but could also convene at the request of a parent, for which State regulation provided a 60-day timeline from the referral (id. at p. 1). According to the district, in the October 4, 2019 letter, the parent requested an evaluation of the student, and the compliance date for having an IESP in place for the student was January 28, 2021 (id.). The district also asserted that Succeed's reliance on the 180 hour maximum set forth in the authorization form was in error, as the form explicitly stated a maximum of five hours per week of SETSS; accordingly, the district asserted that the parent was entitled to 100 hours of SETSS—accounting for approximately 20 weeks of school after the issuance of the authorization form (id. at pp. 1-2).

In a decision dated May 12, 2021, the IHO found that the parent was not challenging the program recommended in the January 2020 IESP but that the district had conceded that it failed to implement the January 2020 IESP (IHO Decision at p. 7). Addressing the parties' arguments regarding the timing of the January 2020 CSE meeting, the IHO found that the parent's October 4, 2019 letter was an initial referral and the applicable 60 school day timeline began to run from October 4, 2019 (id.). The IHO found that the district's time for having an IESP in effect was January 14, 2021—two weeks earlier than the date the district argued (id.). The IHO therefore, found the student was entitled to 100 hours of SETSS, computing the amount based on Succeed's affidavit that there were 18 weeks from January 28, 2020 through the end of the school year and adding two weeks (id. at pp. 7-8). The IHO dismissed the parent's argument that the authorization form allowed for a maximum of 180 hours of SETSS, noting that it did not entitle the student to a greater number of hours than were recommended in the IESP (id. at p. 8).

Turning to the SETSS provided to the student by Succeed, the IHO noted that the district did not contest the appropriateness of the services; however, the IHO questioned the validity of the contract the parent entered with Succeed and, considering the questionable validity of the contract, as well as the lack of notice to the district of the parent's intent to secure services from the agency and seek funding from the district, the IHO reduced the rate from the requested $175 per hour, awarding the parent SETSS at the rate of $125 per hour (IHO Decision at pp. 8-9).

IV. Appeal for State-Level Review

The parent appeals. Generally, rather than asserting how the IHO erred in rendering her decision, the parent reiterates the same arguments raised during the impartial hearing and in her post-hearing brief. Initially, the parent asserts that the district should be bound by the 180 hours stated in the SETSS authorization form. Next, the parent contends that the student should have received SETSS for the entire 2019-20 school year because she did not request a "review" by the CSE but only requested an amendment changing the student's program from a special class to SETSS. The parent also contends that, even if she had requested a review by the CSE to develop an IESP, the district was required to have an IEP in place for the student at the start of the school

year, which the district did not prove. Turning to the IHO's reduction in the rate for SETSS from $175 per hour to $125 per hour, the parent asserts that the reduction had no factual or legal basis and must be reversed. More specifically, the parent asserts that the contract and the parent's testimony show that the parent was financially obligated to pay Succeed at the rate of $175 per hour, contrary to the IHO's finding on this point. The parent also objects to the IHO's finding that the parent was required to provide the district with notice of her intention to obtain services from Succeed. The parent requests 180 hours of SETSS for the 2019-20 school year funded by the district at the rate of $175 per hour.

In an answer, the district responds to the parent's allegations and generally argues to uphold the IHO's decision.

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]).[3] "Boards of education of all school districts of the state shall furnish services to students who are residents of this state and who attend nonpublic schools located in such school districts, upon the written request of the parent" (Educ. Law § 3602-c[2][a]). In such circumstances, the district of location's CSE must review the request for services and "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an [IEP]" (Educ. Law § 3602-c[2][b][1]). The CSE must "assure that special education programs and services are made available to students with disabilities attending nonpublic schools located within the school district on an equitable basis, as compared to special education programs and services provided to other students with disabilities attending public or nonpublic schools located within the school district (id.).[4] Thus, under State law an eligible New

[3] 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]).

[4] 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

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. Timing of January 2020 CSE Meeting

As an initial matter, the parent asserts that the CSE should have convened earlier than January 13, 2020 after the parent's October 4, 2019 letter requesting an IESP. More specifically, the parent indicates that because she "was not asking for a review of the special education mandated in [the student's] then IEP, but a change to his program to provide [SETSS] instead of a full-time special education classroom" this should have happened "as soon as possible."[5]

Throughout the hearing and subsequent appeal, neither party appears to have outlined deadlines relevant to a parent's request for an IESP (see Tr. pp. 1-78; IHO Exs. II-III; Req. for Rev.; Answer). As noted above, Education Law § 3602-c—commonly referred to as the dual-enrollment statute—requires parents who seek to obtain educational services for parentally placed students with disabilities to file a written request for such services in the district in which the home 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][a]). The only exception is where a student is initially found eligible for special education after June 1 but before April 1 of the school year at issue, in which instance, the parent must submit a request for equitable services within thirty days after such student is first identified (id.).

Here, the parent's October 4, 2019 request is notably dated well-past the statutory time frame, and, as the parent indicates that the student had an IEP in place prior to her request for an IESP, it does not appear that this is an instance where the student had initially been found eligible for special education after June 1 (see Dist. Ex. 1). Thus, neither the regulatory timelines

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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.).

[5] In addition, the parent contends that, because the district was required to have an IEP in effect at the beginning of the school year but, at the impartial hearing, did not prove the existence of such an IEP, the student should be awarded the program recommended in the January 2020 IESP going back to the beginning of the school year. However, as the parent made no allegation relating to an IEP for the student in her due process complaint notice (see Parent Ex. A), the district had no burden or production or persuasion on this issue at the impartial hearing.

applicable to a CSE annual review of an IEP, nor the provisions specific to amendments of IEPs, are particularly applicable in this circumstance (see 8 NYCRR 200.4[e][1], [g]).[6] In short, the January 2020 CSE was not conducting an annual review after having previously developed an IESP, nor was it considering an amendment to a previously developed IESP. Ultimately, as the district convened a CSE and developed an IESP for the student, the district is bound by the January 2020 IESP (see Application of a Bd. of Educ., Appeal No. 18-088). However, as the district was not required to develop an IESP for the student absent a timely request for the same, any argument that the CSE should have convened earlier in the school year is baseless.

In sum, as the January 2020 CSE developed an IESP for the student and, ultimately, the district conceded that it failed to implement the services mandated therein, the IHO's determination that the student is entitled to district funding of parentally obtained SETSS from January 14, 2020 through the end of the school year shall not be disturbed.[7] However, the parent is not entitled to an award of SETSS to remedy the district's failure to provide the student with equitable services earlier during the 2019-20 school year.

B. Privately Obtained SETSS

As the district conceded that it failed to meet its burden to show that it implemented the January 2020 IESP, I next turn to the parent's requested relief. However, first, an additional comment about the district's failure to implement the January 2020 IEP is warranted as the hearing record indicates that the district delegated the obligation to find a SETSS provider to implement the IESP at an acceptable rate to the parent (see Parent Exs. B; E). This procedure 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]).

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

[6] Regarding the parent's argument that, in her October 4, 2019 letter, she was requesting an amendment to the student's IEP, the letter did not set forth a specific request for SETSS for the student or any other "amendment" (see Dist. Ex. 1). As the parent did not specify the changes she was requesting, it is unclear how this could be considered a request for "making changes to a student's IEP after the annual review ha[d] been conducted" (8 NYCRR 200.4[g][2]) as the parent argues on appeal.

[7] Moreover, the district has not cross-appealed from this finding and, therefore, it has become final and binding on the parties and will not be disturbed (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; 8 NYCRR 279.8[b][4]; 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]).

placement, a process that is essentially the same as the federal process under the 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, 141 S. Ct. 1075 [2021], reh'g denied, 141 S. Ct. 1530 [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.[8]

Accordingly, the parent's request for district funding of the SETSS delivered to the student by Succeed during the 2019-20 school year must be assessed under this framework; namely, having found that the district failed to implement the January 2020 IESP, the issue is whether the SETSS obtained by the parent from Succeed 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 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.

Here, the appropriateness of the SETSS delivered to the student by Succeed 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 January 2020 IESP. However, the IHO did make a determination that, although the parent signed a contract with Succeed, there was no evidence that the agency ever intended to enforce the agreement against the parent as there were no bills or payments for any services. The parent objects to this determination, arguing that the IHO does not have jurisdiction to make this finding as the IHO's decision cannot bind the agency.

The hearing record includes a contract entered into between the parent and Succeed for the delivery of SETSS to the student for the 2019-20 school year at a rate of $175 per hour (Parent Ex. D). The parent testified that Succeed was "holding on the payment" but that she was responsible for paying the cost of the SETSS provided to the student (Tr. p. 68). This is consistent with the

[8] 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/).

terms of the contract, which indicated that, if the district did not pay for the provision of services, the parent "agree[d] to pay the fees associated with the provision of services" (Parent Ex. D). 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. v. New York City Dep't of Educ., 758 F.3d 442, 456-57 [2d Cir. 2014] [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]).

Further, to the extent that the district takes issue with the contract because it does not specify the frequency, duration, or the total amount of SETSS to be provided by the agency, the Second Circuit 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). In the present matter, the contract identifies the educational services to be delivered (SETSS) and the rate for the services ($175 per hour) (Parent Ex. D). Further, the evidence in the hearing record shows that Succeed performed its obligations under the agreement by providing the student with SETSS during the 2019-20 school year (Parent Ex. G).

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 Succeed during the 2019-20 school year and that the IHO erred on this point. Ultimately, however, rather than denying the parent's requested relief based on this finding, the IHO cited it as an equitable consideration that warranted a reduction in the relief awarded. While I do not agree with the IHO's finding regarding the parent's financial responsibility to the agency, here, as the evidence in the hearing records supports other equitable grounds that support the IHO's reduction of the total award sought by the parent, it is unnecessary to disturb the relief ordered by the IHO. It is to such equitable considerations that I next turn.

C. Equitable Considerations

The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16; L.K. v. New York City Dep't of Educ., 674 Fed. App'x 100, 101 [2d Cir. Jan. 19, 2017]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; E.M., 758 F.3d at 461 [identifying factors relevant to equitable considerations, including whether the withdrawal of the student from public school was justified, whether the parent provided adequate notice, whether the amount of the private school tuition was reasonable, possible scholarships or other financial aid from the private school, and any fraud or collusion on the part of the parent or private school]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 840 [2d Cir. 2014] [noting that "[i]mportant to the equitable

consideration is whether the parents obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA"]).

1. Excessiveness of Services or Rate

Among the factors that may warrant a reduction in tuition under equitable considerations is whether the frequency of the services or the cost for the services was excessive (M.C., 226 F.3d at 68; 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., 674 Fed. App'x at 101; E.M., 758 F.3d at 461 [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 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]).

As summarized above, the IHO ordered the district to fund 100 of the 180 hours of SETSS delivered to the student during the 2019-20 school year (see IHO Decision at pp. 7-8). Essentially the IHO limited the number of hours for which the district would be responsible based on a finding that the number of hours delivered were segregable and in excess of what the student required in order to receive a FAPE (see id.).

The parent asserts that the district should be required to fund 180 hours of SETSS for the 2019-20 school year because the SETSS authorization form indicated that the student could receive a maximum of 180 hours of SETSS. However, the parent's argument omits other statements included in the SETSS authorization form and does not directly address the IHO's finding that "[t]he provision of a maximum number of 180 hours in the Authorization did not entitle the student to a higher level of service, than was recommended in the IESP" (IHO Decision at p. 8). Regardless of the weaknesses in the parent's arguments, the hearing record supports the IHO's determination that the SETSS authorization form identified a maximum of 180 hours of SETSS and did not assure that the student would receive 180 hours of SETSS. The January 28, 2020 SETSS authorization form indicated that SETSS could be provided for a maximum of five hours per week "and may not continue beyond a total of 180 hours, or beyond 6/30/2020" (Parent Ex. B). Accordingly, the form itself does not provide support for awarding SETSS in excess of five hours per week.

On the same day the authorization form was issued, Succeed began providing the student with ten hours per week of SETSS (Parent Ex. G). The supervisor of Succeed testified that the agency provided the student with ten hours per week of SETSS based on the authorization form identifying 180 hours; however, the supervisor did not explain why the agency ignored the other portion of the authorization form identifying a maximum of five hours per week of SETSS (Tr. p. 48). She then added that, based on the student moving from a self-contained classroom, the agency felt "the 180 hours was what he needed" (Tr. p. 49). Counsel for the parent described the ten hours per week of SETSS as a "self-remedy, if you will compensatory, because the kid really needed the services" (Tr. p. 40). If the parent felt the student needed ten hours per week of SETSS, she could

have presented that allegation in the due process complaint notice. However, the parent agreed with the January 2020 CSE's recommendation for five hours per week of SETSS (Tr. p. 63; see Parent Ex. A).

Thus, although the student was provided with ten hours per week of SETSS from January 28, 2020 through the end of the 2019-20 school year, the parties agree that the recommendation for five hours per week of SETSS, as set forth in the January 2020 IESP, was appropriate. The parent's position that the additional services were compensatory is without merit because, beyond the district's concession relating to its failure to implement the IESP beginning in January 2020, there is no other basis for an award of relief. Accordingly, as the IHO found, the parent is entitled to district funding of no more than five hours per week of SETSS provided to the student between January 28, 2020 and the end of the 2019-20 school year.

As to the rate, the hearing record does not include evidence that the rate charged by Succeed was excessive. Although the district attempted to prove unreasonableness of the rate charged through cross-examination of the supervisor of Succeed, the district did not offer any evidence of a reasonable rate for SETSS to compare to the rate of $175 per hour charged by Succeed. Accordingly, there is no basis for a finding that the rate of $175 was unreasonable.

2. Notice of Unilateral Placement

The parent appeals from the IHO's determination that the parent did not provide the district with advance notice that she intended to secure services from the agency at district expense. The parent contends that the requirement for advance notice does not apply to privately placed students receiving services through an IESP, as there is no removal of the student from public school or rejection of a placement.[9]

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]). Parents of students enrolled in private school are not exempted from 10-day notice requirements (S.W. v New York City Dep't of Educ., 646 F. Supp. 2d 346, 361-63 [S.D.N.Y. 2009]).

[9] The parent also objects to the IHO's finding and argues that the parent should be deemed exempt from the ten business day notice requirement because she did not receive the procedural safeguards notice. However, the January 15, 2020 prior written notice mailed to the parent provided directions for obtaining a copy of the procedural safeguards notice and the parent did not provide any testimony indicating that she did not receive a copy of it or have access to read it (see Dist. Ex. 3 at p. 2).

To be sure, the district conceded a failure to deliver the services identified in the student's IESP; however, the parent's cooperation and communication with the district was also lacking. The evidence in the hearing record includes a statement signed by the student's father indicating that he attempted to contact five SETSS providers but was unable to find a provider willing to deliver services to the student (Parent Ex. E). It is unclear from the list if the individuals that the father contacted were district "eligible providers" or where the father obtained the names to contact, although the parent testified that she believed the individuals were from a list of district providers (see Tr. pp. 67-68; Parent Ex. B). The father's efforts over five days beginning on the date of the CSE meeting (January 15 through January 19, 2020) pre-dated the district's provision of the SETSS authorization form (see Parent Exs. B; E; Dist. Ex. 2). The form provided by the district directed the parent to a list of providers and stated "[y]ou may select a SETSS provider other than those listed, but the provider must register with the [district] before being authorized to begin service" and that "[i]f you need assistance locating a provider, or if you have an questions, please contact the [district] person listed in Section 1 of this form" (Parent Ex. B). The parent did not present any evidence that either she or the student's father sought assistance from the district or that she or the provider, Succeed, attempted to register with the district before beginning to deliver services to the student. Thereafter, the parent did not notify the district that she was engaging in self-help and obtaining a private provider to deliver the student's SETSS with the intent to seek district funding thereof.

Based on the foregoing, there is insufficient basis in the hearing record to reverse the IHO's finding that equitable considerations warranted a reduction in the total cost of the services sought by the parent. Nor is there sufficient reason to modify the amount of the IHO's discretionary reduction of the rate from $175 to $125 per hour, which amounts to a reduction of appropriately 28.5 percent.

VII. Conclusion

There is insufficient basis in the hearing record to modify the IHO's decision to direct the district to fund 100 hours of SETSS provided to the student by Succeed during the 2019-20 school year at the rate of $125 per hour.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
August 11, 2021

SARAH L. HARRINGTON
STATE REVIEW OFFICER