



The University of the State of New York

The State Education Department

State Review Officer

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No. 20-122

Application of a STUDENT WITH A DISABILITY, by her parent, for review 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 Cynthia Sheps, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO), which awarded the parent a portion of the amount of special education teacher support services (SETSS) she requested for the 2018-19 and 2019-20 school years, and which denied the parent's request to increase the hourly rate paid by respondent (the district) for the student's SETSS. The district cross appeals from the IHO's determination that the district did not offer the student a free appropriate public education (FAPE) and ordered it to fund the costs of the student's special education services for the 2018-19 and 2019-20 school years. The appeal must be sustained in part. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to 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 attended a general education sixth grade class at a parentally-selected private school when her parent initially referred her to the district for evaluations in March 2018 due to the parent's concerns about the student's academic performance (Tr. pp. 85-86, 117; Dist. Exs. 4

at p. 1; 13 at p. 7).¹ The district conducted a speech-language evaluation in April 2018, a social history in May 2018, classroom observation in June 2018, and a psychoeducational evaluation dated June 15, 2018 (Dist. Exs. 3 at pp. 1-2; 4 at pp. 1-8; 13 at p. 7).

On August 1, 2018, a CSE convened and developed the student's individualized education services program (IESP) for the 2018-19 school year beginning September 2018 (Parent Ex. C at pp. 1-9). Having determined the student was eligible for special education services as a student with a speech or language impairment, the CSE recommended five periods per week of direct SETSS in a group, and two 30-minute individual sessions of speech-language therapy per week (*id.* at pp. 1, 6-7). In addition, the CSE recommended strategies and supports to address the student's management needs, several annual goals, and testing accommodations (*id.* at pp. 4-7). A prior written notice dated August 1, 2018 reflected the recommendations contained in the IESP (compare Parent Ex. C at pp. 1-9, with Dist. Ex. 3 at pp. 1-2). At the beginning of the 2018-19 (seventh grade) school year the student attended the private school in a general education class (Tr. p. 86). The parent privately obtained 12 hours of SETSS for the student which were provided at home (Tr. pp. 131-32).

The CSE reconvened on January 11, 2019 to develop an IEP for the student for the remainder of the 2018-19 school year and a portion of the 2019-20 school year (Parent Ex. D at pp. 1, 11).² After considering the student's report card, a December 31, 2018 SETSS progress report, results from the June 2018 psychoeducational evaluation, and information obtained during a parent interview, the CSE determined the student remained eligible for special education services as a student with a speech or language impairment, and recommended a 12:1+1 special class placement in a community school (*id.* at pp. 1-2, 7). In addition, the January 2019 CSE recommended two 30-minute individual sessions of speech-language therapy per week, academic and speech-language annual goals, testing accommodations, and strategies and supports to address the student's management needs (*id.* at pp. 3-8). The January 2019 IEP was never implemented as the student remained at the private school (Tr. pp. 85-86, 117).

Two prior written notices with school location letters dated February 11, 2019 and May 30, 2019 reflected the recommendations contained in the January 2019 IEP (compare Parent Ex. D at pp. 7-11, with Dist. Exs. 7 at pp. 1-3, 6-7; 8 at pp. 1-5). The February 2019 prior written notice package also included an initial provision of services consent form letter for the parent to sign and return to the district, which indicated that the parent had requested "FAPE for the 2018-19 school year" (Dist. Ex. 7 at pp. 2, 4). The May 2019 prior written notice indicated that the parent requested FAPE for the 2019-20 school year (Dist. Ex. 8 at pp. 1-2).

The student began the 2019-20 school year in a general education eighth grade class at the private school (Tr. pp. 86, 117). The parent privately obtained 12 hours of SETSS for the student which were provided at home (Tr. pp. 131-32). The CSE convened on December 11, 2019 and

¹ The parent testified that she had been concerned with her daughter's academic performance since first or second grade, but that the principal at the private school with whom she consulted, did not have concerns about the student's performance until the second half of sixth grade (Tr. pp. 118-19).

² The district witness testified that the parent requested an IEP for January 2019 and that the parent had originally requested an IESP for the initial meeting in August 2018 (Tr. p. 56).

developed an IESP for the student for the remainder of the 2019-20 school year, and a portion of the 2020-21 school year (Parent Ex. E at pp. 1, 9).³ After considering a November 2019 SETSS report, a 2018-19 report card, and a December 2019 level 1 vocational parent interview, the CSE determined the student was eligible for special education services as a student with a learning disability and recommended six periods per week of group SETSS to be provided in a separate location (id.). In addition, the December 2019 CSE recommended two 30-minute individual sessions of speech/language therapy per week, academic and speech-language goals, testing accommodations, and a number of strategies and supports to address the student's management needs (id. at pp. 5-10).

A. Due Process Complaint Notice

In a second amended due process complaint notice dated February 1, 2019, the parent asserted that the district failed to provide the student with a free appropriate public education (FAPE) for the 2018-19 and 2019-20 school years (Second Amended Due Process Compl. Notice at p. 5).⁴

With respect to the August 2018 IESP, the parent argued that although she agreed with the two 30-minute sessions of speech-language therapy recommended by the CSE, the recommendation of five sessions of SETSS per week was not sufficient to remediate the student's deficiencies and to allow her to make progress (Second Amended Due Process Compl. Notice at p. 3). In addition, the parent argued that the supports recommended in the "IEP" were insufficient to "adequately implement the management needs that were included in the IEP," and the management needs themselves were "wholly insufficient" to address the student's "difficulties related to her disability" (id.).⁵

The parent further asserted that the evaluative data and documents relied upon by the August 2018, January 2019, and December 2019 CSEs to develop the IEP and IESPs were not adequate; that the CSE did not provide copies of documents to all of the meeting participants; and that "the [IEP] contained mischaracterizations and inaccuracies, particularly with respect to the parent[s] concerns" (Second Amended Due Process Compl. Notice at pp. 3-5). The parent asserted that the IESPs as well as the IEP contained an insufficient quantity of appropriate, measurable goals (and short-term objectives) by which to assess the student's progress; and that the programs and services recommended in the "IEP" were not sufficient to enable the student to achieve the recommended goals; or make adequate or appropriate academic and social progress (id.).

³ The hearing record indicated that the parent requested an IESP, and no longer wanted an IEP (Tr. pp. 64-65; Parent Ex. E at p. 1; see Dist. Ex. 9).

⁴ Included in the hearing record are two previous due process complaint notices dated October 9, 2019 and November 4, 2019 (Parent Ex. A at pp. 1-5; B at pp. 1-5). According to correspondence included with the February 1, 2019 second amended due process complaint notice, that date was a typographical error and should have reflected a February 1, 2020 date (Second Amended Due Process Compl. Notice at p. 7).

⁵ The second amended due process complaint notice incorrectly referred to the August 1, 2018 IESP as an IEP in some places (compare Second Amended Due Process Compl. Notice at p. 3, with Parent Ex. C at p. 1).

With respect to the January 2019 IEP, the parent asserted that the student did not require the recommended 12:1+1 special class in a community school; that the student was capable of making progress in a general education class with "the proper supports"; that the IEP did not allow the student to learn in her least restrictive environment; and that the district's development of this IEP, without new evaluative material, was an admission by the district that the August 2018 IESP was "inappropriately supportive" (Second Amended Due Process Compl. Notice at pp. 1, 3-4).

The parent argued that the December 2019 CSE's recommendation for six periods of SETSS per week and two 30-minute sessions of speech-language therapy per week "completely contradict[ed]" the January 2019 CSE recommendation for a 12:1+1 special class placement, in that by recommending a 12:1+1 special class for the student, the CSE determined that the student "required significant one-to-one instruction in a more restrictive environment to support her progress so that she can remain in a general education environment" (Second Amended Due Process Compl. Notice at p. 4). Additionally, the parent asserted that evaluative information referred to in the IESP made it "abundantly clear" that the student required "significantly more than 6 hours of SET[S]S per week" (*id.*).

The parent indicated that the student had been unilaterally placed at the private school, and noted that along with appropriate supports and services, the program "will appropriately address her needs and enable her to make academic and social progress and avoid regression" (Second Amended Due Process Compl. Notice at p. 5). As relief, the parent requested a substantive finding by the IHO that the district failed to provide the student with a FAPE for the 2018-19 and 2019-20 school years; that the district would fund 12 hours of SETSS per week at the provider's rate; that the district would fund two 30-minute speech-language therapy sessions per week at the provider's rate; and that the district would fund compensatory education services for any services the student was entitled to and did not receive, including pendency services (*id.* at pp. 5-6).

B. Impartial Hearing Officer Decision

An impartial hearing convened on January 14, 2020 and concluded on May 15, 2020 after five days of proceedings (*see* Tr. pp. 1-212). In a corrected decision dated June 2, 2020, the IHO determined that the "2019-2020 IESP was appropriate" (IHO Decision at p. 11).⁶ Specifically, the IHO found that the district's witness, who the IHO found credible, testified as to the appropriateness of the CSE's recommendation that the student receive six hours of SETSS per week, because "the student was only receiving 12 hours a week (three periods a day) in English of academic classes" (*id.* at pp. 10-11).⁷ Therefore, as "the student was receiving only 12 periods of academic work a week, six periods of SETSS is one period of SETSS for every two periods of English academic work" (*id.* at p. 10). The IHO also determined that the parent did not challenge the IESP "beyond the number of hours of recommended SETSS" (*id.* at p. 11).

⁶ The original IHO Decision was undated.

⁷ The IHO does not address the 2018-19 school year; or the August 2018 IESP, which included recommendations for five periods of SETSS per week as well as two 30-minute sessions of speech-language therapy per week (*see* IHO Decision at pp. 1-14).

Turning to the parent's case, the IHO noted that the student had attended general education class in the "religious school" for her entire educational life; and that the religious school had failed to provide any services for the student and watched her fall "further and further" behind (IHO Decision at p. 11). In addition, the IHO opined that the parent refused to move her daughter to an appropriate program and that the parent had every right to determine the school the student attended "even when that school ha[d] failed to provide the necessary services and classroom that would provide an appropriate education program" (*id.* at p. 13).

The IHO noted that the student's SETSS provider testified that the agency (Momentum) determined that 12 hours of SETSS per week was necessary for the student and that although she had conducted some assessments, the parent's attorney "did not submit any of the alleged assessments into evidence" (IHO Decision at p. 11).⁸ Further, the IHO noted that the SETSS provider testified that she was providing 12 hours of SETSS to the student at home, not at the school, even though the district's witness testified that there was a resource room for the provision of SETSS at the private school (*id.* at p. 12). The IHO determined that SETSS is a service "to support the classroom teacher" and that the district "mandate[d] the SETSS provider to work with the student in the school, not at home," which was why SETSS was not "listed on the IESP as hours, but periods" (*id.*).

Regarding the issue of rate, the IHO indicated that the neither the SETSS provider who testified nor the parent knew the rate the agency charged for the student's SETSS, but the provider testified she was paid \$125.00 an hour (*id.* at pp. 12-13). The IHO found that as there was no evidence that \$125.00 per hour was an "accepted community rate" or evidence of any administrative expenses the IHO awarded SETSS at the rate of \$110.00 per hour (*id.* at p. 13). The IHO found that both the SETSS provider and the agency had a direct financial interest in the number of hours/periods the student received, and that there was no assessment, such as a neuropsychological assessment, presented as evidence of the student's needs (*id.* at p. 13).

For relief, the IHO ordered that upon receipt of a notarized affidavit as to the specific days and times the SETSS provider worked with the student for the 2018-19 and 2019-20 school years, the district "shall pay for six periods of SETSS" per week not to exceed \$125.00 a period (IHO Decision at p. 13). In addition, the IHO specifically noted that the district "shall not pay for SETSS at the student's home for any services after COVID-19"; because "SETSS [was] for support in the classroom not at home" (*id.* at p.14).

IV. Appeal for State-Level Review

On appeal, the parent alleges that, as an initial matter, the district never argued that SETSS should not be provided at home through remote learning during the COVID-19 pandemic, and

⁸ The IHO noted that although the SETSS provider testified that she was providing 12 hours of SETSS, when asked to specify her schedule, the number of hours added up to 11 hours of instruction, not 12 hours of instruction (IHO Decision at p. 12).

argues that she was deprived of her basic due process rights when the IHO raised the issue on his own and found that SETSS could not be provided at home during the pandemic.

The parent asserts that none of the IHO's arguments with respect to limiting the frequency of SETSS to six periods per week have merit. The parent argues that the district witness did not testify as to what the student's academic issues were and how six periods of SETSS per week would be sufficient to address them, nor did the IHO cite to any "rule or regulation that deem[ed] 50% of secular studies periods to be an appropriate amount of SETSS", given that the January 2019 IEP recommended a full-time special education placement. In addition, the parent argues, that the IHO "fundamentally misunderstand[ed] what SETSS is" when he stated "that SETSS is strictly a service 'to support the classroom teacher' and not tutoring," and must be "given in school." Specifically, the parent argues that the district conceded that SETSS could be provided at home. According to the parent, there is no legal basis for the IHO to claim that SETSS is limited to supporting the classroom teacher or must be provided at school, and further, the parent contends it is not the IHO's argument to make, but rather the district's and the district did not make that argument.

With respect to the rate, the parent argues that the IHO was wrong to refuse evidence as to the rate the parent was being charged by the agency, and to limit the award to \$125.00 per hour. Further, the parent asserts that the IHO "should not have cut off the [p]arent's testimony about the rate being charged, should have allowed full evidence as the [a]gency's rate of \$150.00 per hour, and awarded that rate".

As to relief, the parent is seeking reversal of the IHO's findings that the student is only entitled to six periods of SETSS per week for the 2018-19 and 2019-20 school years and is not entitled to 12 hours of SETSS per week for each of the two school years; that the district is only required to pay a rate not to exceed \$125.00 per hour to the SETSS agency chosen by the parent for the services the student received during the 2018-19 and 2019-20 school years and not \$150.00 per hour actually being charged; and that the district is not required to pay for SETSS delivered at the student's home for any services "after COVID-19." The parent requests that the district pay for "12 periods of SETSS, each period an hour, per week" for the 2018-19 and 2019-20 school years at a rate of \$150.00 an hour and that the district pay for all SETSS delivered at the student's home at any time during the 2018-19 and 2019-20 school years.

In an answer and cross appeal, the district responds to the parent's request for review by admissions and denials, and argues to uphold the IHO's decision that the district's recommendation of six hours weekly of SETSS was appropriate for the student. The district asserts that the evidence demonstrated that the district offered the student equitable services for the 2018-19 and 2019-20 school years and the IHO's findings should be affirmed; and that the CSE reviewed sufficient evaluative materials.

The district argues that the parent's allegation that the student should receive SETSS instruction for "every single period" of the school day based on the recommendations in the January 2019 IEP has no merit and that the recommendation for special education services in a

12:1+1 special class for 35 periods weekly in a community school was not implemented because the student was parentally placed for the 2019-20 school year at parent expense at the private school . The district argues that the recommendation of six periods per week of SETSS as a 'direct' and 'group' service in the December 2019 IESP was to be provided in the student's regular education classes and that SETSS are not defined in State or federal laws or regulations and are not identified on the State continuum of special education services. Further, the district alleges that the reference in the December 2019 IESP to the service as "direct" is in keeping with the language used in State regulations for consultant teacher services. The district continues that in accordance with the regulations, the SETSS were to be provided during the portion of the school schedule where the student attended academic classes and secular studies and the parent's allegations that the SETSS could be delivered at home have no merit.

The district argues that the IHO properly found that the parent failed to sustain her burden that the student required 12 hours per week of SETSS and that although the student may have benefited from 12 hours of SETSS per week, the relevant issue here is whether the program provided educational instruction specifically designed to meet the unique needs of the student. The district asserts that the hearing record supports the IHO's determination that the parent did not meet her burden to show that 12 hours of SETSS per week was appropriate to meet the student's special education needs.

The district argues that there is no indication in the hearing record that any assessments conducted by Momentum were available to either the August 2018 CSE or the December 2019 CSE and therefore could not be relied upon retrospectively to assess the CSE's recommendations. In addition, the district argues that the parent's claim that the student's private provider is entitled to a rate of \$150.00 an hour has no merit; and further, that the hearing record fails to provide support for the \$150.00 hourly rate when the record reflects that the agency is paying the provider a rate of \$125.00 an hour.

The district cross-appeals, and argues that the IHO erred in applying the FAPE standard; the district submits that the SETSS at issue in this matter relates to recommendations found in the August 2018 IESP and the December 2019 IESP and, therefore, whether the district offered a FAPE to the student is not at issue.⁹ Additionally, the district cross-appeals from the IHO's

⁹ Although the IHO "applied the FAPE standard," his findings were based on the appropriateness of the level of SETSS recommended in the IESPs (IHO Decision at pp. 10-11). Regarding the district's contention that the IHO erred in applying the FAPE standard to the IESP recommendations, the district does not convincingly explain how the "equitable services standard" under the State's dual enrollment statute would result in a different outcome when analyzing the relevant facts of this matter, especially where the dual enrollment statute has been routinely treated by the New York Court of Appeals as providing eligible students with an individual right to special education services that must be tailored to the student's particular needs by the CSE as well as the right to seek redress through the due process hearing system called for by the IDEA (see Bd. of Educ. of Bay Shore Union Free Sch. Dist. v. Thomas K., 14 N.Y.3d 289 [2010] [reviewing due process hearing determinations and noting that the pertinent question is what the educational needs of the particular student require]; Bd. of Educ. of Monroe-Woodbury Cent. Sch. Dist. v. Wieder, 72 N.Y.2d 174, 188 [1988] [noting that services under the dual enrollment statute must take into account the individual educational needs of the student in the least restrictive environment]). Accordingly, the district has pointed to a distinction without a difference in this and I decline to further discuss

decision to limit the relief awarded to the time period prior to school closures in response to the COVID-19 pandemic, but argues the parent is not entitled to any relief for the school year. The district argues that although the IHO erred in determining that the student could not be awarded services for the period of the pandemic, the district submits that given the lack of financial obligation between the parent and provider, the parent is not entitled to any relief for the school year. Further, the district argues that the parent was obligated to introduce some evidence which financially obligated the parent to pay the provider for the services and that the lack of such evidence should foreclose the requested relief.

In an answer to the cross-appeal, the parent replies to the district's cross-appeal by asserting a general denial to all allegations in the cross-appeal, except the parent agrees with the district's statement that the IHO erred in determining that the student could not be awarded services during the pandemic.

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]).¹⁰ "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

this argument.

¹⁰ 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]).

education programs and services provided to other students with disabilities attending public or nonpublic schools located within the school district (*id.*).¹¹

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

VI. Discussion

A. Preliminary Matters—Scope of Review

As an initial matter, it is necessary to identify which of the parties' arguments are properly before me on appeal. First, the parent raised a number of claims in her due process complaint notice that were not addressed by the IHO, and the parent has not specifically appealed from the IHO's failure to address these claims.

In particular, the IHO did not address the parent's claims relating to evaluations, management needs or goals; or the parent's claim that the CSE did not provide documents to participants at the CSE meetings. Additionally, the IHO did not address the parent's claim that the supports recommended in the "IEP" were insufficient to "adequately implement the management needs that were included in the IEP" and that the management needs themselves were "wholly insufficient" to address the student's "difficulties related to her disability." Further, the IHO did not address the parent's claim that evaluative data and documents relied upon by the August 2018, January 2019, and December 2019 CSEs to develop the IEP and IESPs were not adequate and that "the [IEP] contained mischaracterizations and inaccuracies, particularly with respect to the parent[s] concerns." In addition, the IHO did not address the parent's claims that the IESPs as well as the IEP contained an insufficient quantity of appropriate, measurable annual goals (and short-term objectives) by which to assess the student's progress and that the programs and services recommended in the "IEP" were not sufficient to enable the student to achieve the recommended goals or make adequate or appropriate academic and social progress. The IHO did not address the parent's claim that the January 2019 IEP did not allow the student to learn in her least restrictive environment.

The regulations governing practice before the Office of State Review require that "[t]he request for review shall clearly specify the reasons for challenging the impartial hearing officer's decision, identify the findings, conclusions, and orders to which exceptions are taken, or the failure

¹¹ 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](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.*).

or refusal to make a finding, and shall indicate what relief should be granted by the State Review Officer to the petitioner" (8 NYCRR 279.4[a]). Furthermore, the practice regulations require that parties set forth in their pleadings "a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately," and further specify that "any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer" (8 NYCRR 279.8[c][2], [4]). Accordingly, the claims set forth above have been abandoned by the parent and will not be further discussed below.

B. Equitable Services

On appeal, the parent is seeking reversal of the IHO's finding that the student was only entitled to six periods of SETSS per week for the 2018-19 and 2019-20 school years and requests as relief that the district pay for "12 periods of SETSS, each period an hour, per week" for the 2018-19 and 2019-20 school years at a rate of \$150.00 per hour. The district asserts that the IHO properly determined that the district's SETSS recommendations were appropriate.

1. The Student's Needs

Although the student's present levels of educational performance are not in dispute in this matter, in order to determine whether the district's SETSS recommendations for the 2018-19 and 2019-20 school years constituted appropriate equitable services for the student, a brief discussion of the student's needs as reflected in the August 2018 IESP, January 2019 IEP, and December 2019 IESP is necessary.¹²

A psychoeducational evaluation of the student was conducted in June 2018 at the end of sixth grade and the results were reflected in the August 1, 2018 IESP (compare Parent Ex. C at pp. 1-3, with Dist. Ex. 4 at pp. 1-8). With respect to cognitive skills, the student obtained a full-scale IQ in the very low range (borderline), which indicated that the student's overall intellectual functioning corresponded to the third percentile (Parent Ex. C at p. 2). The student's index scores ranged from extremely low to average reflecting a wide range of variability in her skills, and she demonstrated a relative weakness in both auditory and visual domains of short-term working memory (id.).

With respect to the student's academic performance, the August 2018 IESP indicated that her total reading composite score was in the below-average range with her reading comprehension and fluency scores at the low end of the below-average range, which corresponded to the second percentile and a 1.5 grade equivalent (Parent Ex. C at p. 2). The student demonstrated difficulty with literal and inferential comprehension questions; on two of the three grade level passages that the student read, she was able to answer only one out of the 14 comprehension questions that were asked (id. at p. 3). With respect to mathematics, the student's math composite score was in the below-average range for both problem solving and numerical operations (id.). The student had difficulty with simple word problems that involve division of fractions and, according to the

¹² Although the January 2019 CSE recommended a 12:1+1 special class placement in a public school and did not recommend that the student receive SETSS, the IEP present levels of educational performance are relevant to understanding the student's needs.

August 2018 IESP, her math skills were "on a third-grade equivalent in both numerical operations and problem-solving skills" (id.). In addition, the IESP indicated that the student demonstrated delayed writing skills with "poor" sentence structure, that "most of [the student's] writing was one long run on" sentence with very little variation in her sentence structure, and that she was unable to communicate clearly in written form (id.).

According to the August 1, 2018 IESP, results from a speech-language assessment indicated that the student demonstrated moderate to severe language processing delays as evidenced by her performance on the Clinical Evaluation of Language Fundamentals-Fifth Edition (CELF-5) and informal observations (Parent Ex. C at p. 1). The student achieved a core language index score of 72 which corresponded to the third percentile and, overall, demonstrated "extremely poor language/learning and communication skills" (id. at pp. 1-2). The student's speech and language deficits were characterized by poor syntactical and metalinguistic awareness, poor syntax and morphology, poor reasoning skills, a limited vocabulary, and limited knowledge of basic linguistic concepts (id. at p. 2). Additionally, she had difficulty formulating age appropriate sentences, demonstrated poor listening skills and had difficulty retelling stories (id.). The student also lacked specific content vocabulary and the ability to describe objects, pictures, and events (id.). Further, the student demonstrated difficulty with interpreting and responding to questions and organizing her ideas and thoughts (id.). As per the IESP, all of these deficits impeded the student's ability to thrive and progress in the classroom setting (id.).

The January 2019 IEP reflected information from a December 2018 SETSS provider report, which indicated that the student had made progress but was "still behind in all subjects" (Parent Ex. D at p. 2). With respect to reading, the IEP indicated that the student continued to be delayed and, "through much practice" demonstrated "comprehension of materials read to her" on a third grade level; while the student's reading comprehension skills were reportedly at the beginning of third grade level (id.). Additionally, the student reportedly continued to demonstrate delayed mathematic skills at a third-grade level (id.). With respect to writing skills, the student was writing in paragraph form although the paragraphs still lacked the proper structure; further, the IEP indicated that the student was "still behind in her work and need[ed] much practice to get to the goal of writing simple essays" (id.).

With respect to the student's reading skills, the December 2019 IESP reflected a November 2019 SETSS report which indicated that the student was "reading on a[n] end of [fifth] grade level," decoded on a fifth grade level, and had weak comprehension skills (Parent Ex. E at pp. 1, 3). The IESP indicated that with "constant reading and building on vocabulary words," the student learned new words and enjoyed age appropriate books, but also indicated that the student struggled to understand high level words (id. at p. 3). Further, the student demonstrated difficulty with understanding any word that was not in her regular vocabulary and the SETSS provider read sentences to the student to help her understand difficult words (id.). In order to assist the student in figuring out the meaning of different words based on sentences, the SETSS provider read books with the student (id.). Additionally, the student had a difficult time following complex language, and struggled with age appropriate reading materials and figuring out the main idea or the topic

being discussed (id.). The December 2019 IESP reflected the student's grades from a 2018-19 report card which reflected grades of "C" in literature and reading comprehension (id.).¹³

According to the December 2019 IESP, a November 2019 SETSS report indicated that with pre-teaching and constant review, the student was following the regular eighth grade math common core curriculum and took tests along with her peers; however, the report also noted that the student needed "the steps to be broken down completely in order to follow them correctly" (Parent Ex. E at pp. 1, 3). The IESP also indicated that complex equations "confuse[d]" the student and she required reminders to focus on each step (id. at p. 3). Further, the IESP reflected that the student confused "simple addition and subtraction with negatives and positives," her grade on her then-current report card as reflected in the IESP, was a C+ in both math computation and problem solving (id. at pp. 1, 3).¹⁴

With respect to writing skills, the December 2019 IESP reflected the November 2019 SETSS report which indicated the student was "on an end of fourth grade level in writing," demonstrated difficulty keeping up and writing a standard essay, and struggled with spelling, communication skills, and explaining complex ideas (Parent Ex. E at p. 3). In addition, the student reportedly expressed her ideas verbally in simple words; however, her written language was limited, and she could not "write it out" (id.). The student learned to fill out an outline and was slowly gaining confidence to write out topic sentences (id.). According to the IESP, the student had achieved the following grades on her report card by that point in the 2018-19 school year: writing C-, assigned spelling C+, applied spelling C-, and grammar C (id. at p. 1).¹⁵

2. Recommendation for SETSS

As relevant here, the hearing record shows that the CSEs' recommendations for SETSS were that the student receive five and then six periods of SETSS per week in a group in school during the respective school years (see Parent Exs. C at p. 6; E at p. 9). The district's witness testified that her position at the district was a "[t]eacher [a]ssigned" to the CSE, along with psychologists and social workers, who conducted annual reviews (Tr. pp. 48, 50). The teacher assigned to the CSE testified that she participated in the development of the student's December

¹³ I note that at the time of her testimony on May 15, 2020, the SETSS provider indicated that the student was functioning at a sixth grade level for "reading itself," but that her comprehension was at about the fifth grade level and because the student presented with severely delayed language processing skills, language needed to be broken up into very simple terms (Tr. pp. 147, 154-55, 161).

¹⁴ The student's SETSS provider testified at the May 15, 2020 hearing that the student was functioning at a fourth-grade level in mathematics and the provider was "currently using" fifth grade level math books which the provider modified by breaking up the language further in order for the student to be able to use it (Tr. pp. 161, 164). The provider testified that the student was using an eighth-grade level textbook for math in her classroom at the private school and the student was following the curriculum in the classroom (Tr. p. 164). In addition, the student received grades of B in science and B- in history on her 2018-19 report card (Parent Ex. E at p.1).

¹⁵ Further, as of May 15, 2020, the SETSS provider testified that the student's writing skills were at about the fifth-grade level (Tr. p. 161).

2019 IESP (Tr. pp. 55-56). According to the teacher, the parent had requested an IESP that offered 12 hours of SETSS to the student (Tr. pp. 64-65; see Dist. Ex. 9).¹⁶

Based on the documentation available to the CSE, as well as "clinical and professional discussions" the CSE determined that it could not recommend 12 periods of SETSS (Tr. pp. 65-66). Rather, the CSE recommended that the student receive six periods per week of SETSS, which the teacher stated was "sufficient enough" to address the student's academic concerns (Tr. p. 67).

As discussed in greater detail above, the December 2019 IESP reflected a report from the student's SETSS provider (Parent Ex. E at p. 3). The student's SETSS provider then testified at the hearing that she did not believe the recommendation for six hours per week of SETSS was sufficient because the student needed to be "pre-taught the material and constantly reviewed all the material that she learns" (Tr. p. 158). She testified that she did not "believe six hours would cover all of that" (id.).

The teacher assigned to the CSE testified that six periods of SETSS per week was "a very large amount of SETSS to begin with" considering that the student received three hours of English instruction per day at the private school, or 12 hours per week (Tr. pp. 67, 88-89). Therefore, according to the teacher, the student was "getting a significant amount of help in her [] academic studies" and the six SETSS periods per week "should be able to address any reading, math or writing deficits" (Tr. pp. 67, 71). According to the teacher, speech-language therapy could also address some of the student's academic concerns (Tr. p. 68). Therefore, in conjunction with the CSE's recommendation for twice weekly speech-language therapy sessions, the recommended amount of SETSS would "greatly help [the student] academically seeing that she only [got] half the day in English at school" (Tr. pp. 68, 71, 88-89; see Parent Ex. E at p. 9). The teacher opined that between the student's classroom teacher at the school and the SETSS provider, in conjunction with accommodations and differentiation provided in the classroom, that should have been "more than enough to address [the student's] delays" (Tr. pp. 71-72; see Parent Ex. E at p. 5). Additionally, the teacher testified that the group aspect of the SETSS recommendation was "super important" because the student's social issues could be addressed in the "small group type atmosphere" (Tr. p. 95; see Parent Ex. E at p. 4).

¹⁶ SETSS is not defined in the State continuum of special education services (see 8 NYCRR 200.6). Parent's counsel characterized SETSS as "special education instructional supports," and the teacher assigned to the CSE testified that SETSS, as recommended by the CSE, was provided by a State certified special education teacher in a group setting at school (see Tr. p. 42, 89-91, 99-100). In describing the services she provided, the private SETSS provider testified that she delivered SETSS at the student's home six nights per week to "break up the language and pre-teach it in simple language, so [the student] can process the curriculum taught in the classroom" (Tr. pp. 153-54). As has been laid out in prior administrative proceedings, it is not clear at all that the parties are working with the same definition of "SETSS" (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). The district has previously been warned that this administrative tribunal will not take judicial notice of the meaning of the term or favor one party over another as to its meaning (Application of a Student with a Disability, Appeal No. 17-103).

To the extent the parent argues that the six hours of SETSS was insufficient considering the CSE's prior recommendation for a 12:1+1 special class placement, the teacher assigned to the CSE testified that the special class placement was recommended in an IEP to be implemented in a public school setting (Tr. p. 88). Initially, there is nothing in State law that prevents a district from recommending a special class placement in a public school for a portion of a school day for a dually-enrolled student if the CSE believes such a recommendation is necessary (see Educ. Law § 3602-c; see e.g., Application of the Bd. of Educ., Appeal No. 20-066).¹⁷

In this instance, the December 2019 CSE recommendation for six periods of SETSS was made in consideration of the student attending the private school and receiving approximately 12 hours of academic instruction in English (Tr. pp. 88-89). The teacher assigned to the CSE testified that the CSE had to "estimate the recommendations based on where the parent intend[ed] to put [the student]," and "take into account" the amount of instruction in English the student received at the private school, which is how the CSE formulated its recommendation for six periods of SETSS (Tr. p. 89). The teacher testified that the district assumed that SETSS would be "provided in school where they should be" and that she was aware that the private school "ha[d] SETSS providers in the school" (Tr. pp. 95-96). Therefore, she indicated that there was "no reason for [SETSS] to be administered outside of school" (Tr. p. 96).

Based on the above, with particular attention to the student's needs as identified in the IESPs, while I can understand the parent's desire for the student to receive more instruction from a special education teacher than was recommended by the CSEs, the evidence in the hearing record supports the IHO's finding that the recommendation for six periods per week of SETSS was appropriate to meet the student's academic needs (see IHO Decision at pp. 10-11; Tr. pp. 67-68, 88-89).

3. Rate for SETSS

While I uphold the IHO's determination that the recommendation for six periods per week of SETSS was appropriate, in a similar situation as to what has recently been described by another State Review Officer as a "complete systemic dysfunction regarding the provision of special education services" and "an illegal practice by attempting to contract out for the delivery of instruction by a special education teacher" (see Application of a Student with a Disability, Appeal No. 20-087), the district in this matter abdicated all responsibility for the delivery of the recommended SETSS (Tr. pp. 95-96, 130-31).

The IHO and the parties all agree that the district failed to deliver the recommended SETSS and the parent obtained SETSS for the student on her own. More specifically, the district does not appeal from the IHO's award of direct payment to the agency for six hours per week of SETSS for the 2018-19 and 2019-20 school years at a rate of \$125 per hour, setting the minimum amount of

¹⁷ In addressing the question of whether a district must provide special education programs and services to a student with a disability at the nonpublic school the student attends, the New York Court of Appeals found that the location in which services are provided to a parentally-placed nonpublic school student with a disability pursuant to § 3602-c should be determined based on what is appropriate to address the individual educational needs of the student (Bd. of Educ. of Bay Shore Union Free Sch. Dist. v. Thomas K., 14 N.Y.3d 289, 293-94 [2010]; Bd. of Educ. of Monroe-Woodbury Cent. Sch. Dist. v. Wieder, 72 N.Y.2d 174, 183-88 [1988]).

relief in the form of direct payment for services to which the parent is entitled. This matter therefore comes down to whether the parent can obtain the SETSS at a higher rate and whether the district is obligated to fund SETSS during the Covid-19 pandemic.

With respect to the rate for the SETSS, although not directly applicable to a matter involving a dually enrolled student, the Second Circuit Court of Appeals has held that a direct payment remedy is an appropriate form of relief in some circumstances, and that "[i]ndeed, where the equities call for it, direct payment fits comfortably within the Burlington–Carter framework" (E.M. v. New York City Dep't of Educ., 758 F.3d 442, 453 [2d Cir. 2014]; see also Mr. and Mrs. A. v. New York City Dep't of Educ., 769 F. Supp. 2d 403, 430 [S.D.N.Y. 2011] [finding it appropriate to order a school district to make retroactive tuition payment directly to a private school where equitable considerations favor an award of the costs of private school tuition but the parents, although legally obligated to make tuition payments, have not done so due to a lack of financial resources]).

The parent is now requesting \$150 per hour for the SETSS provided during the 2018-19 and 2019-20 school years, yet, the hearing record is devoid of evidence regarding the rate charged by the agency secured by the parent to deliver SETSS. The SETSS provider testified that she had been paid \$125.00 per hour by the agency; however, she also testified that she did not know what the agency charged the parent (Tr. p. 157). The parent testified that she did not pay anything for her daughter's SETSS, but that she is responsible for paying them and "we're going to go to an agreement after the hearing" (Tr. pp. 131-34). Due to the lack of evidence regarding the most basic of information as to the relief that the parent is requesting, there is no basis for overturning the IHO's decision as to rate.

With respect to the delivery of SETSS during the Covid-19 pandemic, both parties appear to agree that the IHO erred in finding that the district was not responsible for providing the student with SETSS during that time (see Req. for Rev. ¶; Answer with Cross-Appeal ¶20). The IHO appeared to rationalize that because SETSS is for support in the classroom, the district should not have to pay for the SETSS delivered at home during the pandemic (IHO Decision at p. 14). However, the hearing record does not support the IHO's determination that the student no longer received any instruction that could be supported by SETSS. The SETSS provider testified that the student's school closed in March 2020, but the school continued online work (Tr. p. 163). In addition, the SETSS provider testified that she provided the student with ten hours per week of instruction during that time and that, in arranging the services, she worked around the student's school schedule (Tr. pp. 149, 163).

In addition, in March 2020, the Department of Education issued a Question and Answer document regarding the provision of special education during the Covid-19 pandemic, which provided:

If an LEA continues to provide educational opportunities to the general student population during a school closure, the school must ensure that students with disabilities also have equal access to the same opportunities, including the provision of FAPE. (34 CFR §§ 104.4, 104.33 (Section 504) and 28 CFR § 35.130 (Title II of the ADA)). SEAs, LEAs, and schools must ensure that, to the greatest

extent possible, each student with a disability can be provided the special education and related services identified in the student's IEP developed under IDEA, or a plan developed under Section 504. (34 CFR §§ 300.101 and 300.201 (IDEA), and 34 CFR § 104.33 (Section 504)).

(Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak, 76 IDELR 77 [OSERS 2020]).

In line with the federal guidance, the Office of Special Education issued a Question and Answer document that provided that "FAPE may be provided consistent with the need to protect the health and safety of students with disabilities and those individuals providing special education and related services to students. During this emergency, schools may not be able to provide all services in the same manner they are typically provided" (Provision of Services to Students with Disabilities During Statewide School Closures Due to Novel Coronavirus (COVID-19) Outbreak in New York State, Topic Questions and Answers, Office of Special Ed. [March 2020], available at <http://www.p12.nysed.gov/specialed/publications/2020-memos/nysed-covid-19-provision-of-services-to-swd-during-statewide-school-closure-3-27-20.pdf>). In addition, the State guidance provided that a district must ensure that "to the greatest extent possible, each parentally placed nonpublic school student can be provided the special education and related services identified in the student's individualized education services plan on an equitable basis as compared to other students with disabilities enrolled in the public school with an IEP" (*id.*).

Accordingly, as the district was responsible for the implementation of the student's IESP during the period of time schools were closed due to the Covid-19 pandemic and, as with the rest of the school year, there is no indication in the hearing record that the district fulfilled this obligation, the IHO's determination to limit the relief awarded to exclude the period of time schools were closed due to the Covid-19 pandemic must be overturned.

VII. Conclusion

The evidence in the hearing record supports the IHO's determination that six periods of SETSS per week was an appropriate recommendation to meet the student's identified needs. Additionally, as the district did not provide for the services recommended in the student's IESPs, the parent is entitled to an award of direct payment for six hours per week of SETSS as ordered by the IHO. However, the IHO erred in limiting the relief to the period of time the student's school building was closed due to the Covid-19 pandemic.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED

THE CROSS-APPEAL IS DISMISSED

IT IS ORDERED that the IHO's decision dated June 2, 2020 is modified by reversing that portion which denied relief for the SETSS delivered at home after the start of the Covid-19 pandemic;

IT IS FURTHER ORDERED that upon presentation of a notarized affidavit as to the specific days and times that SETSS were provided to the student during the 2018-19 and 2019-20

school years, the district shall directly pay for the cost of such services, up six hours per week at a rate of \$125 per hour.

Dated: **Albany, New York**
 September 17, 2020

STEVEN KROLAK
STATE REVIEW OFFICER