



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 22-024

**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 Thomas W. MacLeod, 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 for direct funding of the cost of her son's privately obtained special education teacher support services (SETSS) during the 2020-21 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 programming for students with disabilities under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482), namely a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, 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). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

### **III. Facts and Procedural History**

The student was referred for an initial eligibility determination during the 2019-20 school year and the district conducted both a bilingual psychoeducational evaluation on December 9, 2019, and a speech-language evaluation on January 21, 2020, in Yiddish (Parent Exs. C at pp. 1,

2, 5; E at p. 1).<sup>1</sup> According to background information provided by the parent, the student received physical therapy as an Early Intervention service and had not had any other therapy (Parent Ex. C at p. 1). The hearing record also indicates that a speech-language evaluation was conducted when the student was three or four years of age, he had received speech-language therapy in preschool until approximately second grade and then sporadically until the 2019-20 initial referral; however, there is scant information in the hearing record describing how the student's eligibility for services was previously determined or how speech-language therapy was delivered (see Tr. pp. 120-28). The parent testified that the student has never attended public school (Tr. pp. 128-29). For the 2020-21 school year, the student was parentally placed at a religious nonpublic school (NPS) (Parent Ex. A at p. 1).

By notice dated January 30, 2020, the parent was invited to attend a February 6, 2020 CSE meeting to review the results of the initial evaluation, determine the student's eligibility for special education services and develop an IESP for the student (Parent Ex. D at p. 1). A CSE convened on February 6, 2020, and found the student eligible for special education and related services as a student with a speech or language impairment (Parent Ex. I at p. 1). The February 2020 CSE recommended that the student receive two 30-minute sessions per week of individual speech-language therapy in Yiddish in a separate location (id. at p. 7). The February 2020 IESP included four annual speech-language therapy goals to address the student's needs in the areas of reading, oral motor skills, and language concepts (id. at pp. 5-6). The February 2020 IESP included recommendations to address the student's management needs consisting of a multisensory approach to learning, when possible; preferential seating; verbal and visual cues; and prompting and redirection as needed (id. at p. 4). The February 2020 IESP also indicated that the parent did not have any concerns related to the student's social and physical development (id.).

In an agreement dated September 1, 2020, the parent obtained five one-hour periods of SETSS per week from a teacher from Knowledge Tree LLC (Knowledge Tree) at a cost of \$145 per hour (Parent Ex. H at p. 1).<sup>2</sup> The agreement indicated that the parent was responsible for the

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<sup>1</sup> According to the district's evaluation reports, the student had limited language skills in English and his dominant language was Yiddish (Parent Exs. C at p. 2; E at p. 1).

<sup>2</sup> It is noted that SETSS is not defined in the State continuum of special education services (see 8 NYCRR 200.6). As has been laid out in prior administrative proceedings, a static and reliable definition of "SETSS" does not exist, and unless the parties and the hearing officer take the time to develop a record on the topic it becomes problematic (see Application of the Dep't of Educ., Appeal No. 20-125). For example, SETSS has been described in a prior proceeding as "a flexible hybrid service combining Consultant Teacher and Resource Room Service" that was instituted under a temporary innovative program waiver to support a student "in the general education classroom" (Application of a Student with a Disability, Appeal No. 16-056), and in another proceeding it was suggested that SETSS was more of an a la carte service that is completely disconnected from supporting the student in a general education classroom setting (Application of a Student with a Disability, Appeal No. 19-047). In this matter, the student received 1:1 academic instruction in the teacher's home (Tr. pp. 155, 157, 162-66, 173). The parties appear to agree that for purposes of this proceeding SETSS was akin to 1:1 tutoring (IHO Decision at p. 6; see Parent Exs. A at p. 1; H at p. 1). The hearing record indicates that the privately obtained 1:1 tutoring provided to the student was continually referred to as SETSS, and for the sole purpose of avoiding confusion herein, the services will be referred to as SETSS in this decision. By no means should the district infer the undersigned's concession to clarity as acceptance of the ill-defined term. The district has previously been warned that this administrative tribunal will not make assumptions or take judicial notice of the meaning of the local term or favor one party over another as to its meaning (Application of a Student with a Disability, Appeal No. 22-012).

fees charged if the parent was unsuccessful at obtaining direct funding at a future impartial hearing (*id.*).

### **A. Due Process Complaint Notice**

By due process complaint notice dated December 31, 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 timely evaluate the student, timely develop an education program, develop an appropriate education program, and provide a special education provider (*id.*). More specifically, the parent alleged that the IESP developed for the 2020-21 school year failed to include a recommendation for SETSS and that the student required at least five periods per week of SETSS (*id.*). The parent asserted that the recommendation of two 30-minute periods per week of speech-language therapy was insufficient to address the student's academic delays and failed to provide the student with an appropriate education (*id.*).

As relief, the parent requested an award of at least five periods per week of SETSS at an enhanced rate for the entire 2020-21 school year and funding for payment to the provider/agency of the privately obtained SETSS for at least five periods per week of SETSS for the entire 2020-21 school year (Parent Ex. A at p. 2).

### **B. Impartial Hearing Officer Decision**

An IHO convened an impartial hearing approximately 11 months later on November 30, 2021, which concluded on December 30, 2021 after three days of proceedings (Tr. pp. 1-208). By decision dated January 23, 2022, the IHO determined that the district failed to demonstrate that the student was offered a FAPE, reasoning that it failed to produce a witness able to testify about the February 2020 CSE meeting wherein the student's 2020-21 IESP was developed (IHO Decision at p. 10).<sup>3</sup>

Turning to the parent's request for direct payment to her privately obtained SETSS teacher, the IHO found that the parent's teacher was certified to teach kindergarten through second grade and "was providing services beyond [her] certification qualification by providing services to a 12 year old in the 6th grade" (IHO Decision at p. 10). The IHO further found that the SETSS teacher's testimony that the student was performing "4 grades below grade level" was unsupported by other evidence in the hearing record (*id.*). Next the IHO opined that the SETSS teacher's delivery schedule of two-hour sessions twice per week from 8:00 p.m. to 10:00 p.m. outside of the student's classroom placement was not appropriate for a 12 year-old student (*id.*). The IHO further stated that the SETSS teacher's testimony that the student "manifest[ed] tantrum-like disruptions" was not corroborated by documentary evidence in the hearing record (*id.*). The IHO found that the SETSS teacher's testimony "strain[ed] credulity" and determined that her testimony was not reliable (*id.*). Further, the IHO found that the SETSS teacher's affidavit of services was vague, lacking in specific details concerning the provision of services, and when asked questions "the witness had difficulty and reacted badly to being probed for specifics" (*id.* at p. 11). In conclusion,

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<sup>3</sup> In his decision the IHO set forth the correct legal standard pursuant to section 3602-c, nevertheless, he made determinations using a FAPE standard (IHO Decision at pp. 9-10).

the IHO determined that the provision of SETSS was "haphazard [and] inconsistent... and inappropriate for requested payment at \$145 per hour" (*id.*). For those reasons, the IHO dismissed the parent's due process complaint notice (*id.*).

#### **IV. Appeal for State-Level Review**

The parent appeals and argues that the IHO correctly determined that the district failed to offer the student a FAPE for the 2020-21 school year; however, the parent asserts the IHO erred in failing to award her requested relief. The parent asserts that she provided sufficient evidence that five hours per week of SETSS was an appropriate program for the student. Next, the parent contends that the IHO's rationale for denying her requested relief was flawed. More specifically, the parent argued that the teacher's certification not being for the student's grade did not reflect an inability to provide the service and that the IHO's concerns regarding the teacher's schedule were in error—asserting that the teacher did not have a bad reaction in response to questioning, that her affidavit was not vague, and that the IHO did not cite to the hearing record and accordingly, there were no contradictions. The parent argues that the hearing record supported an award of direct payment for 180 hours of privately obtained SETSS at an enhanced rate of \$145 per hour. In conclusion, the parent asserts that the requirement to provide the district with ten-day notice of her intention to obtain private services and request public funding should not apply because the district did not raise this argument during the impartial hearing and that there was no evidence in the hearing record that the parent received a procedural safeguards notice for the 2020-21 school year.

In an answer, the district denies the parent's allegations and argues that the IHO's dismissal of the parent's due process complaint notice should be affirmed. The district initially asserts that the parent's request for review should be dismissed for failure to comply with the practice regulations as it fails to individually number the issues to be reviewed and fails to present them in a clear and concise manner. Further, the district alleges that it is not possible to determine with any certainty the exact nature or extent of the parent's claims due to the lack of a clear and concise statement of the issues presented for review.

Next the district argues that the IHO correctly dismissed the parent's due process complaint notice. The district alleges that the parent did not present sufficient evidence that five periods per week of SETSS were appropriate for the student and that the hearing record did not demonstrate that the student needed SETSS. The district also noted that it was not cross-appealing the IHO's finding of a denial of a FAPE.<sup>4, 5</sup> The district further asserts that any acknowledgment of academic

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<sup>4</sup> In its answer, the district indicates that it will not contest the parent's use of FAPE terminology and concedes that use of equitable services terminology would have no effect on the outcome of the matter (Answer ¶12 n.3).

<sup>5</sup> As neither party has appealed the IHO's finding that the district failed to meet its burden that it offered the student a FAPE, that determination has become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see *M.Z. v. New York City Dep't of Educ.*, 2013 WL 1314992, at \*6-\*7, \*10 [S.D.N.Y. Mar. 21, 2013]). Nevertheless, while I will not disturb the IHO's final order with respect to the first Burlington-Carter criteria, I cannot generally endorse the IHO's findings on the issue of the district's obligation to produce a witness. Here, the parent alleged that the February 2020 IESP was inappropriate due to the district's failure to recommend SETSS. In response to this type of claim, the district could have relied solely on documentary evidence to meet its burden of proof. The hearing record reflects that the CSE convened on February 6, 2020, and developed an IESP for the student (Parent Ex. I). A signed CSE meeting attendance sheet

need set forth in the February 2020 IESP did not automatically entitle the student to SETSS. Additionally, the district alleges that the parent did not meet her burden by presenting the conclusory reports and testimony of the SETSS teacher or by testifying to her personal belief that the student required SETSS. The district also argues that the SETSS teacher did not establish that she was qualified to conduct the assessments noted in her progress reports and did not explain how the student's academic needs were related to the assessments or how SETSS addressed the student's needs. The district further asserts that the March 2021 progress report was prepared well after the student began receiving SETSS and is not relevant. In addition, the district contends that the parent did not request that the district reevaluate the student or reconsider the need for SETSS prior to privately obtaining services. Lastly, the district alleges that although not dispositive, the IHO correctly considered the SETSS teacher's lack of appropriate certification in finding the parent's privately obtained SETSS inappropriate. For all of these reasons, the district argues that the IHO justifiably denied the parent's requested relief and dismissed the parent's due process complaint.

## 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]).<sup>6</sup> "Boards of education of all school districts of the state shall furnish

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was produced by the district (Dist. Ex. 1). Further, the parent testified that she attended the meeting, recalled the meeting, and confirmed that the meeting was attended by those persons reflected on the attendance sheet (Tr. pp. 26-27). In addition, the parent testified about what occurred during the meeting during direct examination, cross-examination, and in response to direct questioning by the IHO (Tr. pp. 61, 72-73, 75-76, 77, 78, 82-86). Thus, I do not agree with the IHO that it was necessary for the district to call a witness to authenticate the written information on the IESP or to authenticate the signed CSE meeting attendance sheet in order to establish that the February 6, 2020 CSE meeting occurred and the February 2020 IESP was developed (IHO Decision at p. 10). The February 6, 2020 IESP was admitted into evidence and the document speaks for itself. The totality of the evidence in the hearing record unequivocally demonstrated that the February 6, 2020 CSE meeting was held and attended by the parent, wherein she was permitted to participate and advised of her due process rights (Tr. pp. 61, 72-74; Parent Ex. I at pp. 3, 4; Dist. Ex. 1). The only remaining issue before the IHO—for which the district had the burden of proof—was whether or not the February 2020 IESP, as written, offered the student special education and related services on an equitable basis (Educ. Law § 3602-c).

<sup>6</sup> 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

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.*).<sup>7</sup> Thus, under State law an eligible New York State resident student may be voluntarily enrolled by a parent in a nonpublic school, but at the same time the student is also enrolled in the public school district for the purpose of receiving special education programming under Education Law § 3602-c, services for which a public school district may be held accountable through an impartial hearing.

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E. v. New York City Dept of Educ., 694 F.3d 167, 184-85 [2d Cir. 2012]).

## **VI. Discussion**

### **A. Appropriateness of Unilaterally Obtained SETSS**

As noted above, the district has not appealed from the IHO's finding that the district did not present sufficient evidence to show that the program offered in the February 2020 IESP was appropriate to address the student's needs due to the lack of a witness that testified during the impartial hearing to explain "the occurrences at the IESP meeting of February 2020" (see IHO Decision at p. 10). Accordingly, the focus of this decision turns to what relief the parent may obtain from the district for such a failure under the circumstances of this case. In her request for review, the parent asserts that the five hours of SETSS per week that she obtained for the student for the 2020-21 school year was an appropriate support for the student and that the IHO's decision denying direct payment for the services she obtained was flawed and without merit.

The IHO determined that the parent's privately obtained SETSS were not an appropriate service on several grounds. The IHO found that the SETSS teacher was State certified to teach

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§ 4401(1)" (Educ. Law § 3602-c[1][a], [d]).

<sup>7</sup> State guidance explains that providing services on an "equitable basis" means that "special education services are provided to parentally placed nonpublic school students with disabilities in the same manner as compared to other students with disabilities attending public or nonpublic schools located within the school district" ("Chapter 378 of the Laws of 2007—Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the Individuals with Disabilities Education Act (IDEA) 2004 and New York State (NYS) Education Law Section 3602-c," Attachment 1 at p. 11, VESID Mem. [Sept. 2007], available at <http://www.p12.nysed.gov/specialed/publications/policy/nonpublic907.pdf>). The guidance document further provides that "parentally placed nonpublic students must be provided services based on need and the same range of services provided by the district of location to its public school students must be made available to nonpublic students, taking into account the student's placement in the nonpublic school program" (*id.*).

kindergarten through second grade and "was providing services beyond [her] certification qualification by providing services to a 12 year old in the 6<sup>th</sup> grade" and that "[t]here [wa]s no supportive evidence or indication in this matter that the student [] was performing 4 grades below grade level except vaguely by Parent's selected service provider" (IHO Decision at p. 10). The IHO further found that the SETSS teacher's "delivery schedule" was inappropriate based on her testimony that she provided SETSS to the student outside of the classroom and in her home from 8:00 pm to 10:00 pm on Mondays and Wednesdays and from 4:00 pm to 5:00 pm on Sundays (*id.*; see Tr. pp. 173, 187, 191-92). The IHO also indicated that "there [we]re no references to the student manifesting tantrum-like disruptions in any of the documentary evidence submitted in this matter nor from Parent's testimony" (IHO Decision at p. 10). The IHO further noted that the October 2019 SETSS teacher evaluation report did not mention transition difficulties or social/emotional difficulties, which was consistent with the other evidence in the hearing record but contrary to the SETSS teacher's testimony during the impartial hearing (*id.*; see Parent Ex. F). Next the IHO found that "[t]he testimonial contradictions from the Parent selected service provider strain credulity when compared against the other evidence in this matter and I determine it to be unreliable" (IHO Decision at p. 10). With respect to the SETSS teacher's affidavit of services, the IHO found it to be "vague and lacking in specific details concerning provision of services" and noted that "when inquired the witness had difficulty and reacted badly to being probed for specifics" (*id.* at p. 11; see Parent Ex. G). The IHO then determined that the SETSS teacher's responses reflected a "very haphazard inconsistent delivery of services about which testimony [wa]s purposefully vague[,] aloof and inappropriate for requested payment at \$145 per hour" (IHO Decision at p. 11).

The district argues that the IHO correctly determined that the parent was not entitled to her requested relief. While acknowledging that the parent's SETSS teacher was not required to be certified to teach at the student's grade level, the district contends that the IHO appropriately considered the teacher's certification as one factor in his overall determination that five hours per week of SETSS was not appropriate for the student.

Prior to reaching the substance of the parties' arguments, some consideration must be given to the appropriate legal standard to be applied. In this matter, the student has been parentally placed in an NPS and the parent does not seek tuition reimbursement for the cost of the student's attendance therein. The parent alleged that the February 2020 IESP was insufficient to address the student's needs and unilaterally obtained private services from Knowledge Tree for the student and then commenced due process to obtain remuneration for Knowledge Tree's services. Accordingly, the issue in this matter is whether the 180 hours of SETSS obtained by the parent 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 Knowledge Tree 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. "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."]).

As for the substantive standard for assessing the services that are unilaterally obtained by a parent, a board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 252 [2d Cir. 2009]). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998]). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (id. at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether a unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether the placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] ["evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

The Second Circuit has set forth the standard for determining whether parents have carried their burden of demonstrating the appropriateness of their unilateral placement.

No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

(Gagliardo, 489 F.3d at 112, quoting Frank G., 459 F.3d at 364-65).

Turning to the student's special education needs and how they were addressed by the unilaterally obtained SETSS, according to a report prepared by the Knowledge Tree teacher, the student was evaluated on October 6, 2019 (evaluation report) (Parent Ex. F at p. 1). The October 2019 evaluation report indicated that "a variety of assessment tools" were used as part of "[a] comprehensive screening," which included the Behavioral Characteristics Progression Birth-14+ years (BCP) and the "Woodcock-Johnson-R" (*id.*).<sup>8</sup> Background information included in the evaluation report reflected that at the time of the assessment, the student was 11 years old and in the sixth grade at an NPS (*id.*). The SETSS teacher indicated that the student was "deficient" in reading skills, writing skills, mathematics skills, handwriting skills, receptive language skills, expressive language skills, social/emotional skills, behavioral skills, as well as conceptual and critical thinking skills (*id.*). In a section entitled present level of function, the SETSS teacher reported that the student had been screened in all "relevant" educational areas and the evaluation report indicated that the student was "not performing at age-level norms" in reading. Specifically, the student reportedly had difficulty decoding and could not read many basic sight words, misspelled words more than fifty percent of the time, was "incompetent in spelling words in isolation and in context at a grade-appropriate level," and could not effectively read text without constant prompting and redirecting (*id.*). The SETSS teacher also noted that the student required auditory and visual cues to help him answer basic comprehension questions (*id.*). In addition, the SETSS teacher reported that the student could verbally summarize a short passage but required assistance "making it coherent" and had difficulty making connections to other passages and with identifying similarities in familiar concepts (*id.*).

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<sup>8</sup> The October 2019 evaluation report does not indicate what other assessment tools were used to evaluate the student and does not include any scores (*see* Parent Ex. F). The SETSS teacher's reference to "Woodcock-Johnson-R" appears to refer to the Woodcock-Johnson Psycho-Educational Battery-Revised (WJ-R). Although not dispositive of the disputed issues, I note that the version of the assessment is quite dated and the testing instrument has since been revised more than once in the last two decades—it has not been referenced in an SRO decision for nearly 20 years and even then it had been used several years before the cases reached the SRO (*see, e.g., Application of a Child with a Disability*, Appeal No. 02-040).

With respect to writing skills, the SETSS teacher reported that the student's writing was "way below grade level" (Parent Ex. F at p. 1). The SETSS teacher indicated that the student was "unable to write a complete thought down on paper" (id.). In addition, the student reportedly was "unable to write a complete coherent sentence," was "unable to write using proper conventions," including capitalization, punctuation, or appropriate grammar, and was "unable to write a paragraph consisting of [three] sentences on a given topic" (id.). The SETSS teacher further stated that the student became "stumped when the topic involve[d] spontaneous ideas or if it [wa]s open ended. When asked to write a sentence he just stared at the paper blankly and didn't write" (id.).

In the area of language skills, the SETSS teacher reported that the student displayed weakness in receptive language skills (Parent Ex. F at pp. 1-2). Specifically, the SETSS teacher noted that the student was not able to demonstrate the short-term memory skills required to process multistep directions, as well as demonstrate the ability to process language or information by answering questions quickly (id. at p. 2). The student reportedly grasped the main ideas of the topic but missed key details and events (id.). In addition, the student was unable to answer questions related to the reasoning behind the story or how it evolved (id.). The SETSS teacher further indicated that the student had difficulty sequencing ideas and thoughts after reading a passage, could not follow verbal cueing of third grade level commands, and was also described as having difficulty understanding and describing cause and effect relationships (id.). According to the SETSS teacher the student exhibited delays in vocabulary when "compared to grade level" (id.). Expressively, the student's responses reportedly consisted "of very few words and often missed the point" (id.).

With regard to mathematics skills, the SETSS teacher described the student as "lagging behind grade level" (Parent Ex. F at p. 2). According to the October 2019 evaluation report, the student lacked fluency and had not "mastered many sixth grade math concepts" (id.). The student was reportedly able to compute basic multiplication but could not compute long multiplication or division (id.). In addition, the SETSS teacher indicated that word problems and critical thinking were "above his level" (id.). According to the SETSS teacher, the student's math skills were "on a third grade level" (id.).

With respect to conceptual and critical thinking skills, the SETSS teacher reported that the student had not "acquired [the] skills necessary for identifying a problem when presented with the background of a problematic situation, auditorily, from described event or from read passage" (Parent Ex. F at p. 2). In addition, the student was noted to have difficulty giving solutions to a presented problem (id.).

The October 2019 evaluation report also included eight goals that the SETSS teacher indicated were then-currently "being addressed" (Parent Ex. F at p. 2). The SETSS teacher reported that the goals were projected to be achieved within a year and that progress would be measured using a combination of formal and informal assessment tools (id.). The goals targeted the student's needs identified in the evaluation report in the areas of spelling, reading, writing, mathematics, language processing and comprehension, expressive language, critical thinking, and problem solving (id. at pp. 2-4).

The district conducted a bilingual psychoeducational evaluation, and an evaluation report was completed on December 9, 2019 as part of the student's initial eligibility determination during

the 2019-20 school year (Parent Ex. C at pp. 1, 2, 5). According to the December 2019 evaluation report, the evaluator conducted an interview with the parent, a behavioral observation, a Judaic studies performance survey and assessed the student using the Wechsler Intelligence Scale for Children-Fifth Edition (WISC-V) and the Wechsler Individual Achievement Test, Third Edition (WIAT-III) (id. at p. 1). The parent reported that the student was referred for an initial evaluation due to academic concerns, specifically that the student's English reading skills were noted to be poor (id.). The evaluation report also reflected that the student attended an NPS in the sixth grade and was described as cooperative in school and as socializing well with peers (id.).

The evaluator described the student's behavior during testing as "pleasant and cooperative" noting that rapport was easily established (Parent Ex. C at p. 1). According to the evaluator, the student exhibited an excellent capacity for sustained attention and concentration during administration of nonverbal subtests indicating that the student thoughtfully focused on tasks (id.). With regard to verbal subtests, the evaluator reported that the student appeared to have some difficulty responding to questions (id.). Specifically, the evaluator noted that when asked to provide the definition of "island," the student responded, "place where people live" and when asked to define "prize," the student responded, "something you play with" (id. at pp. 1-2).

According to the December 2019 evaluation report, the student spoke Yiddish and "some English" and it was noted that the family spoke Yiddish in the home (Parent Ex. C at p. 2). The evaluator reported that the student was able to respond to questions presented in English but periodically responded in Yiddish (id.). The evaluation report reflected that the student's dominant language was Yiddish, and as such, Yiddish was the "[l]anguage of [a]ssessment" (id. at pp. 1, 2). The evaluator administered the WISC-V, noting that reported performance ranges should be interpreted with caution "due to some deviations of standard testing procedures to accommodate bilingual issues" (id. at p. 2). The evaluation report indicated that the student's scores on the verbal comprehension index were within the borderline range, while the student's performance on the fluid reasoning index and the processing speed index were both within the average range (id.). The student's "scores on the test of intellectual functioning" ranged from borderline to average with a full scale IQ within the average range, which the evaluator indicated was comparable to his peers (id. at p. 3). The evaluator reported that the student's performance on the verbal comprehension index was lower than most children his age and was an area of personal weakness compared to his overall ability (id.). According to the evaluator low scores on the verbal comprehension index could be attributable to poorly developed word knowledge, difficulty retrieving acquired information, problems with verbal expression, or general difficulties with reasoning and problem solving (id.). The evaluator indicated that the student's scores on verbal comprehension tasks were weaker than his performance on tasks that required him to use logic to solve problems (id.). On selected subtests within the verbal comprehension index, the student's performance indicated that his abstract reasoning skills and word knowledge were similarly developed at the time of assessment (id.). The student's performance on the vocabulary subtest was reportedly very low, "suggesting that he shows significant difficulty learning new words and explaining his knowledge aloud" (id.). On a comprehension subtest requiring the student to answer questions based on his understanding of general principles and social situations, the student's performance was average for his age (id.). The evaluator indicated that the student's performance on the comprehension subtest suggested age-appropriate understanding of practical knowledge and ability to verbalize meaningful concepts (id.).

According to the evaluator, the student's performance on the fluid reasoning index suggested that his perceptual organization and quantitative reasoning skills were similarly developed at the time of assessment (Parent Ex. C at p. 3). The student's performance was typical for his age and was noted to be particularly strong when compared to his performance on tasks that involved language-based skills (id.). Additionally, the student exhibited age-appropriate (nonverbal) categorical reasoning skills (id.).

On the processing speed index, the student's performance on tasks was typical for his age and indicated that his associative memory, graphomotor speed, and visual scanning ability were similarly developed (Parent Ex. C at p. 4). His speed and accuracy when processing visual information were strengths as compared to his performance on tasks involving language-based reasoning (id.). The evaluator also noted that the student performed particularly well on other subtests measuring cognitive ability, specifically, the student's score on the block design subtest was within the superior range, which according to the evaluator suggested advanced visual spatial skills (id.). On a task measuring the student's working memory, the student's performance was similar to same age peers (id.).

The evaluator also administered the WIAT-III and reported that the student's score on word reading tasks fell within the below average range (Parent Ex. C at p. 4). On reading comprehension tasks, the student's score fell within the low range (id.). The evaluator also reported that the student was informally tested in Yiddish reading, and his skills appeared "to be on par with those of his peers" (id.). In mathematics skills, the student reportedly performed within the below average range on math problem solving tasks and within the average range on measures of numerical operations skills (id.).

The district conducted a speech-language evaluation on January 21, 2020, and in a report dated January 22, 2020, the evaluator determined that the student presented with a mild-moderate expressive language delay (Parent Ex. E at pp. 1, 4). The evaluation report reflected that it was conducted in Yiddish and included background information provided by the parent (id. at p. 1). According to the parent, the student attended a fifth-grade class at the NPS and had difficulty communicating with both teachers and other students (id.).<sup>9</sup> The parent reported that the student's poor language skills were affecting his social and academic development (id.). The evaluation report reflected that the parents spoke to the student in Yiddish and that his language skills in English were limited (id.). Consistent with the district's December 9, 2019 psychoeducational evaluation report, the student was described as friendly and polite and exhibited adequate sustained attention during the speech-language evaluation (compare Parent Ex. C at p. 1, with Parent Ex. E at p. 2). The speech-language evaluator observed that the student did not establish appropriate eye contact during the evaluation and the parent stated that it was due to the student's "intense

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<sup>9</sup> There is inconsistency in the hearing record when describing which grade the NPS placed the student in. According to the October 2019 SETSS teacher's evaluation report, the student was in the sixth grade during the 2019-20 school year (Parent Ex. F at p. 1). The district's December 2019 psychoeducational evaluation stated that the student was in the fifth grade in the heading information and that the student was in the sixth grade in the background information section (Parent Ex. C at p. 1). According to the March 2021 SETSS teacher's evaluation report, the student was attending the eighth grade during the 2020-21 school year (Parent Ex. J at p. 1). During the impartial hearing, the parent's attorney stated that the student attended the seventh grade during the 2020-21 school year (Tr. pp. 30, 45). The parent also testified that the student attended the seventh grade during the 2020-21 school year (Tr. p. 65).

concentration" while thinking of answers (Parent Ex. E at p. 2). The student's language skills were informally assessed using the Clinical Evaluation of Language Fundamentals-Fifth Edition (CELF-5) (id.). The speech-language evaluator "noted that the norms for the CELF-5 [were] based on a monolingual English sample and [were] not available for the bilingual population" (id.). Therefore the evaluator did not report the student's scores and advised that results should be interpreted with caution (id.). On the subtests of word classes, following directions, understanding spoken paragraphs, and semantic relationships, the student demonstrated adequate skills (id. at pp. 2-3). On the subtest of formulated sentences, the student demonstrated moderate weakness (id. at p. 2). The subtests of recalling sentences and sentence assembly were determined by the speech-language evaluator to be inappropriate due to administering the evaluation in Yiddish (id.). However, those concepts were informally assessed and the student's skills were adjudged by the evaluator to be below normal limits (id. at pp. 2, 3). The subtest of word definitions was also not formally administered, although informal assessment of this skill was determined by the speech-language evaluator to be within normal limits (id. at p. 3). Overall, the student's receptive language skills were informally judged to be within normal limits for his age and his expressive language skills were informally judged to be moderately below normal limits for his age (id.).

On picture sequencing and storytelling tasks, the speech-language evaluator noted that "[v]ocabulary variety was missing throughout the narrative retell as evidenced by the absence of adjectives, adverbs and pronouns" (Parent Ex. E at p. 3). On a School-age Language Assessment Measures (SLAM) task, the student was reportedly able to independently describe the picture with adequate referential and causal coherence (id.). The speech-language evaluator also stated "[p]ragmatic language skills observed, to be absent, include[d] maintenance of culturally appropriate eye contact and appropriate conversational turn taking skills" (id.). The speech-language evaluator further noted that "requesting information, responding, predicting and using repair strategies were judged to be appropriate for his age" (id.).

According to the speech-language evaluator's clinical observation, the student demonstrated adequate receptive language skills "in his ability to think critically in the areas of problem solving, identifying cause [and] effect and in predicting outcomes" (Parent Ex. E at p. 3). The student also reportedly demonstrated the use of inferences to answer questions about images and from a short reading passage (id.). With respect to the student's expressive language skills, the speech-language evaluator reported that the student "failed to adequately use descriptive vocabulary when describing common objects and when relating personal information, and instead relied on gestures to relay his communicative message" (id.). In addition, the speech-language evaluator indicated that the student "also had difficulty retelling a narrative, characterized by limited information and disorganization," which according to the evaluator supported the earlier determination of a mild-moderate expressive language delay (id.).

Although only relevant to the late portion of the 2020-21 school year in which the parent is seeking the costs of the SETSS from Knowledge Tree, the Knowledge Tree SETSS teacher also prepared an evaluation report of the student on March 7, 2021 (Parent Ex. J at p. 1).<sup>10</sup> As with the October 2019 evaluation report, the March 2021 evaluation report likewise indicated that "a variety

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<sup>10</sup> This evaluation could not have been considered by the CSE at the time it was developing the IESP for the student, but it has some relevance to the relief sought by the parent.

of assessment tools" were used as part of "[a] comprehensive screening," which included the Behavioral Characteristics Progression Birth-14+ years (BCP) and the "Woodcock-Johnson-R" (compare Parent Ex. J at p. 1, with Parent Ex. F at p. 1). Background information included in the evaluation report reflected that at the time of the assessment, the student was 12 years old and in the eighth grade at an NPS (Parent Ex. J at p. 1).<sup>11</sup> The SETSS teacher reiterated that the student was "deficient" in reading skills, writing skills, mathematics skills, handwriting skills, receptive language skills, expressive language skills, social/emotional skills, behavioral skills, as well as conceptual and critical thinking skills (compare Parent Ex. J at p. 1, with Parent Ex. F at p. 1). In a present level of performance section, consistent with the October 2019 evaluation report, the SETSS teacher reported that the student had been screened in all relevant educational domains and the evaluation indicated that the student was "not performing at age-level norms in [r]eading" (compare Parent Ex. J at p. 1, with Parent Ex. F at p. 1). The March 2021 evaluation report reflected that the student still had difficulty decoding multisyllable words and still required prompting with certain sight words (Parent Ex. J at p. 1). In language identical to the October 2019 evaluation report, the SETSS teacher reported that the student misspelled words fifty percent of the time, was "incompetent in spelling words in isolation and in context at a grade-appropriate level," and could not effectively read text without constant prompting and redirecting (compare Parent Ex. J at p. 1, with Parent Ex. F at p. 1). Also identical to the October 2019 evaluation report, the SETSS teacher noted that the student required auditory and visual cues to help him answer basic comprehension questions (compare Parent Ex. J at p. 1, with Parent Ex. F at p. 1). The SETSS teacher's conclusion to the reading skills section was also identical to the October 2019 evaluation report and stated that the student could verbally summarize a short passage but required assistance "making it coherent" and had difficulty making connections to other passages and with identifying similarities in familiar concepts (compare Parent Ex. J at p. 1, with Parent Ex. F at p. 1).

With respect to writing skills, the March 2021 SETSS teacher's evaluation report indicated that the student presented with difficulties in the writing domain (Parent Ex. J at p. 2). Using language identical to the October 2019 evaluation report, the SETSS teacher indicated that the student was "unable to write a complete thought down on paper" (compare Parent Ex. J at p. 2, with Parent Ex. F at p. 1). In addition, the student reportedly was unable to write a complete coherent paragraph, and consistent with the October 2019 evaluation report, was unable to write using appropriate grammar, and was unable to write a paragraph consisting of three sentences on a given topic (compare Parent Ex. J at p. 2, with Parent Ex. F at p. 1). Also identical to the October 2019 evaluation report, the SETSS teacher further stated that the student became "stumped when the topic involve[d] spontaneous ideas or if it [was] open ended. When asked to write a sentence he just stared at the paper blankly and didn't write" (compare Parent Ex. J at p. 2, with Parent Ex. F at p. 1).

The March 2021 evaluation report's section related to the student's receptive and expressive language skills was also taken verbatim from the October 2019 evaluation report (compare Parent Ex. J at p. 2, with Parent Ex. F at pp. 1-2). In the March 2021 evaluation report, the SETSS teacher again reported that the student displayed weakness across the receptive language skills domain,

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<sup>11</sup> As noted above, the student was reportedly in the seventh grade at the time of the SETSS teacher's March 2021 evaluation report.

was not able to demonstrate short term memory skills required to process multistep directions or demonstrate the ability to process language or information by answering questions quickly (compare Parent Ex. J at p. 2, with Parent Ex. F at p. 2). The SETSS teacher repeated that the student reportedly grasped the main ideas of the topic but missed key details and events (compare Parent Ex. J at p. 2, with Parent Ex. F at p. 2). In addition, the student was unable to answer questions related to reasoning behind the story or how it evolved (compare Parent Ex. J at p. 2, with Parent Ex. F at p. 2). The SETSS teacher again indicated that the student had difficulty sequencing ideas and thoughts after reading a short story (as opposed to his difficulty after reading a passage), and exhibited delays in vocabulary when "compared to grade level" (compare Parent Ex. J at p. 2, with Parent Ex. F at p. 2). As with the October 2019 evaluation report, the SETSS teacher reported that the student's responses consisted "of very few words and often missed the point" and he was also described as having difficulty understanding and describing cause and effect relationships (compare Parent Ex. J at p. 2, with Parent Ex. F at p. 2).

The description of the student's math skills in the March 2021 evaluation report was consistent with the October 2019 evaluation report in that both reports described the student's mathematics skills as "lagging behind grade level" (compare Parent Ex. F at p. 2, with Parent Ex. J at p. 2). In addition, the March 2019 evaluation report, reflected that the student lacked fluency and had not "mastered most grade level math concepts" (Parent Ex. J at p. 2). Consistent with the October 2019 evaluation report, the student was reportedly able to compute basic multiplication but could not compute long multiplication or division and word problems and critical thinking were still described as being "above his level" (compare Parent Ex. F at p. 2, with Parent Ex. J at p. 2). Despite the similarities in describing the student's needs, the March 2021 evaluation report reflected the student's math skills as being "on a fifth-grade level," while the October 2019 report had reflected the student's math skills as being "on a third grade level" (id.).

The March 2021 evaluation report also indicated that the parent was "extremely concerned" about the student's skills in the social/emotional and behavioral domains (Parent Ex. J at p. 3). The evaluation report reflects that the parent felt the student lacked "basic age appropriate social cues and [did not] engage in appropriate social interaction" (id.). The parent reportedly told the SETSS teacher that she felt the student's delays in these areas limited the student "from having friends at school and may be the cause of his constant outbursts at home" (id.).

Consistent with the October 2019 evaluation report, with regard to the domain of conceptual and critical thinking, the March 2021 evaluation report indicated that the student had not "acquired [the] skills necessary for identifying a problem when presented with the background of a problematic situation, auditorily, from described event or from read passage" (compare Parent Ex. F at p. 2, with Parent Ex. J at p. 3). In addition, the student was noted to have difficulty giving solutions to a presented problem (compare Parent Ex. F at p. 2, with Parent Ex. J at p. 3). The March 2021 evaluation report did not include any annual goals or report any progress specifically related to the goals included with the October 2019 evaluation report (compare Parent Ex. J at p. 3, with Parent Ex. F at pp. 2-4).

The parent testified that the student's expressive language was "very delayed" and had always been the student's greatest challenge (Tr. pp. 54-56). The parent also testified that math was a relative strength for the student, however he had difficulty with word problems (Tr. pp. 56-59). In addition, the parent noted that the student's reading decoding skills in English were also

delayed (Tr. pp. 59-60). The parent further testified that she obtained SETSS for the student for the 2020-21 school year and observed the student make progress in expressive language and reading "organization" (Tr. p. 60). During cross-examination, the parent testified that for the 2020-21 school year, following some initial difficulty obtaining a related services authorization (RSA), the student had received three sessions of speech-language therapy per week (Tr. p. 66).<sup>12</sup> With regard to the five sessions per week of SETSS the parent obtained, she testified that the student attended school Sunday through Thursday and she felt that "every single day of the week after he finishes school, it w[ould] be a smart thing for him to go help him with what he learned that day... [f]ive days, five hours of services. Just adds up, makes sense" (Tr. pp. 71-72). The parent also testified that she did not request that the CSE reevaluate the student because she had gone "through such a grueling process" (Tr. p. 72). The IHO also questioned the parent and confirmed that the parent was not challenging the recommended speech-language therapy services (Tr. p. 76). The parent also confirmed that she did not have any concerns related to the student's social/emotional functioning at the time of the February 2020 CSE meeting; however, at the time of the impartial hearing she did have concerns (Tr. pp. 76-77). In response to further questioning by the IHO, the parent indicated that the student had received speech-language therapy services in preschool and during elementary school when the parent "deemed it appropriate" (Tr. pp. 125-26, 131, 133-35).<sup>13</sup> The parent further testified that when she felt the student needed it, she "reached out to the [district], picked up the RSA, took him to the speech therapist, had him go for a few sessions, and that was the extent of his services" (Tr. p. 126). After elementary school, the parent testified that she no longer felt that speech-language therapy would address the student's reading and math needs and requested referral to the CSE during the 2019-20 school year (Tr. pp. 126-28).

In review of the above, and, in particular, considering the similarities between the SETSS teacher's October 2019 and March 2021 evaluation reports, the IHO's concerns regarding the appropriateness of SETSS provided to the student appear justified (IHO Decision at pp. 10-11).

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<sup>12</sup> The parent's due process complaint notice did not allege that the district failed to implement the speech-language services recommended in the February 2020 IESP (see Parent Ex. A). According to the February 2020 IESP, the student was recommended to receive two 30-minute sessions of speech-language therapy per week (Parent Ex. I at p. 7).

<sup>13</sup> During the parent's testimony, the IHO questioned the parent as to the student's educational history and receipt of special education from the district; however, the IHO found the parent's answers confusing and requested that the district's representative provide clarifying information (Tr. pp. 126-36). In order to clarify the student's educational history, the district representative was permitted to read information aloud into the hearing record including information regarding prior IESPs, declassification, provision of prior written notices, parental consent for services, and the parent's request for referral to the CSE following declassification, without identifying the information source or producing documentation in support of the district representative's statements (Tr. pp. 136-43, 145-47). The IHO has the authority to ask questions of counsel or witnesses for the purposes of clarification or completeness of the hearing record (8 NYCRR 200.5[j][3][vii]), which is often necessary with respect to facts relevant to the disputed issues in a case to ensure that the IHO has an adequate record to support his or her decision. In this instance, the IHO appears to have used his authority to obtain background information regarding the student's educational history, which is not in dispute in this appeal and which was the subject of a prior impartial hearing (Tr. pp. 144-45, 147-48). In the event that the IHO intended to use any of this information in his decision to address a disputed issue, the IHO should have required the production of documentary or testimonial evidence. In fact, the IHO utilized this tact in inquiring of the district how it intended to demonstrate "who the participants were at the IEP meeting," which inquiry resulted in the district producing the signed CSE attendance sheet (Tr. p. 17; see also Tr. pp. 18-20).

In particular the IHO found the provision of 1:1 instruction to a twelve-year-old student outside of the general education classroom and during the hours of 8:00 p.m. and 10:00 p.m. was inappropriate (*id.* at p. 10). Further, the IHO found the SETSS teacher's testimony unreliable, noting apparent contradictions and assertions such as that the student was reading at a third grade level at the beginning of seventh grade and that the student exhibited tantrums to be unsupported by other evidence in the hearing record (*id.*). As an example, the SETSS teacher's testimony regarding the student's functioning in the classroom appears inconsistent. Initially, the teacher testified that because she worked with the student one-to-one, she did not see the social/emotional or behavioral aspect to the student's classroom functioning but she tried to work on it as per what the parent told her (Tr. p. 155). However, in explaining the basis for why she believed the student needed SETSS during the 2020-21 school year, the SETSS teacher's testimony focused on the student's functioning in the classroom; she testified that her instruction "got [the student] to participate and attend and engage in the teacher's lessons," further testifying that the student "really is lost in a classroom, and often tends just to shut down there" (Tr. pp. 166-67). Additionally, as noted by the IHO, the teacher testified that the student had difficulties with transitions, resulting in the student acting out physically or by having "a verbal rant"; however, other than a reference to "outbursts at home" in the March 2021 evaluation report, the evaluative information included in the hearing record does not indicate that the student exhibited behavioral concerns as testified to by the SETSS teacher (Tr. pp. 156-57; Parent Ex. J at p. 3; IHO Decision at p. 10; *see* Parent Exs. C; E-F; I-J).

Additionally, the IHO noted the witness' demeanor in responding to questions during cross-examination as an additional basis for finding the witness' testimony to not be credible (IHO Decision at p. 11). Generally, an SRO gives due deference to the credibility findings of an IHO, unless non-testimonial evidence in the hearing record justifies a contrary conclusion or the hearing record, read in its entirety, compels a contrary conclusion (*see Carlisle Area Sch. v. Scott P.*, 62 F.3d 520, 524, 528-29 [3d Cir. 1995]; *P.G. v. City Sch. Dist. of New York*, 2015 WL 787008, at \*16 [S.D.N.Y. Feb. 25, 2015]; *M.W. v. New York City Dep't of Educ.*, 869 F. Supp. 2d 320, 330 [E.D.N.Y. 2012], *aff'd* 725 F.3d 131 [2d Cir. 2013]; *Bd. of Educ. of Hicksville Union Free Sch. Dist. v. Schaefer*, 84 A.D.3d 795, 796 [2d Dep't 2011]; *Application of a Student with a Disability*, Appeal No. 12-076). In this instance, as discussed above, a review of the hearing record does not compel such a conclusion, but rather affirms some of the IHO's concerns regarding the delivery of SETSS. Accordingly, the IHO's determinations as to credibility must be considered in weighing the teacher's testimony (*see K.R. v. New York City Dep't of Educ.*, 107 F.3d 295, 308-09 [S.D.N.Y. 2015] [describing IHO's observations of the witness's demeanor in assessing credibility, which included "the cadence and volume of [the witness's] speech, hesitations and pauses, and tone of voice"]).

The parent's private SETSS teacher testified that she provided the student with services during the 2019-20 and 2020-21 school years (Tr. pp. 153-54). She further testified that the student was "weak across all academic domains... reading, math, writing, and... the social-emotional/behavioral aspect" (Tr. p. 155; Parent Ex. F at pp. 1-2). In addition, the parent's private SETSS teacher testified that she provided services to the student in both English and Yiddish, although tutoring "focused on English language studies" and that "emphasis [wa]s on English" (Tr. pp. 175-76; *see* Parent Ex. F). According to the SETSS teacher, she spoke to the student "in English basically," adding that she used Yiddish when the student didn't understand (Tr. p. 176). The parent's private SETSS teacher also described the student as not "hav[ing] the know-how as

to how to react when there are any changes in his environment... anything that requires a transition... he often acts out physically or... goes on a... verbal rant... lots of environmental triggers just tick him off and cause him to become disruptive" (Tr. p. 156). In response to the next question from the parent's attorney regarding whether the outbursts and triggers she just reported affected the student academically, the private SETSS teacher testified "[o]f course, that could affect them because he also tends to shut off completely. If there's going to be that trigger, he's going to shut off and there's going to be no one to talk to, and he's going to just block out any outside stimuli" (Tr. p. 157). The parent's private SETSS teacher further testified that she worked with the student on "very, very, very basic reading skills," mathematical operations with an emphasis on word problems, using proper writing conventions, basic grammar and punctuation, and modeling, role playing and social stories to address the student's social/emotional needs (Tr. pp. 162-63, 165, 166). The private SETSS teacher also testified that she did not believe that the student would have made academic gains during the 2020-21 school year without the services she provided five times per week (Tr. pp. 166-67). On cross-examination, the parent's private SETSS teacher testified that she assessed the student's reading level using Fountas & Pinnell but was unable to provide the corresponding level letter (Tr. p. 168). The SETSS teacher testified that the student was reading at a third-grade level at the beginning of seventh grade during the 2020-21 school year and at a fourth-grade level towards the end of seventh grade, however she was unable to provide a Fountas & Pinnell level and became confused during her testimony (Tr. pp. 168-72). When asked if she had reviewed the February 2020 IESP, the SETSS teacher testified "[y]es, yes; did not have at all enough information on his deficiencies" (Tr. p. 174). In response to questioning from the IHO, the private SETSS teacher indicated that she provided 1:1 instruction to the student in her home on Monday and Wednesday from 8:00 p.m. to 10:00 pm and on Sunday from 4:00 pm to 5:00 pm (Tr. pp. 191-92).

Upon review of the evidence in the impartial hearing record, I am not persuaded that the IHO erred in determining that the parent failed to establish that the unilaterally obtained SETSS was appropriate. In particular, the SETSS teacher's testimony contains inconsistencies regarding the student's functioning in the classroom. Further, as the SETSS teacher's testimony was found to not be credible by the IHO, it would not be proper to base a finding of appropriateness of SETSS solely on the teacher's anecdotal testimony about the benefit of SETSS to the student's functioning in the classroom. Additionally, as the teacher only provided services outside of school and more often late at night, there is no information in the hearing record to determine how the student was functioning at the NPS or whether SETSS supported the student's functioning in the general education environment in his school. Accordingly, I decline to depart from the IHO's findings as to the appropriateness of the SETSS provided to the student during the 2020-21 school year.

## **B. Equitable Considerations**

Although I did not disturb the IHO's ultimate conclusion as to the appropriateness of the SETSS unilaterally obtained from Knowledge Tree, it is also necessary to make additional findings related to equitable considerations, as some of the IHO's findings as to SETSS are more appropriately assessed under an equitable considerations standard.

The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ.,

226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]; L.K. v. New York City Dep't of Educ., 674 Fed. App'x 100, 101 [2d Cir. Jan. 19, 2017]).

### **1. Excessiveness of Services**

Among the factors that may warrant a reduction in tuition under equitable considerations is whether the frequency of the services or the rate for the services were excessive a (see E.M. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014] [noting that whether the amount of the private school tuition was reasonable is one factor relevant to equitable considerations]). The IHO may consider evidence regarding whether the rate charged by the private agency was unreasonable or regarding any segregable costs charged by the private agency that exceed the level 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 noted above, the IHO found that the parent did not sustain her burden of demonstrating the appropriateness of her unilaterally obtained SETSS, the hearing record also does not clearly establish that the student required five hours per week of 1:1 instruction outside of the classroom. Of particular note in the evaluative information summarized above, the district's evaluators determined that the student's dominant language was Yiddish, and therefore the language of assessment was Yiddish; however, both reports indicated that the student had some or limited English language skills (Parent Exs. C at p. 2; E at p. 1). The hearing record reflects that the district's December 2019 psychoeducational evaluation and January 2020 speech-language evaluation were conducted as part of an initial determination of eligibility for special education and related services during the 2019-20 school year. State regulation provides that any individual evaluation or reevaluation must be provided and administered in the student's native language and that materials and procedures used to assess a student with limited English proficiency are selected and administered to ensure that they measure the extent to which the student has a disability and needs special education, rather than measure the student's English language skills (8 NYCRR 200.4[b][1], [6][i][a], [6][xvi]). Part 154 of the Commissioner's Regulations holds all school districts accountable for identifying and serving English Language Learners (ELLs). Districts are required to adopt a policy on the education of ELLs, plan and provide appropriate services for them, and evaluate and report their academic achievement (see generally 8 NYCRR 154-1.1). School districts are required to refer ELLs who are suspected of having a disability to the CSE and assure that a bilingual multidisciplinary assessment is conducted before identifying an ELL as having a disability (8 NYCRR 154-1.3[e]). Consistent with these requirements, the district conducted bilingual assessments of the student in this case as part of the initial eligibility determination (Parent Exs. C at pp. 1-2; E at pp. 1-2).

Consistent with State guidance on the evaluation of students who are culturally and linguistically diverse, the December 2019 bilingual psychoeducational evaluation report omitted quantitative scores and instead provided score ranges, adding that these should be "interpreted with caution" (id. at p. 2; see "Use of Standardized Scores in Individual Evaluations of Culturally and Linguistically Diverse English Language Learners Ages 3 through 21," at p. 2, Office of Special

Educ. Field Advisory [December 2014], available at [http://www.nysed.gov/common/nysed/files/programs/bilingual-ed/memo\\_sped\\_field\\_advisory.pdf](http://www.nysed.gov/common/nysed/files/programs/bilingual-ed/memo_sped_field_advisory.pdf).

The December 2019 psychoeducational evaluation report also included assessment of the student's academic skills through administration of the WIAT-III for math and reading (Parent Ex. C at p. 4). On the math portion of the WIAT-III, the student performed in the below average range on math problem solving—where the student displayed a number of skills but did not respond correctly to questions involving fractions and geometry—and in the average range on numerical operations, where he was able to solve addition, subtraction, multiplication, and some division problems (*id.*). On the reading portion of the WIAT-III, which measures the student's English reading ability, the student scored in the below average range in word reading and in the low range on reading comprehension, where the student had difficulty reading the stories presented, and consequently had difficulty responding to questions assessing his comprehension of the material (*id.*). In contrast, when informally assessed in Yiddish during the psychoeducational evaluation, the student's reading skills "appeare[d] to be on par with those of his peers" (*id.*).

The January 2020 speech-language evaluation report indicated that the student's language skills were "informally measured" via the CELF-5, noting that norms for that assessment were based on "a monolingual English sample" and not available for the bilingual population—as such, descriptors were used in lieu of test scores (*id.* at p. 2). Overall, the student's receptive language skills were assessed to be "within normal limits" but his expressive language skills were assessed to be "below normal limits" and the student was identified as exhibiting a "mild-moderate" expressive language delay (*id.* at p. 3). Notably, despite the student's identified delays in expressive language, on the understanding spoken paragraphs subtest, he was able to sustain attention and focus while listening to spoken paragraphs, create meaning from oral narratives and text, answer questions about the content of the information given, and use critical thinking strategies for interpreting beyond the given information (*id.* at pp. 2, 3). The speech-language evaluation report indicated that the questions in the understanding spoken paragraphs section of the CELF-5 measured understanding of the main idea, memory for facts and details, recall of event sequences and making inferences and predictions (*id.*).

To address the student's expressive language delay, the February 2020 CSE recommended two 30-minute sessions per week of speech-language therapy in Yiddish in a separate location of the provider's choosing (Parent Ex. I at p. 9). The February 2020 IESP included four annual goals, including multiple goals that supported the student's expressive language needs as they related to reading (*id.* at pp. 5-6). The parent testified that she did not disagree with the speech-language therapy goals in the IESP (Tr. p. 85).

However, even if I had overturned the IHO's credibility and appropriateness determinations above regarding the 1:1 SETSS instruction, I am also not convinced that the district should be responsible for the services obtained by the parent because they are in excess of what the district would have had to provide. The evidence shows that 1:1 SETSS was provided in English, but the evidence in the hearing record shows that the student—with the exception of exhibiting an expressive language delay in Yiddish—otherwise demonstrated adequate cognitive and receptive language skills in Yiddish. As such, as described below, it is not clear that the student's below average performance on assessments administered in English is indicative of a cognitive or language deficit as opposed to insufficient instruction in English, or a lack of English language

skills. Specifically, review of the hearing record indicates that the description of the student's functioning and performance in some areas as reported by the parent's privately obtained SETSS teacher in her October 2019 evaluation report is not consistent with the results of the district's initial evaluation in December 2019 and January 2020. In contrast, the SETSS teacher from Knowledge Tree who prepared the October 2019 evaluation report did not even identify a language of administration of her assessments, however, she testified that when providing instruction she "focused on English language studies" and that emphasis was on English, adding that she used Yiddish when the student didn't understand (Tr. p. 176; Parent Ex. F at p. 1). Notably, neither the October 2019 evaluation report nor the private SETSS teacher's testimony identified what specific assessments and subtests were administered to measure the student's performance in each academic area, nor did they provide any corresponding scores or ranges to support the SETSS teacher's identified areas of need (Tr. p. 155; Parent Ex. F at p. 1, 2). Additionally, the October 2019 evaluation report appeared to reflect the student's performance during SETSS sessions conducted in English; there was no indication whether the results reflected, or were consistent with the student's performance in Yiddish, or with his academic performance in the NPS classroom.<sup>14</sup>

The private SETSS teacher described the student in her October 2019 evaluation report as "deficient in" multiple areas, including—reading, writing, math, handwriting, receptive language, expressive language, social-emotional and behavior, conceptual, and critical thinking skills (Parent Ex. F at p. 1). Specifically, regarding reading, the October 2019 evaluation report described the student as struggling with decoding and reading basic sight words, spelling, independently reading text, answering basic comprehension questions, making connections with other passages, and drawing similarities between familiar concepts (*id.*). While the private SETSS teacher testified that the student lacked basic reading skills and required instruction in consonant blends, consonant digraphs, and sight words when instructed in English, the student's results on the district's December 2019 bilingual psychoeducation evaluation report showed that when informally assessed in Yiddish reading, the student's skills appeared to be "on par" with those of his peers (compare Tr. pp. 162-63, with Parent Ex. C at p. 4).

Regarding the student's conceptual and critical thinking skills, the private SETSS teacher's October 2019 evaluation report indicated that the student did not have the skills necessary for identifying a problem when presented with the background of a problem or situation when presented auditorily or in a reading passage and had difficulty giving solutions to a problem presented (Parent Ex. F at p. 2). This differs substantially from the results of the December 2019 administration of the WISC-V in Yiddish, where the student's fluid reasoning skills—including his ability to detect underlying conceptual relationships among visual objects, use reasoning to apply rules, use inductive and quantitative reasoning, exhibit broad visual intelligence and simultaneous processing, and use abstract thinking—were assessed to be "typical for his age" (Parent Ex. C at p. 3). The district's December 2019 psychoeducational evaluation report further noted that the student's performance on fluid reasoning tasks "w[ere] particularly strong when compared to his performance on tasks that involved language-based skills" and also described that while the student's performance on the verbal comprehension index subtest of the WISC-V showed that his vocabulary was very low, his performance on the comprehension subtest was average for

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<sup>14</sup> Review of the hearing record shows that it does not include any information regarding the details of the student's NPS classroom, or the language of instruction therein (see Tr. pp. 1-208; Parent Exs. B-J).

his age, suggesting "age-appropriate understanding of practical knowledge and ability to verbalize meaningful concepts" (*id.* at pp. 3-4). Similarly, the district's January 2020 bilingual speech-language evaluation report noted that while the student exhibited a mild-moderate expressive language delay, his performance on the spoken paragraphs subtest—including the ability to create meaning from oral narratives and text, answer questions about the content of the information given, use critical thinking strategies for interpreting beyond the given information, demonstrate understanding of the main idea, demonstrate memory for facts and details, recall event sequences, and make inferences and predictions—was "adequate" (Parent Ex. E at pp. 2, 3).

With respect to the student's expressive and receptive language skills, the private SETSS teacher's October 2019 evaluation report also described the student as "display[ing] weakness across the receptive language skills domain" and reflected that the student could not demonstrate the short-term memory skills needed to process multi-step directions, could not process language and information to answer questions quickly, was able to identify the "main ideas of the topic" but missed key details and events, could not answer questions related to the reasoning behind a story, struggled to sequence events and thoughts after reading a passage, and could not follow "verbal cueing of [third] grade level commands" (Parent Ex. F at p. 2). Of note, the October 2019 evaluation report does not include information to explain how these determinations were made (*id.*). The October 2019 evaluation report also indicated that the student demonstrated "below grade level" vocabulary, that his responses consisted of very few words and often missed the point, and that the student had difficulty understanding and describing cause and effect relationships (*id.*). However, the district's January 2020 bilingual speech-language evaluation notably determined that while the student exhibited a mild-moderate expressive language delay, the student demonstrated "adequate" receptive language skills—including the ability to think critically to solve problems, to identify cause and effect, to predict outcomes, and to use inferences to answer questions about images and from a short reading passage when informally assessed in Yiddish (Parent Ex. E at p. 3).

Review of the hearing record demonstrates that the student's performance on formal and informal assessments conducted in Yiddish exceeded his performance in assessments conducted in English and was consistent with the identified mild-moderate expressive language delay. Nevertheless, in accordance with State guidance, when interpreting evaluation results, care must be taken that issues of language differences are not confused with language disorders and that patterns of performance related to the student's socio-cultural background or interrupted schooling are not mistaken for signs of a disability. Here, the district found the student eligible for special education and related services as a student with a speech or language impairment. The hearing record does not support the parent's position that the student required five periods per week of SETSS after school as a result of a language-based disability. Rather, the hearing record tends to indicate that the student is an emerging reader in English due to limited English proficiency. Accordingly, even if I were to have found the SETSS was appropriate for the student because he benefited from it educationally, there is enough evidence to suggest that the SETSS instruction was not being used to address the student's speech-language impairment as a special education service but was instead being provided as extra instruction to support an increase in his English proficiency. The district would not be required to provide such instruction on an IESP, and accordingly, on equitable grounds I find the student would not be entitled to 180 hours of SETSS as relief in this case to redress the fact that there was no witness to address the occurrences at the IESP meeting, and the parent as not sought any other relief.

## 2. Notice of Unilateral Placement

In her request for review, the parent asserts that she should not be required to provide the district with ten-day notice of her intention to obtain private services and request public funding because the district did not raise this argument during the impartial hearing and because there was no evidence in the hearing record that the parent received a procedural safeguards notice for the 2020-21 school year.

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]).

The parent correctly asserts that the hearing record does not include a procedural safeguards notice and if the parent had demonstrated the appropriateness of her unilaterally obtained SETSS, lack of a ten-day notice would not preclude an award of reimbursement or direct funding in this instance. Nevertheless, the parent is forewarned and cautioned that going forward, the district's failure to provide a copy of a procedural safeguards notice in the hearing record will not be sufficient to relieve the parent of her obligation to provide a written ten-day notice to the district of her intent to unilaterally obtain services and seek reimbursement or direct funding from the district.

## VII. Conclusion

In summary, there is insufficient basis in the hearing record to disturb the IHO's determination that the parent did not sustain her burden of demonstrating the appropriateness of her unilaterally obtained services. Further, for the reasons above I have determined that equitable considerations would not warrant any relief in this case.

**THE APPEAL IS DISMISSED.**

**Dated: Albany, New York  
April 8, 2022**

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**JUSTYN P. BATES  
STATE REVIEW OFFICER**