The University of the State of New York

The State Education Department
State Review Officer
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No. 20-023

Application of a STUDENT WITH A DISABILITY, by her 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.

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Thomas W. MacLeod, Esq.

DECISION

I. Introduction

This proceeding arises under Article 89 of the New York State Education Law. Petitioner (the parent) appeals from a decision of an impartial hearing officer (IHO) which declined to award all of the relief requested by the parent to redress respondent's (the district's) denial of appropriate equitable services for the student for the 2018-19 and 2019-20 school years and denied her request for an independent educational evaluation (IEE) at district expense. The appeal must be sustained in part.

II. Overview—Administrative Procedures

When a student who resides in New York is eligible for special education services and attends a nonpublic school, Article 73 of the New York State Education Law allows for the creation of an individualized education services program (IESP) under the State's so-called "dual enrollment" statute (see Educ. Law §3602-c).[1] The task of creating an IESP is assigned to the

[1] 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]). "Boards of education of all school districts of

same committee that designs educational programing for students with disabilities under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482), namely a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414 [d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts related to IESPs, State law provides that "[r]eview of the recommendation of the committee on special education may be obtained by the parent or person in parental relation of the pupil pursuant to the provisions of [Education Law § 4404]," which effectuates the due process provisions called for by the IDEA (Educ. Law § 3602-c[2][b][1]). Incorporated among the procedural protections of the IDEA and the analogous State law provisions is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to

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

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

According to the hearing record, the student was parentally placed in a nonpublic school and received special education services from the district during the 2015-16 school year and for all or some of the school years thereafter, including pursuant to pendency during the 2019-20 school year (see Parent Exs. B; C; IHO Ex. 1 at p. 2).[2]

At the time of the October 27, 2015 CSE, the student was enrolled in the second grade (see Parent Ex. B at p. 1). The October 2015 IESP provided for five periods per week of special education teacher support services (SETSS), two 30-minute sessions per week of individual speech-language therapy, and two 30-minute sessions per week of counseling services (id. at p. 2).

According to the parent, a CSE convened in May 2019 for the first time since the October 2015 CSE (Tr. p. 10). The parent testified that, at the May 2019 CSE meeting, she requested that the student's SETSS services be increased to ten sessions per week but that the CSE, instead, recommended a decrease in the services to three sessions per week (Tr. p. 16).

A. Due Process Complaint Notice and Pendency Agreement

The parent filed a due process complaint notice dated September 11, 2019, asserting the district failed to offer and/or implement appropriate equitable services for the 2018-19 and 2019-20 school years (Parent Ex. A at pp. 2, 3). Initially, the parent requested a determination that the student's pendency placement lay in the October 2015 IESP (id. at p. 2).

Regarding alleged violations, the parent claimed that, prior to May 2019, the district had failed to develop an IESP for the student since October 2015 (Parent Ex. A at p. 3). Next, the parent argued that, during the 2018-19 school year, the district failed to provide the student with his mandated SETSS between January and May 2019 (id.). As for the May 2019 IESP, the parent argued that the May 2019 CSE disregarded the recommendations of the student's then-current

[2] Aside from the parent's evidence concerning the student's continued receipt of the SETSS sessions recommended in the October 2015 IESP for at least part of the 2018-19 school year, the hearing record does not indicate what services the student received during the 2016-17 and 2017-18 school years, and the parent alleges that the district has not developed an IESP for the student since October 2015.

SETSS provider for goals and the continuation of five sessions of SETSS per week, and instead reduced the student's SETSS to three sessions per week (id.).

As a remedy for the alleged lapse in implementation of SETSS during the 2018-19 school year, the parent requested "compensatory services for the missed sessions with additional sessions to make up for the regression" (Parent Ex. A at pp. 2, 3). The parent also sought SETSS for the student "at an enhanced rate," as well as a new CSE meeting "to develop proper goals with new evaluations" (id. at p. 2).

Finally, the parent alleged that the district had "neglected to independently evaluate [the student] per the parent['s] request" (Parent Ex. A at p. 3). Therefore, the parent requested an IEE for all areas (id.). The parent also sought an interim order for an IEE in order to "review ongoing services" (id. at p. 2).

The parent and district executed a "Pendency Agreement," dated October 18, 2019, wherein the district and parent agreed that the student's pendency program arose from the October 2015 IESP (IHO Ex. I at pp. 1-3). The agreement indicated that the district would directly pay a specified agency (Children's Learning Ladders) for the student's SETSS and counseling services and would issue a related services authorization (RSA) to the parent for the student's speech-language therapy services (id. at p. 2). The agreement was signed by the parent's advocate and a district representative (id. at p. 3). In addition, the agreement was "endorsed" by the IHO on October 23, 2019 (id.).

B. Impartial Hearing Officer Decision

An impartial hearing was held on December 30, 2019 (Tr. pp. 1-21). During the impartial hearing, the IHO found that, because the district failed to appear, ask for an adjournment, or contact him or his office, and as the parent and her advocate were present, the district had "default[ed]" and would be found to have denied the student a free appropriate public education (FAPE) (Tr. pp. 3-4). Therefore, the IHO indicated that the purpose of the impartial hearing would be "an inquest" into whether or not the relief sought by the parent was appropriate (Tr. pp. 4-5).

In a decision dated December 31, 2019, the IHO reiterated his determination that the district was in default (IHO Decision at pp. 8-9, 10, 11).[3] The IHO also acknowledged the pendency agreement between the parties and found that, due to the agreement, there was no need for him to address the issue of pendency (id. at pp. 5, 16).

With respect to the parent's request for compensatory education to remedy the district's failure to deliver all of the student's SETSS during the 2018-19 school year, the IHO found that the hearing record lacked evidence as to the precise types of educational services the student needed to progress and that the parent failed to "propos[e] a well-articulated plan that reflects the student's current education abilities and needs and is supported by the record" (IHO Decision at p.

[3] The IHO's decision is not paginated (see generally IHO Decision). For purposes of this decision, citations to the IHO decision will reflect pages "1" through "19" with the cover page as page "1."

16). Therefore, the IHO held that the hearing record did not support an award of compensatory education services (id.).

Turning to the parent's request for SETSS at an enhanced rate, the IHO found that the parent had not demonstrated a financial obligation to pay the difference between the district's approved rate and the rate charged by the provider (IHO Decision at p. 14). The IHO also determined that it was not necessary to make a determination regarding the requested enhanced rate, as the evidence in the hearing record did not support a finding that the district failed to make available to the student special education programs and services on an equitable basis, as the parent testified that, at the most recent CSE meeting, the district offered the student three sessions of SETSS (id. at p. 15). The IHO further noted that there was "no substantive evidence" in the hearing record regarding "the [p]arent's efforts to secure a provider and/or of the providers she did contact" (id.).

Finally, as to the parent's request for IEEs, the IHO found that, while the district did not file a due process complaint notice to defend any of its evaluations, there was nothing in the hearing record to show that the parent objected to the district's evaluations or requested IEEs and the parent's testimony was not "entirely credible" (IHO Decision at pp. 15-16). Therefore, the IHO found that the evidence in the hearing record was insufficient to award IEEs (id. at p. 16). Although denying the parent's request for IEEs, the IHO ordered the district to re-evaluate the student in all areas of suspected disability that had not been evaluated in the "last two years" (id.).

The IHO ordered that the district conduct a re-evaluation of the student in all areas of suspected disability and that the CSE reconvene, consider all of the student's evaluations upon their completion as well as any other relevant information, and produce a new IESP for the student's 2020-21 school year (IHO Decision at p. 17).

IV. Appeal for State-Level Review

The parent appeals, asserting the IHO erred in: denying her request for compensatory education for missed SETSS sessions during the 2018-19 school year; finding that, for the 2019-20 school year, three periods per week of SETSS was appropriate, as opposed to the five periods; not awarding SETSS at an enhanced rate for the 2019-20 school year; and for denying the parent's request for IEEs.

In its answer, the district generally responds to the parent's allegations with admissions and denials and argues that the IHO's decision should be upheld.[4] The district also asserts that any relief sought by the parent relating to the May 2019 CSE's SETSS recommendation had been resolved by virtue of the operation of pendency and, in particular, via the pendency agreement between the parties.

[4] The district appears to acknowledge that the IHO erred in some of his findings (i.e., that the three periods of SETSS recommended by the May 2019 CSE was sufficient) but argues that the IHO's ultimate determinations denying the parent's requested relief were correct.

V. Applicable Standards

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

However, under State law, parents of a student with a disability who have privately enrolled their child in a nonpublic school may seek to obtain educational "services" for their child by filing a request for such services in the district of location where the nonpublic school is located on or before the first day of June preceding the school year for which the request for services is made (Educ. Law § 3602-c[2]).[5] "Boards of education of all school districts of the state shall furnish services to students who are residents of this state and who attend nonpublic schools located in such school districts, upon the written request of the parent" (Educ. Law § 3602-c[2][a]). In such circumstances, the district of location's CSE must review the request for services and "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an [IEP]" (Educ. Law § 3602-c[2][b][1]). The CSE must "assure that special education programs and services are made available to students with disabilities attending nonpublic schools located within the school district on an equitable basis, as compared to special education programs and services provided to other students with disabilities attending public or nonpublic schools located within the school district" (id.).[6]

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

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[5] State law provides that "services" includes "education for students with disabilities," which means "special educational programs designed to serve persons who meet the definition of children with disabilities set forth in [Education Law § 4401(1)]" (Educ. Law § 3602-c[1][a], [d]).

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

VI. Discussion

A. Scope of Review

The district has not cross-appealed from the IHO's determination that, due to its failure to appear at the impartial hearing, it was in default and, therefore, failed to meet its burden to prove that it offered the student appropriate equitable services for the 2018-19 and 2019-20 school years. Therefore, the IHO's determination that the district denied the student appropriate equitable series for both school years has become final and binding upon the parties and will not be further addressed (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; 279.8[c][4]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]). Accordingly, I turn next to the question what relief is warranted to remedy the district's denial of appropriate equitable services.

B. 2018-19 School Year

The parent asserts the IHO erred in denying her request for compensatory education services to remedy the lapse in delivery of SETSS services during the 2018-19 school year. Compensatory education relief may be awarded to a student with a disability who remains eligible for instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). The purpose of an award of compensatory education is to provide an appropriate remedy for a denial of a FAPE (see E.M. v. New York City Dep't of Educ., 758 F.3d 442, 451 [2d Cir. 2014] [holding that compensatory education is a remedy designed to "make up for" a denial of a FAPE]; P. v. Newington Bd. of Educ., 546 F.3d 111, 123 [2d Cir. 2008] [stating that "[t]he IDEA allows a hearing officer to fashion an appropriate remedy, and . . . compensatory education is an available option under the Act to make up for denial of a [FAPE]"]; see also Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 456 [2d Cir. 2015]; Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005] [holding that, in fashioning an appropriate compensatory education remedy, "the inquiry must be fact-specific, and to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"]; Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1497 [9th Cir. 1994]). Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). Accordingly, an award of compensatory education should aim to place the student in the position he or she would have been in had the district complied with its obligations under the IDEA (see Newington, 546 F.3d at 123 [holding that compensatory education awards should be designed so as to "appropriately address[] the problems with the IEP"]; see also Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1289 [11th Cir. 2008] [holding that "[c]ompensatory awards should place children in the position they would have been in but for the violation of the Act"]; Bd. of Educ. of Fayette County v. L.M., 478 F.3d 307, 316 [6th Cir. 2007] [holding that "a flexible approach, rather than a rote hour-by-hour compensation award, is more likely to address [the student's] educational problems successfully"]; Reid, 401 F.3d at 518 [holding that compensatory education is a "replacement of educational services the child should have received in the first place" and that compensatory education awards "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA"]).

In this case, a remedy for a deficiency in equitable services under State law should be similar to a remedy for a deficient service under the IDEA (see generally Doe v. E. Lyme Bd. of Educ., 262 F. Supp. 3d 11, 27 [D. Conn. 2017] [outlining variety of forms that compensatory education may take as an equitable form of relief in order to address different circumstances], aff'd in part, vacated in part, 2020 WL 3273347 [2d Cir. June 18, 2020]). However, where, as here, the district did not appear at the impartial hearing to defend its provision of equitable services to the student, and the IHO determined that the district effectively conceded that it did not comply with its obligations to do so, the determination of an appropriate remedy becomes more complicated. Generally, where a district concedes that it failed to provide the student with appropriate special education services, the deficiencies alleged by the parent in the due process complaint notice are, for purposes of crafting relief, deemed true to the extent not contradicted by the hearing record (see Application of a Student with a Disability, Appeal No. 19-038; Application of a Student with a Disability, Appeal No. 15-050; Application of a Student with a Disability, Appeal No. 15-011; Application of a Student with a Disability, Appeal No. 14-079).[7]

Here, as summarized above, the parent alleged that the student was entitled to receive SETSS during the 2018-19 school year and that the student did not receive those services from January 1 through May 1, 2019 (Parent Ex. A at p. 3).[8] The hearing record contains the parent's testimony that the student was not provided with five periods of SETSS per week from December 2018 to May 2019 when the district was unable to find a provider (Tr. pp. 14, 16).[9] The district offered no evidence during the impartial hearing—and does not otherwise argue in its answer to the parent's appeal—that it either did not have the obligation to deliver services, that it delivered all or most of the services that the student was entitled to receive, or that any lapse in services did

[7] While the parent may be entitled to a presumption as to the truth of the asserted facts underlying her claims that the student did not receive the equitable services to which he was entitled in light of the district's concession, she is not necessarily entitled to "default" relief. Indeed, an outright default judgment awarding compensatory education—including any and all of the relief requested by the parent without further inquiry—is a disfavored outcome even in cases where the district's conduct in denying the student appropriate services and in failing to actively participate in the impartial hearing process is egregious (see Branham v. Govt. of the Dist. of Columbia, 427 F.3d 7, 11-12 [D.C. Cir. 2005]). In some instances, an award ordered without considering the nature of the violation to be remedied and the impact of the award on the child's educational needs could ultimately do more harm than good for a student (see M.M. v. New York City Dep't of Educ., 2017 WL 1194685, at *8 [S.D.N.Y. Mar. 30, 2017] ["Common sense and experience teaches that services that may be valuable for, or even critical to, a child's educational achievement when provided in small to moderate amounts may become close to useless, or even burdensome, if provided in overwhelming quantity"]).

[8] Given the parent's allegation that no IESP was developed for the student since October 2015, it is unclear whether the district's obligation to deliver SETSS during the 2018-19 school year was by operation of agreement between the parties that the district would continue to implement the October 2015 or whether there was some other arrangement. Given that the district does not challenge that it had an obligation to deliver SETSS during this school year it is unnecessary to opine about the circumstances, except to note that it appears that the parties agree that the district was obligated to provide SETSS to the student during the 2018-19 school year in the same frequency and duration as set forth in the student's October 2015 IESP (i.e., five periods of SETSS per week).

[9] The parent was unsure as to the exact end and resumption dates for the SETSS (see Tr. pp. 14, 16, 19).

not amount to a substantial and material deviation from the services mandated (see generally Answer).[10]

Further, in this instance, the district by its nonappearance also failed to address its burdens, as it is required under the due process procedures set forth in New York State law, by describing its views, based on a fact-specific inquiry set forth in an evidentiary record, regarding an appropriate compensatory education remedy that would most reasonably and efficiently place the student in the position that he would have been but for the denial of the services to which he was entitled in the first instance (E. Lyme, 790 F.3d at 457; Reid, 401 F.3d at 524). Where, as here, New York State law has placed the burden of production and persuasion at an impartial hearing on the district, it is not an SRO's responsibility to craft the district's position regarding the appropriate compensatory education remedy.[11]

With regard to relief, on appeal, the parent points to her testimony about the lapse in services as well as a December 2019 progress report completed by the student's then-current SETSS provider, which the parent argues is evidence of the "specific additional work the Student required" (Req. for Rev. ¶ 14). In its answer, the district asserts that the progress report offers "no insight" as to the student's needs and levels of performance at the start and end of the "purported gap" during which the student was not provided with SETSS (Answer ¶ 16). While the district is correct that the December 2019 progress report does not provide information specific to articulating the services the student needed in order to make up for the lapse in SETSS (see Parent Ex. C), the district fails to acknowledge its responsibility for the deficiencies in the hearing record overall. The district also points to the parent's testimony that the student "caught up" once she

[10] With regard to the implementation of a student's IEP, a denial of a FAPE occurs if there was more than a de minimis failure to implement all elements of the IEP, and instead, the school district failed to implement substantial or significant provisions of the IEP (Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 349 [5th Cir. 2000]; see also Fisher v. Stafford Township Bd. of Educ., 289 Fed. App'x 520, 524 [3d Cir. Aug. 14, 2008]; Couture v. Bd. of Educ. of Albuquerque Pub. Schs., 535 F.3d 1243 [10th Cir. 2008]; Neosho R-V Sch. Dist. v. Clark, 315 F.3d 1022, 1027 n.3 [8th Cir. 2003]).

[11] With respect to the burden of proof, the IHO stated that the parent carried the burden to propose "a well-articulated plan that reflects the student's current education abilities and needs and is supported by the record" and further indicated that, although the district defaulted on the question of liability, "damages . . . remain[ed] the Parent's burden to prove" (IHO Decision at pp. 13, 16). However, the caselaw relied upon by the IHO is either inapplicable to the present context (see Fed. R. Civ. Pro. 55; City of New York v. Mickalis Pawn Shop, LLC, 645 F.3d 114, 128 [2d Cir. 2011]) or arises from a jurisdiction that follows Schaffer v. Weast, 546 U.S. 49, 59-62 (2005) in placing the burden of proof on the party seeking relief (see Phillips v. Dist. of Columbia, 2010 WL 3563068, at *6 [D.D.C. Sept. 13, 2010), as opposed to Education Law § 4404(1)(c), which places the burden of proof on the school district during the impartial hearing except in an instance where a parent seeks tuition reimbursement for a unilateral placement, in which case the parent has the burden of proof regarding the appropriateness of such placement. With that said, parents will find themselves in a better position to argue for the relief they seek if they quantify a request for compensatory education with reference to specific services deemed necessary to remediate a district's failure to offer the student appropriate services and/or present evidence regarding what may be an appropriate compensatory remedy (see Application of a Student with a Disability, Appeal No. 16-050). An IHO may find a prehearing conference is a good opportunity to request that parents detail the compensatory remedy sought (see 8 NYCRR 200.5[j][3][xi][a]). In this instance, while the parent's plan for compensatory education may not have been articulated with perfect clarity, she has consistently sought make-up services for the SETSS sessions that the student missed (see Parent Ex. A at pp. 2, 3).

started working with a new SETSS provider during the 2019-20 school year, in order to assert that no compensatory education remedy is warranted (Answer ¶ 16). The parent testified that the new SETSS provider was given the student's curriculum and helped the student do some of the work she had missed (Tr. p. 19). However, once again, given the district's failure to present evidence during the impartial hearing, this testimony is insufficient to establish that the SETSS provider worked with the student to the degree that the lapse in services was otherwise remedied.[12]

Ultimately, while an award of compensatory education should be based on a fact-specific inquiry (see Reid, 401 F.3d at 524), in this instance the nature of the allegation (i.e., the district's failure to implement services) lends itself to an hour-by-hour quantitative approach to determining an appropriate award of make-up services, notwithstanding the lack of information in the hearing record about the student's needs. Accordingly, I am ordering an hour-for-hour compensatory education award to remedy the district's failure to provide the student with five SETSS sessions per week from January 1 through April 30, 2019, which amounts to approximately 80 sessions of make-up SETSS sessions.

B. 2019-20 School Year

With regard to the 2019-20 school year, the IHO made substantive findings relating to the district's provision of equitable services that were inconsistent with his determination that, by its nonappearance, the district defaulted and essentially conceded that it failed to offer the student appropriate equitable services. Specifically, despite the fact that the district offered no documentary or testimonial evidence at the impartial hearing, the IHO found that the district met its obligation to offer appropriate equitable services by virtue of the May 2019 CSE's recommendation of three sessions of SETSS per week and indicated that the hearing record lacked evidence of the parent's efforts to secure a provider (see IHO Decision at p. 15). The IHO erred in these discrete determinations, but ultimately, as the district does not appeal the IHO's determination that, by its nonappearance, it defaulted and, therefore, was deemed to have failed to provide the student with appropriate equitable services for the 2019-20 school year, that finding is final and binding, as noted above. Accordingly, the only issue that remains to be addressed relates to relief, and specifically, the rate of the SETSS services delivered to the student during the 2019-20 school year.

Before turning to the merits of the parent's appeal, it is necessary to consider the district's assertion in its answer that the parent's appeal pertaining to the funding for services during the 2019-20 school year is now moot. It is well settled that a dispute between parties must at all stages be "real and live," and not "academic," or it risks becoming moot (Lillbask v. State of Conn. Dep't of Educ., 397 F.3d 77, 84 [2d Cir. 2005]; see Toth v. City of New York Dep't of Educ., 720 Fed. App'x 48, 51 [2d Cir. Jan. 2, 2018]; F.O. v. New York City Dep't of Educ., 899 F. Supp. 2d 251, 254 [S.D.N.Y. 2012]; Patskin v. Bd. of Educ. of Webster Cent. Sch. Dist., 583 F. Supp. 2d 422,

[12] On the other hand, the parent's testimony indicates that she asked the SETSS provider who was working with the student at the time to "give [them] all the free time that she had" in order to help make up for the lapse in services (Tr. p. 19). To the extent that the parent incurred the cost for services above and beyond the five hours per week that the student received once the new provider started in May 2019, I will order the district to reimburse the parent for the costs thereof, upon proof of payment shown, and the number of sessions reimbursed should be subtracted from the total compensatory award ordered herein.

428 [W.D.N.Y. 2008]; Student X. v. New York City Dep't of Educ., 2008 WL 4890440, at *12 [E.D.N.Y. Oct. 30, 2008]; J.N. v. Depew Union Free Sch. Dist., 2008 WL 4501940, at *3-*4 [W.D.N.Y. Sept. 30, 2008]; see also Coleman v. Daines, 19 N.Y.3d 1087, 1090 [2012]; Hearst Corp. v. Clyne, 50 N.Y.2d 707, 714 [1980]). In general, cases dealing with issues such as desired changes in IEPs, specific placements, and implementation disputes may become moot at the end of the school year because no meaningful relief can be granted (see, e.g., V.M. v. N. Colonie Cent. Sch. Dist., 954 F. Supp. 2d 102, 119-21 [N.D.N.Y. 2013]; M.S. v. New York City Dep't of Educ., 734 F. Supp. 2d 271, 280-81 [E.D.N.Y. 2010]; Patskin, 583 F. Supp. 2d at 428-29; J.N., 2008 WL 4501940, at *3-*4; but see A.A. v. Walled Lake Consol. Schs., 2017 WL 2591906, at *6-*9 [E.D. Mich. June 15, 2017] [considering the question of the "potential mootness of a claim for declaratory relief"]). However, in most instances, a claim for compensatory education will not be rendered moot (see Mason v. Schenectady City Sch. Dist., 879 F. Supp. 215, 219 [N.D.N.Y. 1993] [demand for compensation to correct past wrongs remains as a live controversy even if parents are satisfied with student's current placement]; see also Toth, 720 Fed. App'x at 51).

The district asserts that the student has been receiving five periods per week of SETSS, pursuant to the October 2019 pendency agreement, retroactive to the date the parent filed the due process complaint notice on September 11, 2019 and that, by the end of the 2019-20 school year, the student will have received the requested amount of SETSS, thereby rendering the issue moot (Answer at p. 5). Despite some reference in the parent's request for review to the pendency agreement not having been entered into by the parties (Req. for Rev. ¶ 6) and an indication that, on appeal, the parent is seeking "an Order on Pendency" (id. at p. 6), both parties agree in substance that the student's pendency for the 2019-20 school consists of the services recommended in the October 2015 IESP, which is precisely what the pendency agreement stated. Moreover, the pendency agreement indicated that the district would directly pay a specified agency (Children's Learning Ladders) for delivery of the student's SETSS services during the pendency of the proceedings (IHO Ex. I at p. 2). The provider who delivered SETSS to the student during the 2019-20 school year, for which the parent seeks funding, appears to have been from the agency specified in the October 2019 pendency agreement (see Parent Ex. C at p. 1).

Even assuming that the parent's claims are not moot, the substance of the claims have been resolved in the parent's favor, as noted above, and the only remaining issue is the parent's appeal of the IHO's determination that the parent was not entitled to the full rate charged by the SETSS provider. However, based on the October 2019 pendency agreement, it is entirely unclear why the provider's rate remains an issue at this juncture. If for some reason, the district is refusing to pay the SETSS provider the rate she charges, the parent has not made such an allegation, choosing instead to disavow the pendency agreement and claim that she carries the financial obligation to the provider. If the parent is seeking a higher rate for the provider that is above and beyond what the provider is charging the district to implement pendency services pursuant to some agreement between the provider and the district, such a circumstance would likely raise contract law and other concerns that are beyond the purview of this forum.[13] In sum, under the circumstances of this matter, this is not the forum for the parties' rate dispute, to the extent such a dispute exists.

[13] An SRO's jurisdiction is limited to matters relating to the identification, evaluation, or placement of students with disabilities, or the provision of a FAPE to such students (20 U.S.C. § 1415[b][6][A]; Educ. Law § 4404[1][a]; 34 CFR 300.503[a], 300.507[a][1]; 8 NYCRR 200.5[i][1]).

Therefore, based on the above, the district was obligated to fund five sessions per week of SETSS during the 2019-20 school year as contemplated by the pendency agreement between the parties. However, under the circumstances of this matter, the parent's request for an explicit determination that the services should be funded at the "enhanced rate" is denied.

C. Independent Educational Evaluations

Turning to the parent's request for independent evaluations, the IDEA and State and federal regulations guarantee parents the right to obtain an IEE (see 20 U.S.C. § 1415[b][1]; 34 CFR 300.502; 8 NYCRR 200.5[g]), which is defined by State regulation as "an individual evaluation of a student with a disability or a student thought to have a disability, conducted by a qualified examiner who is not employed by the public agency responsible for the education of the student" (8 NYCRR 200.1[z]; see 34 CFR 300.502[a][3][i]). Parents have the right to have an IEE conducted at public expense if the parent expresses disagreement with an evaluation conducted by the district and requests that an IEE be conducted at public expense (34 CFR 300.502[b]; 8 NYCRR 200.5[g][1]; see K.B. v Pearl Riv. Union Free Sch. Dist., 2012 WL 234392, at *5 [S.D.N.Y. Jan. 13, 2012] [noting that "a prerequisite for an IEE is a disagreement with a specific evaluation conducted by the district"]; R.L. v. Plainville Bd. of Educ., 363 F. Supp. 2d. 222, 234-35 [D. Conn. 2005] [finding parental failure to disagree with an evaluation obtained by a public agency defeated a parent's claim for an IEE at public expense]). Guidance from the United States Department of Education's Office of Special Education Programs (OSEP) indicates that if a parent disagrees with an evaluation because a child was not assessed in a particular area, "the parent has the right to request an IEE to assess the child in that area to determine whether the child has a disability and the nature and extent of the special education and related services that child needs" (Letter to Baus, 65 IDELR 81 [OSEP 2015]; see Letter to Carroll, 68 IDELR 279 [OSEP 2016]). If a parent requests an IEE at public expense, the school district must, without unnecessary delay, either (1) ensure that an IEE is provided at public expense; or (2) initiate an impartial hearing to establish that its evaluation is appropriate or that the evaluation obtained by the parent does not meet the school district criteria (34 CFR 300.502[b][2][i]-[ii]; 8 NYCRR 200.5[g][1][iv]). If a school district's evaluation is determined to be appropriate by an IHO, the parent may still obtain an IEE, although not at public expense (34 CFR 300.502[b][3]; 8 NYCRR 200.5[g][1][v]). Additionally, both federal and State regulations provide that "[a] parent is entitled to only one [IEE] at public expense each time the public agency conducts an evaluation with which the parent disagrees" (34 CFR 300.502[b][5]; 8 NYCRR 200.5[g][1]).

The IHO denied the parent's requests for IEEs in all areas of suspected disability because he determined that there was "nothing in the record that show[ed] [the parent] objected to the [district's] evaluations or requested evaluations and/or which evaluations she objected to or requested" (IHO Decision at pp. 15-16). On appeal, the parent asserts that she is entitled to IEEs because she disagreed with the district's most recent proposed IESP and because the district failed "to contest the Parent's request for additional independent evaluations" at public expense (Req. for Rev. ¶ 15).

As noted above, according to the parent, the May 2019 CSE recommended that the student's SETSS sessions be reduced from five per week to three per week, and the parent disagreed with that change in services (see Tr. pp. 11, 16). During the impartial hearing, the parent testified that she "believe[d]" that the district conducted an evaluation of the student prior to the

May 2019 CSE meeting but she could not recall whether or not she agreed with the outcome of the evaluation or "how accurate the evaluation was" (Tr. pp. 10-11). Moreover, according to the parent's own testimony, the CSE relied "solely" upon the information shared by the student's teacher in making its recommendation for a decrease in services, not a district evaluation (see Tr. pp. 11-13). In particular, the parent testified that the student's teacher "first praised [the student] and expressed her strengths," at which point the CSE "cut her off," and determined based on this description that the student "d[id]n't need any more help" (Tr. pp. 11-12). The parent testified that the teacher "tried to speak and say that that's not what she meant" and later expressed to assistant principal at the nonpublic school that she felt "misrepresented" and "misunderstood" by the CSE (Tr. pp. 12-13). The parent indicated that, when the teacher praised the student, she was referring to her behavior, not her academic abilities, and that, in fact, the student was struggling academically (Tr. pp. 12-13).[14]

Although the parent objected to the IESP proposed at the May 2019 meeting, she has not identified any specific district assessment with which she disagreed or clarified which areas of the student's needs she now wishes to be independently evaluated, and, absent further clarity regarding the IEE the parent seeks, there is no basis to overturn the IHO's denial of the parent's request. However, as neither party has appealed the IHO's order that the CSE conduct a re-evaluation of the student in all areas of suspected disability that had not been evaluated in the "last two years" (IHO Decision at pp. 16, 17), this has become final and binding on the parties. Accordingly, after the district completes the re-evaluation so ordered, the parent may request an IEE if she disagrees with the district's assessments; further, to the extent an evaluation has already been conducted within the last two years, the parent is not precluded from pursuing an IEE if she disagrees.

VII. Conclusion

Based on the foregoing, the IHO's determination that the district failed to offer the student equitable services during the 2018-19 and 2019-20 school year are final and binding. However, the evidence in the hearing record does not support the IHO's denial of the parent's request for compensatory education to remedy missed SETSS sessions during the 2018-19 school year. As for the 2019-20 school year, the district is obligated to fund five sessions per week of SETSS by the private provider pursuant to the pendency agreement between the parties but the parent is not otherwise entitled to an order requiring the district to pay an unspecified "enhanced rate" for the services. Finally, for the reasons set forth above, the IHO's denial of the parent's request for IEEs is upheld.

THE APPEAL IS SUSTAINED IN PART.

IT IS ORDERED that the IHO's decision dated December 31, 2019 is hereby modified by reversing that portion that denied the parent request for compensatory education for missed SETSS sessions during the 2018-19 school year; and

[14] This is not to say that the May 2019 CSE acted appropriately in relying on the teacher's description of the student without more in recommending a reduction in services; however, since the parent relies on the CSE's recommendation to highlight her entitlement to an IEE, it is relevant that the CSE purportedly relied on anecdotal information shared by the student's teacher, not a district evaluation of the student.

IT IS FURTHER ORDERED that the district shall provide 80 sessions of compensatory education in the form of SETSS at the rate charged by the agency that delivered the student's SETSS during the pendency of this proceeding, provided that, if the parent incurred the costs for any make-up services for the student from a provider from the same agency after May 1, 2019, the district shall reimburse her upon proof of payment shown and the number of hours so reimbursed shall be subtracted from the 80 sessions of compensatory education ordered herein.

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

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SARAH L. HARRINGTON
STATE REVIEW OFFICER