The University of the State of New York

The State Education Department
State Review Officer
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No. 21-245

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.

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

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request to be reimbursed for, or to directly fund, the costs of the student's special education services for the 2020-21 school year and which denied, in part, her request to be reimbursed for, or to directly fund, the costs of the student's special education services for the 2021-22 school year. Respondent (the district) cross-appeals from that portion of the IHO's decision which found that the district failed to offer the student an appropriate educational program for the 2020-21 and 2021-22 school years and which awarded funding to the parent for nine hours per week of special education services. The appeal must be dismissed. 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 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, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4[a]). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

Given the limited scope of this appeal, a recitation of the student's educational history is not necessary. Briefly, however, the evidence in the hearing record indicates that a CSE convened in May 2019 to conduct the student's annual review and to develop an IESP for delivering public school special education services to the student while attending a parochial school selected by the parent for the 2019-20 school year (May 2019 IESP) (see Parent Ex. F at pp. 1, 9).[1] Finding the student eligible for special education as a student with a speech or language impairment, the May 2019 CSE recommended that the student receive five periods of instruction per week through special education teacher support services (SETSS) to support his participation in a general education setting (delivered in a separate location) and related services consisting of two 30-minute sessions per week of individual occupational therapy (OT); two 30-minute session per week of individual speech-language therapy; one 30-minute sessions per week of counseling; and the services of a full-time, individual paraprofessional for behavioral support (id. at pp. 1, 7).

A. Due Process Complaint Notices and Intervening Events

By due process complaint notice dated September 3, 2020, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2020-21 school year (see Parent Ex. A at p. 1). The parent asserted that the district failed to offer the student a "procedurally valid and substantively appropriate IEP" for the 2020-21 school year, and failed to implement appropriate services for the 2020-21 school year (id.). More specifically, the parent alleged that a CSE had last convened for the student in May 2019 to develop an IESP, and at that time, recommended five periods per week of SETSS, two 30-minute session per week of individual OT, one 30-minute session per week of individual counseling services, two 30-minute sessions per week of individual speech-language therapy, and paraprofessional services (full-time, individual) (id. at p. 2). The parent also contended that the district failed to convene a CSE meeting to conduct an annual review for the 2020-21 school year, and thus, failed to recommend the appropriate amount of SETSS services for the student; in addition, the parent alleged that the district failed to implement any special education services for the 2020-21 school year (id.). In addition to these allegations, the parent requested a pendency placement for the student consisting of the special education and related services set forth in the May 2019 IESP (id.).

As relief for the alleged violations, the parent requested the provision of 10 periods per week of SETSS at an enhanced rate, the provision of full-time paraprofessional services at an enhanced rate—, but rather than have the SETSS and paraprofessional services provided by the public school, the parent sought to select their own private providers such as "AIM Educational Support Services or a similar provider"—as well as the provision of the related services set forth in the student's May 2019 IESP (Parent Ex. A at p. 2).

For purposes of the student's stay-put, in a document executed by the parent's attorney on September 3, 2020, and subsequently executed by a district representative on November 2, 2020,

[1] At the time of the May 2019 CSE meeting, the student was four years old, but would turn five years old in August 2019—therefore, the May 2019 IESP was the first IESP created for the student as he transitioned from receiving preschool services to receiving school-age services (i.e., kindergarten) (see Parent Ex. F at p. 1; see also Tr. pp. 91-92).

the parties agreed that the following constituted the student's pendency placement: five periods per week of SETSS; the services of a full-time, individual paraprofessional; two 30-minute sessions per week of individual OT; two 30-minute sessions per week of individual speech-language therapy; and one 30-minute session per week of individual counseling services (see Pendency Agreement at pp. 1-2). The same document indicated that "AIM Educational Support Services" agency would provide the student with the SETSS and paraprofessional services with "Direct Payment to [the] Provider" (id. at p. 1). As reflected in the same pendency agreement, the student's OT, speech-language therapy, and counseling services were to be provided by three different providers—not by the "AIM Educational Support Services" agency—with "Direct Payment to [the] Provider" (id.).

By letter dated May 28, 2021, the parent informed the district that, although she was "awaiting the receipt" of the student's IESP for the 2021-22 school year, she was requesting the provision of special education and related services at a specific nonpublic school the student "may be enrolled in," but did not waive any rights for the student to receive a FAPE for the 2021-22 school year (Parent Ex. D at p. 1).[2] In addition, the parent indicated in the letter that she understood that the special education and related services must be requested in writing by "June 1st or risk [the student] not receiving any services whatsoever" (id.).[3]

In a second due process complaint notice, dated July 1, 2021, the parent alleged that the district failed to offer the student a FAPE for the 2021-22 school year by repeating the same allegations that formed the basis of the parent's September 2020 due process complaint notice concerning the 2020-21 school year (compare Parent Ex. B at pp. 1-2, with Parent Ex. A at pp. 1-2). With respect to the 2021-22 school year, the parent also alleged that the district failed to recommend a 12-month school year program (compare Parent Ex. B at p. 2, with Parent Ex. A at p. 2). The parent similarly requested a pendency placement for the student consisting of the special education and related services set forth in the May 2019 IESP, and requested the same relief as sought in the September 2020 due process complaint notice, but on a 12-month school year basis (compare Parent Ex. B at p. 2, with Parent Ex. A at p. 2).

On July 26, 2021, an IHO was appointed (see IHO Decision at p. 1). In an order dated July 29, 2021, the IHO granted the parent's request to consolidate the two due process complaint notices for an impartial hearing (see Consol. Order at p. 2).

B. Impartial Hearing

On August 23, 2021, the parties (absent a district representative) proceeded to an impartial hearing, which concluded on October 29, 2021, after three total days of proceedings (see Tr. pp.

[2] The nonpublic school identified in the parent's May 2021 letter was the same nonpublic school the parent had indicated the student was attending in both the September 2020 due process complaint notice and, subsequently, in the July 2021 due process complaint notice (compare Parent Ex. D at p. 1, with Parent Ex. A at p. 2, and Parent Ex. B at p. 2). The evidence in the hearing record reflects that the nonpublic school was a religious-based, "general education school" (Tr. p. 10).

[3] The hearing record does not include a similar letter from the parent to the district for the 2020-21 school year (see generally Tr. pp. 1-105; Parent Exs. A-D; F-H).

1-105). At the impartial hearing, the parent's attorney stated that, as relief for the 2020-21 school year, the parent sought an order for 10 hours per week of individual SETSS at a rate of $175.00 per hour; paraprofessional services at an enhanced rate of $35.00 per hour; and to continue the student's related services of OT, and speech-language therapy services through the provision of related services authorizations (RSAs) (see Tr. pp. 24-25). The parent's attorney confirmed that the district had issued RSAs for the student's related services and that the student had received the services (see Tr. p. 25).[4] With respect to the 2021-22 school year, the parent's attorney requested the following relief: 10 hours per week of individual SETSS at an enhanced rate of $185.00 per hour and paraprofessional services at an enhanced rate of $45.00 per hour (see Tr. pp. 25-26, 103-04). The parent's attorney also confirmed that the student had received SETSS for the 2020-21 school year through an agency, and for the 2021-22 school year, the student continued to receive SETSS from an agency (see Tr. p. 26).

The district representative confirmed at the impartial hearing that the "last IESP" developed for the student was the May 2019 IESP, which the parent had entered into the hearing record as evidence (see Tr. pp. 27-28, 31-32; see also Tr. pp. 12-13; see generally Parent Ex. F). She also stated that the district had not created a subsequent IESP because the parent had not returned a "notice of intent" letter to the district, and moreover, it was not until the parent filed a due process complaint notice that the district learned the student was attending a nonpublic school that was different than the nonpublic school listed in the district's database (Tr. pp. 13-14). In addition, the district representative noted that, pursuant to the pendency agreement, the student received "five periods" per week of SETSS, as had been recommended in the May 2019 IESP (Tr. p. 15).[5] She further indicated that the district would not be presenting any witnesses at the impartial hearing (see Tr. p. 16).[6]

At the impartial hearing, the parent's first witness was a Board Certified Behavior Analyst (BCBA), who was employed by two agencies, "AIM" and "applied ABC," as an independent contractor and who testified that she first began working with the student "last year," beginning in September (Tr. pp. 36-37, 40). As part of her role with "AIM," the BCBA acted as a behavioral consultant and supervised students' providers, specifically paraprofessionals and SETSS instructors;[7] in addition, the BCBA coordinated the providers' services to "make sure that the

[4] The district's authority to rely on RSAs to procure related services for public school services is limited (see https://www.p12.nysed.gov/resources/contractsforinstruction/qa.html).

[5] The parent subsequently testified that, for the then-current school year (i.e., 2021-22), the student was receiving speech-language therapy and OT services "twice a week," paraprofessional services, and SETSS (Tr. pp. 98-100).

[6] The district also did not present any documentary evidence at the impartial hearing (see generally Tr. pp. 1-105).

[7] The BCBA refers to the SETSS teachers as "providers" as if it is a related service, but teachers nearly always provide core instruction. "[C]ore instructional services comprise those instructional programs which are part of the regular curriculum of the school district and to which students are entitled as part of a free public education. This would include both general and special education programs and related services which school districts are required by law to provide as part of a program of public education and for which a certification area exists and to which tenure rights apply pursuant to Education Law and/or Commissioner's regulations" (see https://www.p12.nysed.gov/resources/contractsforinstruction/qa.html). The services required on by IEP or an IESP would nearly always constitute core instruction, unless it is merely being provided to support a student's

therapies [wer]e being generalized across all areas" (Tr. pp. 37-38). The BCBA also coordinated "between the parents, the home, and also the other related service therapies, including the students' teachers (Tr. p. 38).

With regard to the student in this case, the BCBA testified that she acted as "his consultant to supervise and provide behavioral goals and intervention as well as to assess and analyze his academics and provide necessary supervision and coordination" (Tr. p. 39). The BCBA also testified that she did not, however, provide any direct services to the student (see Tr. p. 40).[8] The BCBA testified that she supervised the student's SETSS services by making sure the student made academic progress, and she also provided the SETSS providers with whatever "materials" they needed or assisted in "troubleshooting and coming up with different solutions to issues" that arose or to "assess skills as necessary" (Tr. pp. 43-44). The BCBA testified that the student received 10 hours per week of SETSS from AIM, which were delivered at the student's school in a "mostly" individual setting and primarily as a pull-out service due to the student's level of distractibility (Tr. pp. 44, 46). According to the BCBA, the student required an individual setting in order to learn "new concepts" (see Tr. p. 44). The BCBA testified that the student received one hour of SETSS in the morning and one hour of SETSS in the afternoon, for a total of 10 hours per week of SETSS (Tr. p. 45). The BCBA also provided two hours per week of supervision, which, at times, included working individually with the student to make sure he was providing the "necessary responses to the academic instruction," as well as "observing the provider and giving them feedback" (id.). The BCBA testified that AIM currently paid her $105.00 per hour, but she would be seeking an increased rate for the current year (see Tr. pp. 47-48). The BCBA also testified that, in her opinion, the student required 10 hours per week of individual SETSS in order to receive an educational benefit (see Tr. pp. 59-60).

According to the BCBA, the student was currently in first grade and had attained a "kindergarten" level in phonemic awareness, a "[p]re-K to early kindergarten" level in mathematics, and a "[k]indergarten" level in writing (see Tr. pp. 62-63).

The second witness to testify on the parent's behalf at the impartial hearing was the "administrative assistant" ("employee") of the "AIM Service" agency (see Tr. pp. 69-72). With respect to the 2020-21 school year, the administrative assistant testified that the AIM Service agency provided the student with eight hours per week of "direct" SETSS services—meaning, the direct provision of SETSS to the student—and two hours per week of "indirect" SETSS services—meaning, the time spent by the "supervisor/BCBA working with the providers and with [the student] on the supervisory supports" (Tr. pp. 74-75). The witness further testified that the student received the same SETSS services during the 2021-22 school year (see Tr. p. 75). According to the witness, for both the 2020-21 and 2021-22 school years, the AIM Service agency provided the student with full-time paraprofessional services (id.).

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access to extracurricular activities. It is very clear in this case that the parent obtained and substituted private services for core instruction that the district failed to provide. This in turn prompted the dispute over the rates for the privately-obtained services described herein.

[8] The BCBA testified that the student had two different individuals who provided his paraprofessional services for the 2020-21 and 2021-22 school years (see Tr. pp. 42-43).

With respect to the 2020-21 and 2021-22 school years, the administrative assistant testified that AIM Service charged $175.00 per hour for both the SETSS services and for the "supervisor hours" (Tr. pp. 76-77). The witness also testified that the $175.00 per hour rate for SETSS was based upon the "service provider's experience, education, skills, and the needs—specific needs of the child" (Tr. p. 78). In this case, the student's SETSS provider (the same individual for the 2020-21 and 2021-22 school years) was paid $74.00 per hour (for both school years) (see Tr. pp. 78-79). For the 2020-21 school year, AIM Service charged $35.00 per hour for the paraprofessional services (approximately 35 to 36 hours per week); for the 2021-22 school year, AIM Service charged $45.00 per hour for the paraprofessional services (approximately 36 hours per week) (see Tr. pp. 77-78).[9]

In a closing statement at the impartial hearing, the district representative stated that the district was "not against the [student] getting any services for the school year" and that the student "need[ed] all of the services" (Tr. p. 102). However, the district did object to the parent's request for the "enhanced rate of these services" (Tr. pp. 102-03). In a closing statement for the parent, the parent's attorney argued that the parent "attempted to find SETSS providers as well as a paraprofessional" for both the 2020-21 and 2021-22 school years, but was unsuccessful in those attempts and thus, the parent had to obtain those services from an agency "at an enhanced rate" (Tr. p. 103).

C. Impartial Hearing Officer Decision

In a decision dated November 8, 2021, the IHO initially recounted the testimonial evidence provided by the parent's witnesses (see IHO Decision at pp. 1-5). Turning to the legal analysis, the IHO concluded that the district failed to offer the student a FAPE for the 2020-21 and 2021-22 school years (id. at pp. 5-6).

With respect to the parent's requested relief, the IHO noted that the evidence in the hearing record included a contract executed by the parent, but that the parent's "financial contractual obligation" was not included in the contract (IHO Decision at p. 7 [referring to Parent Ex. H, an "AIM Educational Support Services" "Parents Contract" executed by the parent on June 1, 2021, for the 2021-22 school year]). The IHO questioned how the parent could "understand her legal and financial obligation to AIM" absent a "fee and the number of hours for the school year" included within the contract (id.). In addition, the IHO found that the hearing record did not include any contract for services for the 2020-21 school year for the "alleged incurred services" (id.). As a result, the IHO found that the hearing record failed to contain any evidence that the parent was "legally obligated or contractually obligated to pay AIM any fees for any alleged services" for the 2020-21 school year (id., citing Application of a Student with a Disability, Appeal No. 21-096 [dismissing a parents' appeal in another SETSS payment/relief case wherein the parent in that appeal was represented by the same attorneys in the present matter]). Given the absence of a contract for the 2020-21 school year, the IHO denied "all requests for payment to AIM" for the 2020-21 school year (see IHO Decision at p. 7).

[9] The parent was the third and final witness to testify for her case (see Tr. pp. 86-102).

Next, the IHO found that the hearing record did not contain any evidence to demonstrate that the parent had "paid any money to AIM" for either the 2020-21 or the 2021-22 school year (IHO Decision at p. 7). Similarly, the IHO found that the hearing record failed to contain any evidence that the parent could not afford to pay "AIM for any alleged services" for the 2021-22 school year, such as a tax return, and therefore, the IHO found that there was "no evidence for a Connors decision" (id. at pp. 7-8).[10]

The IHO also noted that the hearing record was devoid of evidence demonstrating that the student received SETSS services or 36 hours per week of paraprofessional services, except for the BCBA's testimony, who, the IHO noted, only spent 1.5 hours per week in the student's classroom (see IHO Decision at p. 8). As further noted by the IHO, the student's teacher did not testify and "thus there was no evidence" that the student could not "be present to follow instructions" within either his kindergarten or first grade classrooms, and moreover, the only evidence of the student's "inappropriate behavior" during the 2021-22 school year—which allegedly required the paraprofessional's services—was from the parent's testimony, who did not testify that she was present in the student's classroom (id.). The IHO also noted that the parent was unaware of "what was being taught in the class" at the nonpublic school, except that it included "religious instruction, prayer, [B]ible study, [and] Hebrew" (id.). In addition, the IHO indicated that, although the BCBA testified that she and the SETSS provider both "engaged in 1:1 special education service[s]," the BCBA was only in the student's classroom for 1.5 hours per week, as opposed to the BCBA's testimony that she provided 2 hours per week of supervision services (id.). The IHO also pointed out that while the student's May 2019 IESP included a recommendation for paraprofessional services for the 2019-20 school year, that recommendation was made some "[27] months [prior to] the writing of this decision" (id.).

Next, the IHO examined the documentary and testimonial evidence with regard to the administrative assistant's testimony that the student received 10 hours per week of individual SETSS and 36 hours per week of individual paraprofessional services during both the 2020-21 and 2021-22 school years (see IHO Decision at pp. 8-10). With respect to the SETSS services, the IHO noted that the student's SETSS provider had recommended an increase of SETSS for the 2021-22 school year, "from 8 hours to 10 hours"; based on this information, the IHO inferred that the student had received eight hours per week of SETSS during the 2020-21 school year, notwithstanding that the student's May 2019 IESP had only called for "5 hours," and the hearing record failed to contain any other evidence "as to how or where the student was to receive 8 hours of SETSS" (id. at pp. 8-9).

[10] While not explained by the IHO, presumably his reference to a "Connors decision" refers to the court's decision issued in Connors v. Mills, 34 F.Supp.2d 795, 799, 804-06 (N.D.N.Y. 1998) (noting a prospective placement would be appropriate where "both the school and the parent agree[d] that the child's unique needs require[d] placement in a private non-approved school and that there [we]re no approved schools that would be appropriate"). More recently, however, a parent's alleged inability to pay for privately obtained services—or to front those costs—was addressed by a court in the decision issued in Mr. & Mrs. A. v. New York City Department of Education, 769 F. Supp. 2d 403, 430 (S.D.N.Y. 2011) (finding it appropriate to order a school district to make retroactive tuition payment directly to a private school where equitable considerations favor an award of the costs of private school tuition but the parents, although legally obligated to make tuition payments, have not done so due to a lack of financial resources).

Turning to the 36 hours per week of individual paraprofessional services allegedly provided to the student for 2021-22 school year, the IHO was not persuaded by evidence examined in support of the administrative assistant's testimony (see IHO Decision at pp. 9-10). For example, the IHO noted discrepancies in testimony concerning what time the student's school day ended: 4:00 p.m. according to the parent, and 4:30 p.m. according to the administrative assistant (id. at p. 9). In addition, the IHO noted that there would be no need for individual paraprofessional services during the provision of the student's related services (OT, PT, and counseling), or during the provision of SETSS to the student or during the BCBA's supervision services (id.). In addition, the IHO noted that, in light of the fact that the student attended a "Yeshiva," the student received religious instruction and "in Yeshiva's [sic] the instruction [wa]s for only four and a half days a week," with "no classes on Friday afternoons," so that students could "go home to prepare for the Jewish Sabbath, which beg[an] at sundown" (id.). Here, the IHO noted that this information "may not be available for those residing in Albany and not familiar with the schedules of Yeshivas in Brooklyn" (id.). The IHO further noted that, as sunset grew earlier and earlier toward the year's end, the "sun setting and the beginning of the Jewish Sabbath beg[an] earlier on Fridays" (id.). Therefore, in noting the BCBA's testimony that the "8 hours [of SETSS] w[ere] provided once in the morning and once in the afternoon," the IHO opined that the student would have received "two hours Monday through Thursday, in that Fridays [wer]e a half a day" (id.). In addition, the IHO opined that the paraprofessional "did not provide 36 hours of services" as the administrative assistant had testified (id. at pp. 9-10). Here, the IHO noted that the hearing record did not include any testimony or a notarized affidavit by the paraprofessional about the hours or services provided, or a class schedule, and therefore, given the absence of credible evidence in the hearing record, the IHO could not determine the "number of hours provided by the paraprofessional" (id. at p. 10). The IHO also indicated that the hearing record did not include any evidence concerning the paraprofessional's "credential," other than "that he graduated high school" (id.).

Therefore, after examining the evidence in the hearing record, the IHO concluded that the parent was not entitled to "any payment for the paraprofessional provided by AIM for the 2021-2022 school year" (IHO Decision at p. 10).

Finally, the IHO turned to the rate to be paid for the 10 hours per week of SETSS for the 2021-22 school year (see IHO Decision at p. 11). The IHO initially noted that the "AIM" agency was not seeking payment from the parent for the costs of the SETSS, but rather, sought payment from the district, at a rate of $175.00 per hour for the SETSS, even though "AIM" only paid the SETSS provider $75.00 per hour for those services (id.). The IHO also noted that the BCBA testified that she was paid $105.00 per hour for services (id.). Notwithstanding that the hearing record did not include any evidence about "any administrative overhead," the IHO calculated that, based on the number of students served by AIM on a weekly basis and the costs attributed thereto, a total of "$285,000 a week for administrative costs after paying the independent contractors" was "not reasonable" under a "Burlington/Carter" analysis (id.). The IHO also indicated that the hearing record failed to contain sufficient "credible evidence that a BCBA was required to provide two hours of supervision for a SETSS provider in her second year in providing services to the same student" (id.). As a result, the IHO found that one hour per week of supervision for a SETSS provider was reasonable (id.).

Thereafter, the IHO summarized his findings (see IHO Decision at pp. 11-12). First, the IHO denied "all claims for payment to AIM [for] the 2020-2021 school year" because the parent

had "no legal obligation to pay AIM for the services rendered," and because the impartial hearing was between the parent and the district, not "with a third party who ha[d] no guardianship over the student" (id. at p. 11). Next, the IHO found that it was unclear as to the student's "need for so many hours as requested when the student [wa]s attending a Yeshiva, which the parent [wa]s paying tuition, and the student ha[d] SETSS hours" (id. at pp. 11-12). Consequently, the IHO denied "all claims for payment of a paraprofessional for the 2021-2022 school year" (id. at p. 12).

As a final directive, the IHO ordered the district to pay for "9 hours of SETSS at a rate not to exceed $110 an hour," and as the hearing record failed to contain any evidence of the parent's inability to pay for the services, the IHO ordered that "all services shall be paid after they [wer]e provided by the service provider" (IHO Decision at p. 12). In addition, the IHO ordered the district to conduct a psychoeducational evaluation of the student, convene a CSE meeting to review the psychoeducational evaluation and "compose a legal and appropriate IESP," and to continue to provide the student with related services (two 30-minute sessions per week of individual OT, two 30-minute sessions per week of individual speech-language therapy, and one 30-minute session per week of individual counseling) for the "rest of the school year" (id.).

IV. Appeal for State-Level Review

The parent appeals. Initially, the parent argues that the IHO erred by failing to award 10 periods per week of SETSS for both the 2020-21 and 2021-22 school years, especially given that the student had no IESP for either school year and the district failed to rebut the parent's evidence that the student required 10 periods per week of SETSS. Next, the parent contends that the IHO erred by failing to award paraprofessional services for both the 2020-21 and 2021-22 school years. The parent argues that, at the impartial hearing, the district did not dispute whether the student's last IESP should be applied to the contested school years or otherwise argue that the student was not entitled to paraprofessional services.

With respect to the parent's request for funding relief, the parent argues that the IHO erred by failing to award $175.00 for the SETSS services for both school years, and by failing to award paraprofessional services at a rate of $35.00 per hour for the 2020-21 school year and $45.00 per hour for the 2021-22 school year. In support of these assertions, the parent argues that this was not a Burlington/Carter case "where a school district provide[d] a full school program to a student that the [p]arent reject[ed] and ch[ose] an entire school program on its own at its own financial risk." Rather, the parent argues that this was a case where the district was obligated to provide services and having failed to provide those services, should be required to pay for the costs of those services. The parent further argues that, while the district's practice of shifting the burden to obtain services to the parents' of students who attend nonpublic schools may not be proper, the district has chosen this practice and the parent was "simply claiming that the [district] should pay for the services it was obligated to provide and fund in the first place" (Answer & Cr. App. ¶ 21, citing Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005]).

In further support of her argument that the IHO erred by denying and reducing her requested funding relief, the parent asserts that the "IHO has rendered a decision as to a claim by the [p]rovider as against the [p]arent outside of this case," which the parent contends exceeded the IHO's jurisdiction and which the IHO did "without giving a full opportunity for presentation of all evidence and arguments on this issue." Additionally, the parent argues that the IHO's rationale for

denying relief for both school years, either in whole or in part, was improper because "[t]his [wa]s not an agreement required to be in writing by the Statute of Frauds," and overall, the parent's evidence established every element needed for an oral agreement to be binding on the parent. Moreover, the parent "cannot disavow their financial obligation to the Agency and are certainly bound by their own evidence" and the district did not present any evidence to rebut the parent's evidence or otherwise argue that the parent was not financially obligated for the services delivered to the student. In addition, the parent asserts that if the IHO's decision is upheld, then the parent is "exposed to a financial obligation to the Agency with no further remedy against the [district]."

As relief, the parent seeks to overturn the IHO's decision and to order an award of direct funding for the costs of the student's 10 hours per week of SETSS for the 2020-21 and 2021-22 school years, at the rate of $175.00 per hour; and to award direct funding for the costs of the student's paraprofessional services for the 2020-21 school year at the rate of $35.00 per hour and at the rate of $45.00 per hour for the 2021-22 school year.

In an answer, the district responds to the parent's allegations and generally argues that the IHO properly denied all of the parent's requested relief for the 2020-21 school year. As a cross-appeal, the district argues that the IHO erred by finding that the district failed to provide the student a FAPE for the 2020-21 and 2021-22 school years because the IDEA does not confer any individual entitlement to special education and related services to students who are enrolled in nonpublic schools by their parents (i.e., parentally placed).[11] As a result, whether the district offered the student a FAPE for the 2020-21 and 2021-22 school years was not at issue. Next, the district argues that the IHO erred by awarding SETSS relief for the 2021-22 school year. Notably, however, while the district affirmatively asserts that the student "required special education services" and does not now contest the parent's request for 10 hours per week of SETSS and the services of a full-time, individual paraprofessional "for the school years at issue," the district argues that the IHO erred by ordering the district to fund nine hours of SETSS per week at a rate of $110.00 per hour because the evidence in the hearing record did not support the relief awarded. In support of these contentions, the district argues that the parent did not have an enforceable contract with AIM Educational Support Services for SETSS or paraprofessional services for the

[11] Notwithstanding that the district has asserted this exact same immaterial argument in three previous appeals—Application of a Student with a Disability, Appeal No. 20-141; Application of a Student with a Disability, Appeal No. 20-140; and Application of a Student with a Disability, Appeal No. 20-115—the district persists in asserting this argument again, and as found in the three previous appeal, it is equally immaterial here. It is undisputed that the district did not meet its obligations to the student for two school years; however, regarding the district's contention that the IHO erred by applying the FAPE standard—or by finding that the student was entitled to a FAPE—the district does not convincingly explain how the "equitable services standard" under the State's dual enrollment statute would result in a different outcome when analyzing the relevant facts of this matter, especially where the dual enrollment statute has been routinely treated by the New York Court of Appeals as providing eligible students with an individual right to special education services that must be tailored to the student's particular needs by the CSE as well as the right to seek redress through the due process hearing system called for by the IDEA (see Bd. of Educ. of Bay Shore Union Free Sch. Dist. v. Thomas K., 14 N.Y.3d 289 [2010] [reviewing due process hearing determinations and noting that the pertinent question is what the educational needs of the particular student require]; Bd. of Educ. of Monroe-Woodbury Cent. Sch. Dist. v. Wieder, 72 N. Y .2d 174, 188 [1988] [noting that services under the dual enrollment statute must take into account the individual educational needs of the student in the least restrictive environment]). Accordingly, the district has pointed to a distinction without a difference in this case, and I decline to further discuss this argument.

2021-22 school year. In addition, the district asserts that the parent never testified about the alleged existence of an oral contract between herself and AIM Educational Support Services at the impartial hearing, therefore, the hearing record is devoid of any evidence of the parent's financial responsibility for these services. The district also argues that the parent failed to provide a 10-day notice of her intention to seek unilaterally obtained services and that the SETSS and paraprofessional costs were unreasonable. Consequently, the district seeks an order dismissing the parent's appeal and to sustain its cross-appeal.

In an answer to the district's cross-appeal, the parent responds to the district's allegations and generally argues to dismiss the cross-appeal.

V. Applicable Standards

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

However, under State law, parents of a student with a disability who have privately enrolled their child in a nonpublic school may seek to obtain educational "services" for their child by filing a request for such services in the district of location where the nonpublic school is located on or before the first day of June preceding the school year for which the request for services is made (Educ. Law § 3602-c[2]).[12] "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.).[13] Thus, under State law an eligible New

[12] 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]).

[13] 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

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—Unilaterally-Obtained SETSS and Paraprofessional Services

Turning to the parent's request for district funding of the unilaterally-obtained SETSS and paraprofessional services, this case is analogous to several recent appeals, in which SROs have noted an alarming level of dysfunction regarding the provision of SETSS to dually-enrolled students and the procedural safeguards that are supposed to protect students (see e.g., Application of a Student with a Disability, Appeal No. 21-119; Application of a Student with a Disability, Appeal No. 21-029; Application of a Student with a Disability, Appeal No. 21-028; Application of a Student with a Disability, Appeal No. 21-025; Application of a Student with a Disability, Appeal No. 20-141; Application of a Student with a Disability, Appeal No. 20-140; Application of a Student with a Disability, Appeal No. 20-115; Application of a Student with a Disability, Appeal No. 20-099; Application of a Student with a Disability, Appeal No. 20-094; Application of a Student with a Disability, Appeal No. 20-087). In describing the effect of the district's failure to perform its obligation to provide SETSS to dually-enrolled students, one SRO has noted "[t]hat dysfunction has twisted itself into a murky dispute that the parents should not even be involved in, but for their efforts to locate services that the district was responsible to plan and provide for" (Application of a Student with a Disability, Appeal No. 20-087).

The district did not present any documentary or testimonial evidence to show that it provided, or even attempted to provide, the student with SETSS or paraprofessional services for the 2020-21 or 2021-22 school years, although it agrees that the student was entitled to the services (see Tr. pp. 16, 102-03; Answer & Cr. App. ¶¶ 6, 14). The limited evidence in the hearing record regarding the provision of SETSS and paraprofessional services indicates that the parent located an agency—AIM Educational Support Services—to deliver the student's SETSS and paraprofessional services, as well as BCBA services (see Tr. pp. 95-98; Parent Exs. H). While the hearing record is scant regarding the circumstances surrounding the parent's initiation of efforts to locate a teacher, this case is similar to a large swath of cases in which parents have parentally placed their child in a private school, sought to dually enroll in the public school for special education services, then privately selected an independent special education teacher of their choice and then gone back to the district to argue over rates. The parent's request in her due process complaint notice for an "enhanced rate" is reminiscent of other cases in which the district has

(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.).

provided parents with a list of independent special education teachers to contact and arrange for services on their own (see e.g., Application of a Student with a Disability, Appeal No. 21-119; Application of a Student with a Disability, Appeal No. 21-029; Application of a Student with a Disability, Appeal No. 20-087). [14] Whether or not a SETSS form or list passed among the parties in this case is not germane, because the point is that while the parent may unilaterally obtain services and attempt to compel the district to reimburse them, no school district is authorized to outsource core instruction to "independent" special education teachers to provide SETSS, as it applies to this student. Any attempt to do so is deeply problematic as it just compounds and continues the violation of State law and both sides stop following the special education planning process. Its sufficiently clear in this case that the CSE stopped convening annual meetings and planning for the student's special education needs.

The Commissioner of Education has made it abundantly clear, having "repeatedly held that a board of education lacks authority to provide instructional services through an independent contractor" (Appeal of Sweeney, 44 Ed. Dept. Rep. 176, Decision No. 15,139; Appeal of Woodarek, 46 Ed. Dept. Rep. 1, Decision No. 15,422), and this application of State law requiring that core instruction provided by a school district must be performed either by teachers who are employees of the district or pursuant to a contract for special education services that a district is specifically authorized by law to enter into has been upheld in the courts (see Bd. of Co-op. Educ. Servs. for Second Supervisory Dist. of Erie, Chautauqua & Cattaraugus Ctys. v. Univ. of State Educ. Dep't, 40 A.D.3d 1349, 1350 [3d Dep't 2007] [noting that the relevant provisions of the Education Law did not provide for instruction by employees of for-profit corporations such as Kelly Services Inc.]; see also Averback v. Bd. of Educ. of New Paltz Cent. Sch. Dist., New Paltz, 147 A.D.2d 152, 154 [3d Dep't 1989] [explaining that "[a]bsent a 'plain and clear' prohibition in statute or decisional law, boards of education are empowered to agree to terms of employment" of a teacher] [emphasis added]). [15]

Additionally, in a July 29, 2009 guidance document, the State also clarified that a school district does not have the authority "to provide core instructional services through contracts with nonprofit and other entities" ("Clarifying Information [R]elated to Contracts for Instruction,"

[14] The State has also imposed a compliance assurance plan upon the district requiring it to "reduce the use of [related service authorizations]" (see New York City Department of Education Compliance Assurance Plan" at p. 16 [May 2019], available at https://www.regents.nysed.gov/common/regents/files/120p12d3.pdf). There is nothing to support the notion that instruction by a special education teacher is a related service.

[15] One begins to question if a school district is abandoning its core functioning when it contracts out the instruction for a student who is able to attend a general education setting for most of the day. Appeal of Boyd, 51 Ed Dept Rep, Decision No. 16,364, provides that "except where so authorized or necessary, school districts lack the authority to contract with an independent contractor to provide core instructional services through employees of that independent contractor" (Appeal of McKenna, et al., 42 Ed Dept Rep 54, Decision No. 14,774), such as social work services (Appeal of Barker and Pitcher, 45 Ed Dept Rep 430, Decision No. 15,375), psychological services (Appeal of Friedman, 19 Ed Dept Rep 522, Decision No. 10,236), or to hire substitute teachers (Appeal of Woodarek, 46 Ed Dept Rep 1, Decision No. 15,422; pet. to review dismss'd Kelly Services, Inc. v. USNY, et al., Sup Ct Albany County, 5/22/07, Index No. 7512-06). In Appeal of McKenna, et al., 42 Ed Dept Rep 54, Decision No. 14,774, the Commissioner explained that "establish[ing], conduct[ing], manag[ing] and maintain[ing] a course of instruction in general academic fields" does not involve "peripheral services such as security services or a recreational program, but is the very core function of a school district."

Office of Special Educ. Mem. [July 2009], available at http://www.p12.nysed.gov/resources/contractsforinstruction/documents/contractsforinstruction2009.pdf). In response to several questions from the field, the State issued further guidance ("Q and A related to Contracts for Instruction" Office of Special Educ. Mem. [June 2010], available at http://www.p12.nysed.gov/resources/contractsforinstruction/documents/contractsforinstruction2010covermemo.pdf).[16] The State explained the statutory instances in which school districts were authorized to contract for the instruction of students including Education Law § 305(33) (for supplemental educational services, which section has since been repealed); Education Law § 3202(6) (students that are hospitalized or institutionalized); Education Law §3602-e (approved prekindergarten programs); Education Law §§4401(2) and 4402(2)(b) (special education services with other school districts, BOCES, State-operated and State-supported schools, approved private schools and the State University at Binghamton which are approved by the Commissioner of Education); Education Law § 4401(2)(n) (transition services for students with disabilities in programs such as vocational training programs approved by certain state agencies) (id.). Moreover, the district is required by State law to locate and assign the student's publicly-provided teachers for a dually enrolled student (Educ Law § 3602-c[2][a]).

With the above described seeming impropriety of the district's current reliance on parents to obtain the services of independent providers to implement SETSS services mandated by an IESP as a backdrop, I note that, in this case, as mentioned above, the district did not present any evidence or witnesses to show that it either arranged for or delivered the SETSS or paraprofessional services, to which it agreed at the time of the impartial hearing that the student should receive, during the 2020-21 and 2021-22 school years. Accordingly, there is no longer any dispute that the student is entitled to receive 10 periods of SETSS per week for the 2020-21 and 2021-22 school years, as well as full-time, individual paraprofessional services for both school years, and this matter now presents itself as a dispute solely as to the rate the district should pay the agency providers arranged for by the parent to deliver those services.

The rate for special education services unilaterally obtained could, in theory, be set by contract. However, as the IHO correctly determined, there was no evidence of a contract for the SETSS and paraprofessional services for the 2020-21 school year in the hearing record, and the contract submitted by the parent allegedly for those same services for the 2021-22 school year did not specify what services would be provided to the student, the price of those services, or whether the parent was financially responsible for the costs of those services (see IHO Decision at p. 7; Parent Ex. H; see generally Tr. pp. 1-105; Parent Exs. A-D; F-H). As described above, school districts cannot deliver contracted special education services called for by the CSE's 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.

[16] The questions and answers guidance draws a distinction between core instruction and instruction that represents a supplemental or additional resource, providing that a district may not contract with private entitles for the former ("Questions and Answers Related to Contracts for Instruction," Office of Special Educ. [June 2010], available at http://www.p12.nysed.gov/resources/contractsforinstruction/qa.html).

But there is a well worn process by which districts can be made to pay for special education services privately obtained for which a parent paid for or has become legally obligated to pay for, 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] [finding that the "Parents' failure to select a program known to be approved by the State in favor of an unapproved option is not itself a bar to reimbursement."]).

Thus, as a practical matter—and contrary to the parent's contention on appeal—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 do not use a Burlington/Carter analysis have tended to lead to chaos.

Accordingly, the parent's request for 10 hours per week of SETSS and full-time paraprofessional services must be assessed under this framework; namely, having found that the district failed to provide appropriate equitable services, the issue is whether the 10 hours of SETSS (five hours of which there is some evidence a provider from the AIM Educational Support Services agency delivered as SETSS to the student under pendency), constituted an appropriate unilateral placement of the student such that the cost of the SETSS are 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 (see Pendency Agreement at p. 1).[18] As a result, the question of rate is somewhat beside the point as

[17] The State Education Department only permits local educational agencies to use teachers and personnel in private settings that are approved by the Commissioner of Education and 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/).

[18] Pursuant to the pendency agreement executed by both parties—which remains in effect throughout the duration of the administrative hearing process—the student was to receive five periods per week of SETSS and the services of a full-time, individual paraprofessional by the "AIM Educational Support Services" agency with "Direct Payment to [the] Provider" (Pendency Agreement at p. 1). The parent does not assert that the student did not fully receive the pendency placement services or that the district has not paid for the pendency placement services (see generally Req. for Rev.; Answer to Cr. App.). Consequently, there does not appear to be any remaining dispute as to the provision of, or payment for, five hours per week of SETSS and the full-time, individual paraprofessional services already provided to the student under pendency during the 2020-21 and 2021-22 school years. Therefore, it appears that the rate issue remains live for five hours per week of SETSS for the 2020-21 and 2021-22 school years.

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 the AIM Educational Support Services agency during the 2020-21 and 2021-22 school years are not seriously in dispute in this matter as it is the same type of service which the district agreed during the impartial hearing that it was required to provide. However, similar to the situation in Application of a Student with a Disability, Appeal No. 20-087 and Application of a Student with a Disability, Appeal No. 20-115, because there is no evidence that the parent has not actually paid any money for which she must be reimbursed, this matter is in a subset of more complicated cases in which the financial injury to the parent and the appropriate remedy are less clear.

The Second Circuit Court of Appeals has held that a direct payment remedy is an appropriate form of relief in some circumstances, and that "[i]ndeed, where the equities call for it, direct payment fits comfortably within the Burlington–Carter framework" (E.M. v. New York City Dep't of Educ., 758 F.3d 442, 453 [2d Cir. 2014]; see also Mr. and Mrs. A. v. New York City Dep't of Educ., 769 F. Supp. 2d 403, 430 [S.D.N.Y. 2011] [finding it appropriate to order a school district to make retroactive tuition payment directly to a private school where equitable considerations favor an award of the costs of private school tuition but the parents, although legally obligated to make tuition payments, have not done so due to a lack of financial resources]). However, unlike the E.M. case, the hearing record in this matter is devoid of any evidence that the parent is legally obligated to pay the agency or the provider for SETSS delivered to the student (see generally Tr. pp. 1-105; Parent Exs. A-D; F-H). In fact, the parent argues that no evidence of a contractual obligation is necessary at all, or alternatively, that the parent met all the elements required for a valid and enforceable oral contract.

Here, the administrative assistant from the AIM Educational Support Services agency testified that the rate that the private agency charges for SETSS services for the student was $175.00 per hour (see Tr. pp. 75-77); however, there is no indication in the hearing record that the parent paid for the services (see generally Tr. pp. 1-105; Parent Exs. A-D; F-H). Although there is some evidence that a provider from AIM Educational Support Services agency delivered eight hours per week of SETSS ("direct" SETSS) to the student for all or some of the 2020-21 and 2021-22 school years, in addition to BCBA services ("indirect" SETSS) for approximately two hours per week (see Tr. pp. 74-75; Parent Ex. C at p. 1), there is nothing in the hearing record to indicate that the parent is legally obligated to pay for such services. As noted by the IHO in his decision, and the district in its answer and cross-appeal, no contract between the parent and the AIM Educational Support Services agency was included in the hearing record for the 2020-21 school year, and the alleged contract for services for the 2021-22 school year did not set forth any information concerning the services to be provided to the student (except for SETSS), the rate to be charged for those services, or whether the parent was financially responsible for the costs of those services (see IHO Decision at p. 7; Parent Ex. H). Therefore, and contrary to the IHO's decision to award funding for nine hours per week of SETSS for the 2021-22 school year, as there is no evidence in the hearing record—such as a written contract between the parent and the agency or an invoice directed to the parent revealing a legal obligation to pay—it is not possible to find

that the parent incurred a financial obligation for the SETSS delivered to the student that would support an award of reimbursement relief for either the 2020-21 or the 2021-22 school year.[19]

As there is inadequate proof that the parent has expended any funds to pay for SETSS for the 2020-21 or 2021-22 school years or is legally obligated to do so, I am not convinced that the dispute regarding the proper amount to be paid to the AIM Educational Support Services agency for educational services for the student during the 2020-21 and 2021-22 school years involves the parent or student's legal interests. Instead, it is far more likely that the rate dispute is a matter to be resolved between the district and the AIM Educational Support Services agency, but the AIM Educational Support Services agency, who has the real financial interest in the outcome of the rate dispute, is not a proper party to a due process proceeding (34 CFR 300.507[a][1]). Therefore, the remaining rate dispute between the AIM Educational Support Services agency must be addressed in a different forum. It is not appropriate equitable relief in this due process proceeding to require the district to either reimburse the parent for the costs of SETSS or to directly fund SETSS under the relevant legal standards discussed above.

Going forward, if they have not done so already, both parties should also return to using the appropriate CSE planning process called for by State law and the parent should ensure that she adheres to the June 1 deadline for requesting section 3602-c services if she intends to place the student in a nonpublic school and seek dual enrollment services. Should the parent continue to find that the district is not engaging in the special education planning process or that the district is not sending a teacher or a paraprofessional to the private school to provide the requisite special education services, the procedure for obtaining private services is to send a timely notice of unilateral placement then obtain reliable proof of an agreement between the parent and the private entity that details the essential terms under which the special education services are provided and who is legally responsible for the costs.

VII. Conclusion

This is a dispute a parent has sought retroactive payment for privately selected services, which places it in a Burlington/Carter framework. There is no reliable evidence that the parent has paid or is liable to AIM Educational Support Services agency for services provided to the student, and in the absence of such evidence, the dispute over rates and the degree of the district's responsibility to pay AIM Educational Support Services agency for core services that the district should have provided must be resolved in another forum with appropriate jurisdiction.[20] Having determined that the evidence in the hearing record does not support the IHO's award of funding for the SETSS provided to the student for the 2021-22 school year, the IHO's finding on that point must be reversed and the necessary inquiry is at an end.

[19] Although the parent argues that there was an oral contract there is no reliable evidence to support the terms of an oral contract, even assuming one would be permissible.

[20] I express no opinion regarding the district's obligation to pay AIM Educational Support Services agency pursuant to stay-put, which the district clearly agreed to accept responsibility for, as there is no dispute regarding that agreement before me in this proceeding. It was up to the district to work out the payment terms with AIM Educational Support Services agency for the pendency services.

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

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision, dated November 8, 2021, is modified by reversing the IHO's order directing the district to fund nine hours per week of SETSS services for the 2021-22 school year.

Dated: **Albany, New York**
February 4, 2022

JUSTYN P. BATES
STATE REVIEW OFFICER