The University of the State of New York

The State Education Department
State Review Officer
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No. 22-078

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Liz Vladeck, General Counsel, attorneys for petitioner, by Nathaniel R. Luken, Esq.

Gulkowitz Berger, LLP, attorneys for respondent, by Shaya M. Berger, 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 district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondent's (the parent's) daughter and ordered it to reimburse the parent for the costs of the student's special education teacher support services (SETSS) provided to the student during the 2021-22 school year.[1] The 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];

[1] In this decision, the terms "foster parent" and "parent" will refer to the student's grandmother, who brought this proceeding and who became the student's foster parent in or around February 2021 (Jan. 13, 2022 Tr. pp. 4-7; see IHO Ex. IV at p. 7 ¶ 13). To avoid confusion, the student's father will be referred to as the student's father.

34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]).[2] If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

[2] Similarly, when a preschool student in New York is eligible for special education services, the IDEA calls for the creation of an IEP, which is delegated to a local Committee on Preschool Special Education (CPSE) that includes, but is not limited to, parents, teachers, an individual who can interpret the instructional implications of evaluation results, and a chairperson that falls within statutory criteria (Educ. Law § 4410; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.1[mm], 200.3, 200.4[d][2], 200.16; see also 34 CFR 300.804).

III. Facts and Procedural History

In this case, the evidence in the hearing record reflects that when the student was approximately four months old, the student's father sought custody of the student and her sibling in the Family Court of the State of New York (see Dist. Ex. 2). The Court found the student's mother in default when she failed to appear in the proceeding and accordingly the Court entered a "Final Order on Petition for Custody on Default," dated March 10, 2017, granting the student's father sole, legal, and physical custody of the student and her sibling pursuant to Article 6 of the Family Court Act (id.).

With respect to the student's educational history, the hearing record is sparse. Overall, the hearing record includes a CPSE IEP created for the student, dated March 11, 2020, but no evaluative information—other than what was reported in the CPSE IEP—and no IEPs subsequently created by either a CPSE or a CSE for the student (see Parent Ex. B at p. 1; see generally Jan. 13, 2022 Tr. pp. 1-14; Feb. 15, 2022 Tr. pp. 15-41; Mar. 4, 2022 Tr. pp. 42-97; Mar. 15, 2022 Tr. pp. 42-69; Mar. 29, 2022 Tr. pp. 70-130; Parent Exs. A-F; Dist. Exs. 1-3; IHO Exs. I-XIV).[3] According to the March 2020 CPSE IEP, the student was eligible for special education as a preschool student with a disability; the IEP reflected a projected implementation date of March 20, 2020 (see Parent Ex. B at pp. 1, 3).[4] The March 2020 CSE recommended that the student receive a 12-month school year program consisting of 7.5 hours per week of special education itinerant teacher (SEIT) services in a 2:1 setting, as well as two 30-minute sessions per week of individual occupational therapy (OT) and two 30-minute sessions per week of individual speech-language therapy (id. at pp. 15-16).[5]

As noted, the student's grandmother became her foster parent in or around February 2021 (Jan. 13, 2022 Tr. pp. 4-7; see IHO Ex. IV at p. 7 ¶ 13). The evidence reflects that, on February 4, 2021, the student began receiving educational services, which, based on evidence of billing records and service provider testimony, appeared to be consistent with the recommendation in the March 2020 CPSE IEP for 7.5 hours per week of SEIT services (see Mar. 29, 2022 Tr. pp. 101-03, 121; Parent Exs. B at p. 15; C at p. 1). At the impartial hearing, the service provider testified that when she initially began providing SEIT services to the student—which was during the Covid-

[3] The transcripts from the impartial hearing in this matter were not consecutively paginated throughout the impartial hearing; for clarity, transcript citations in this decision will refer to the date of the impartial hearing and the page number, such as "Jan. 13, 2022 Tr. p. 10."

[4] At the time the CPSE IEP was developed, the March 2020 CSE identified the student's father as her parent on the IEP (see Parent Ex. B at p. 1). The attendance page for the March 2020 CSE meeting reflects that, despite several telephone calls in an attempt to contact the student's father to participate in the meeting, those efforts were fruitless and the student's father did not attend the March 2020 CSE meeting (id. at p. 2). In addition, it appears from a review of the March 2020 CPSE IEP that the student may have been attending an educational setting, such as a preschool, at the time the student was evaluated, as the IEP reflects information by "teacher reports" and it identified an educational setting by name (see, e.g., Parent Ex. B at pp. 1, 4).

[5] The hearing record does not include any evidence to establish whether the student was eligible for special education as a preschool student with a disability prior to the March 2020 CPSE meeting or if the student received any services through the Early Intervention (EI) program (see generally Jan. 13, 2022 Tr. pp. 1-14; Feb. 15, 2022 Tr. pp. 15-41; Mar. 4, 2022 Tr. pp. 42-97; Mar. 15, 2022 Tr. pp. 42-69; Mar. 29, 2022 Tr. pp. 70-130; Parent Exs. A-F; Dist. Exs. 1-3; IHO Exs. I-XIV).

19 pandemic—the student was in a "foster care agency" that was geographically located in the same borough where the service provider resided, and the student was "then placed into her grandparent's care," which was located in a different borough (Mar. 29, 2022 Tr. pp. 111, 117-18).[6] In addition, the service provider testified that, due to the Covid-19 pandemic, she delivered all of the student's SEIT services virtually—and continued to deliver all of the student's services virtually during the 2021-22 school year—with no plans to switch to in-person services (see Mar. 29, 2022 Tr. pp. 111-13).[7]

The evidence further reflects that the foster parent executed an agreement with an agency, "Children's Circle," to provide 7.5 hours per week of SETSS to the student, at a rate of $150.00 per hour, effective September 1, 2021 for the 2021-22 school year (Parent Ex. D at p. 1).[8,9] The parent's agreement with the agency obligated her to pay for the SETSS at the rate indicated in the agreement if the district was either not required to fund the services or if the district did not agree to pay the agency directly (id.).

A. Due Process Complaint Notice

By due process complaint notice dated September 1, 2021, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2021-22 school year (see Parent Ex. A at p. 1). The parent asserted that the last IEP the district developed for the student was dated March 11, 2020, and included a recommendation for 7.5 hours per week of SEIT services and related services (id.). The parent further asserted that she could not locate a SEIT provider at the district's standard rates for the 2021-22 school year, and the district failed to provide a SEIT (id.). According to the due process complaint notice, the parent could not locate a SEIT provider "due in part to the significant help that the student need[ed], and due in part to the unavailability of providers" (id.). As a result, the parent located a provider for "all of the mandated special education teacher services" but at a "rate higher than standard" district rates (id.). As relief, the parent requested a pendency hearing, funding to pay for 7.5 hours per week of special education teacher services at an enhanced rate for the entire 2021-22 school year, and an award of the related services on the student's IEP together with related services authorizations (RSAs) for those services if obtained by the parent (id. at p. 2).

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[6] According to the service provider's testimony, the student was initially placed with a "foster mother" for approximately two to three weeks prior to the student's placement with her grandmother as her foster parent (Mar. 29, 2022 Tr. p. 118).

[7] The service provider's testimony suggested that, although the student received OT when she began working with the student "about a year ago," the student no longer received OT or speech-language therapy (see Mar. 29, 2022 Tr. p. 105).

[8] The service provider who delivered SEIT services and SETSS to the student testified that she was dually certified in regular education and special education for grades one through six, and she was also trained in applied behavior analysis (ABA) (see Mar. 29, 2022 Tr. pp. 107-08).

[9] Evidence in the hearing record indicates that, during the 2021-22 school year, the student was attending kindergarten in a general education setting at a district public school (see Parent Ex. B at p. 1; see also Mar. 29, 2022 Tr. pp. 103, 110).

B. Impartial Hearing Officer Decision

Prior to the first day of the impartial hearing—which occurred on January 13, 2022—the district moved to dismiss the parent's due process complaint notice by motion dated January 3, 2022, arguing that the parent, as a foster parent, lacked standing to seek an impartial hearing on the student's behalf because the student's father retained the legal right to make educational decisions for the student (see IHO Ex. I at pp. 1-3, 6-7; Jan. 13, 2022 Tr. p. 1; see generally IHO Exs. II-III [constituting the parent's opposition to the district's motion to dismiss and the district's reply to the parent's opposition]). The district's arguments in the motion to dismiss focused on the alleged fact that the student's placement with her grandmother, as a foster parent, was "temporary and revocable," and the district had no awareness of any judicial decree or order granting the foster parent the right to make educational decisions (see IHO Ex. I at pp. 2-3, 6-7). As a result, the district contended that the student's father retained these rights "unless, or until, stated otherwise by judicial decree" and the foster parent had no standing to bring the due process proceeding (id. at pp. 3, 6-7).

Over the course of the first four days of the impartial hearing (January 13, February 15, March 4, and March 15, 2022), the parties and the IHO continued to discuss the issue of standing raised in the district's motion to dismiss, the student's pendency placement, further motion papers filed by the district and related parent responses to the district's motion (see generally Feb. 15, 2022 Tr. pp. 15-41; Mar. 4, 2022 Tr. pp. 42-97; Mar. 15, 2022 Tr. pp. 42-69; IHO Exs. IV-VII; X). More specifically, the district filed an "Addendum" to its motion to dismiss on or about February 22, 2022 (IHO Ex. IV at pp. 1, 5). Within the addendum, the district's arguments concerned its position on which party bore the burden of proof to establish whether the student's father or the foster parent had standing to bring a due process complaint notice on the student's behalf (id. at pp. 2-4). In support of the addendum, the district submitted an affidavit of a district social worker employed as a "Managing Administrator and Public School Liaison" in its office of general counsel and an email exchange with another district social worker in a district school, dated April 5, 2021 (identified as Exhibit 3 attached to the addendum), which purportedly indicated that the student's father—in recent communications with the foster care agency case planner—had expressed to the district that he did not consent to the student receiving special education services (id. at pp. 4, 6 ¶ 2, & n.7). The district asserted that the foster care agency remained in contact with the student's father and both the agency and the district knew of his whereabouts (id. at p. 4). The district further argued that, by refusing to consent to special education services, the student's father was exercising his educational decision-making authority for the student (id. at p. 4 & n.8 [pointing to the attendance page of the March 2020 CPSE IEP, which reflected that the student's father did not attend the meeting, as evidence of the lack of consent for special education services]). The April 2021 email exchange reflected communications between a district social worker and the student's foster care case planners (see IHO Ex. IV at Ex. 3). According to the email from the district social worker, she "wr[ote] to follow up on [their] previous conversation with regards [sic] to obtaining consent for [a] special education evaluation and services" for the student (id.). The district social worker indicated that the case planners should contact her to provide updated information regarding "any changes to educational rights or if the [student's] father ha[d] given written consent" (id.). The district social worker further noted that "[i]f the [student's] father continue[d] to retain rights and d[id] not consent to services, [the district] w[ould] close this process," but that, in the future, the "person with educational rights c[ould] always request an evaluation for the student at any time" (id.). In response, the student's case planners indicated that

a "case planning meeting" took place the previous week with the student's father, which "was not successful at all" and that the student's father "did not answer or consent to any educational questions" about the student (id.).

A review of the affidavit submitted in support of the district's addendum reflects that the informant—the Managing Administrator and Public School Liaison—attested to information upon review of the student's educational records maintained by the district and based on communications with the student's foster care agency caseworker (IHO Ex. IV at pp. 6-7 ¶¶ 2, 8).[10] The affidavit indicated that the district, on January 5, 2021, opened a "referral for re-evaluation" for the student "to prepare for her transition to [k]indergarten" (id. at p. 7 ¶ 12). In addition, the affidavit indicated that, "[o]n information and belief, the foster care agency notified the [district] that upon meeting with the father and the father's advocate, [the student's father] refused to sign consent for the re-evaluation process" and "stated that he did not sign consent for [the student] to receive CPSE services" (id. at p. 7 ¶ 14). The affidavit also indicated that a district supervisor of psychologists "contacted the CPSE responsible for [the student's] preschool, who confirmed that [the student's father] did not consent to CPSE services" and that district "staff confirmed that parental consent was needed to proceed with the re-evaluation process" (id. at p. 7 ¶ 15). Additionally, the affidavit reflected that on April 6, 2021, "despite outreach and counseling to the [p]arent with educational rights," he did not consent to services for the student and the district "closed the re-evaluation" of the student due to lack of consent (id. at p. 7 ¶¶ 16-17).

Subsequently, in response to the parent's continued opposition to the district's motion to dismiss the parent's due process complaint notice for lack of standing, an attorney for the district submitted a reply affirmation (see generally IHO Exs. V-VI).[11] In the reply affirmation, dated March 9, 2022, the district continued to assert that the foster parent failed to establish that she had standing to pursue a due process complaint notice (see IHO Ex. VI ¶¶ 5-8). The district's attorney indicated in the reply affirmation that the district had "more recent correspondence with individuals knowledgeable of the Family Court proceedings": namely, the "attorney for the [student]," a social worker affiliated with the same legal practice group as the student's attorney, and the foster care agency—all of whom reportedly "confirm[ed] that the [student's father's] rights remain[ed] intact" (id. ¶ 11). According to the affirmation, the district had provided "documentary evidence" demonstrating that the student's father "did not attend or consent to services at the [March] 2020 [CPSE] IEP meeting, and the [student's father] ha[d] not consented for the student to undergo a re-evaluation and ha[d] not consented to services for the 2021-2022 school year, which [wa]s the year at issue" (id. ¶ 13). Therefore, the district asserted that it had "no choice but to close this student's case" (id. ¶ 14 [emphasis in original], citing 8 NYCRR 200.5[b][6]).[12] Thereafter, in relevant part,

[10] It must be noted, however, that the informant for this affidavit also appeared as a district representative at the impartial hearing held on February 15, 2022 (compare IHO Ex. IV, with Feb. 15, 2022 Tr. at p. 15, and IHO Ex. V at p. 2).

[11] The district's attorney who submitted the reply affirmation also acted as a district representative at the impartial hearings held on March 4, 2022; March 15, 2022; and March 29, 2022 (compare IHO Ex. VI ¶ 1, with Mar. 4, 2022 Tr. at p. 42, and Mar. 15, 2022 Tr. at p. 42, and Mar. 29, 2022 Tr. at p. 70).

[12] In relevant part, the cited State regulation notes the following: "If the student is a ward of the State and is not residing with the student's parent, the school district shall make reasonable efforts to obtain the informed consent from the parent of the student for an initial evaluation to determine whether the student is a student with a

the reply affirmation indicated that the student's father's educational decision-making authority remained intact, as had been reported to the district—"[u]pon information and belief"—by the student's foster care case planner on February 24, 2022; by the student's attorney for purposes of Family Court proceedings on or about March 4, 2022; and by the social worker related to the Family Court proceedings on or about March 5, 2022 (IHO Ex. VI ¶¶ 15-17). As final points, the district's attorney attested that the impartial hearing was not the appropriate "venue" to access special education for the student and that the "foster care agency, foster parent and the student's attorney, c[ould] make applications for court orders in Family Court, as the Family Court Act and regulations provide[d] for"—and that there had been "no showing that the [foster parent] ha[d] even put the [student's] father on notice" (id. ¶¶ 18-19).

In an interlocutory decision dated March 10, 2022, the IHO denied the district's motion to dismiss the parent's due process complaint notice (see generally IHO Ex. VIII). Overall, the IHO found that the district failed to provide "credible, first-hand, non-hearsay evidence, such as court documentation, establishing parental rights or that the [student's f]ather [wa]s attempting to act as a parent" under the IDEA (id. at p. 5). The IHO also noted that the district—who primarily pointed to State regulations to argue that the foster parent lacked standing—"failed to offer any persuasive authority establishing that the [student's f]oster [p]arent d[id] not have legal standing to file a due process complaint" notice on the student's behalf (id. at pp. 1-2, 4-5).[13]

Thereafter, the district submitted a motion to renew and reargue its motion to dismiss, dated March 23, 2022 (see generally IHO Ex. X). Generally, the district argued that the IHO's decision denying its motion to dismiss was "based on a critical misapprehension of the facts and law," asserting first that, contrary to the IHO's ruling, "hearsay evidence [wa]s admissible in these administrative hearings"; and second, State regulation cited and argued by the district was relevant to the "special inquiry" made by the district when attempting to determine who was a student's "'parent'" for the purposes of obtaining informed consent for an initial evaluation or reevaluation (id. at p. 3). As a third basis to reargue the motion to dismiss, the district asserted that the evidence and the "Chancellor's Regulations" specifically limited the "foster parent's authority" in this case because the student's father's rights remained intact and, absent a court order, the "foster parent c[ould] not act as a parent" (id. at p. 4, citing 8 NYCRR 200.1[ii][2]). As related to this argument, the district acknowledged that the "foster care agency documentation was not obtained until after the date of submissions of the Motion to Dismiss and the IHO's decision and thus could not be

disability" (8 NYCRR 200.5[b][6]). However, in this case, the student had already been identified as a preschool student with a disability, and the district does not point to any statutory or regulatory requirement under the IDEA or federal or State regulations that would require the district to conduct an initial evaluation to determine whether she was a student with a disability, or for that matter, a reevaluation of the student just because the student was transitioning from preschool-age services to school-age services, as noted in a previous affidavit (IHO Ex. IV at p. 7 ¶ 12; see generally IHO Ex. VI).

[13] In an interim decision on pendency dated March 15, 2022, the IHO ordered the district to provide the student with the following as a pendency placement: 7.5 hours per week of SEIT services in a 2:1 setting; two 30-minute sessions per week of individual speech-language therapy; and two 30-minute sessions per week of individual OT (see IHO Ex. IX at p. 6). The IHO found that the student's March 2020 CPSE IEP formed the basis for the student's pendency placement (id.; see generally Parent Ex. B).

fully considered" (IHO Ex. X at p. 4). In light of this newly obtained evidence, the district requested that the IHO dismiss the due process complaint notice (id. at p. 5).[14]

In a second interlocutory decision dated March 24, 2022, the IHO denied the district's motion to renew and reargue its motion to dismiss (see generally IHO Ex. XI). The IHO found that the March 2017 "proof of custody" submitted with the district's motion did not "address the current custodial arrangement of the [s]tudent and biological father, as the 2021 court order placing the [s]tudent in foster care ha[d] never been provided" (id. at p. 1). In addition, the IHO found that the district's motion did not "address the other issue posed in its motion to dismiss, namely, whether the biological father [wa]s attempting to act as a parent concurrently with the foster parent for purposes of educational decision-making authority" (id.). The IHO reiterated that, consistent with the decision issued on March 10, 2022, there was "insufficient evidence (such as written, documentary evidence or testimony from the biological father) that he [wa]s, in fact, 'attempting to act' for purposes of educational decisions"—which the IHO identified as the "crux of the issue of standing" (id. at p. 2). As a result, the IHO denied the district's motion to renew and reargue the motion to dismiss (id.).

Thereafter, the impartial hearing resumed and concluded on March 29, 2022 (see Mar. 29, 2022 Tr. pp. 70-130). Both the district and the parent submitted post-hearing briefs to the IHO (see generally IHO Exs. XIII-XIV). In its brief, the district continued to assert that the parent did not have standing, as the foster parent, to file a due process complaint notice and make educational decisions for the student without a court order or consent from the student's father to do so (see IHO Ex. XIII at pp. 3-5). The district acknowledged in the brief that it did not present a case with respect to whether the district offered the student a FAPE for the 2021-22 school year, maintaining its argument that, without consent from the student's father for the student's "Turning 5 IEP," the district was required to close the student's case and the district could not be found to have violated the requirement to "make FAPE available to the [student] because of the failure to provide the [student] with further special education and related services" (id. at p. 5 & n.1, citing 34 CFR 300.300[b][3][ii]). The district also challenged the appropriateness of the SETSS (or SEIT services) delivered to the student during the 2021-22 school year, and asserted that the parent failed to establish a basis for an enhanced rate for the services (IHO Ex. XIII at pp. 5-7). The district did not raise any issues related to equitable considerations (id. at p. 7).

The parent argued in her post-hearing brief that the district failed to develop any program for the student subsequent to the March 2020 CPSE IEP, and the student still required services (see IHO Ex. XIV at p. 1).

[14] The district identified the newly or belatedly obtained evidence as exhibit 2 and exhibit 4 (see IHO Ex. X at p. 4). Exhibit 2 is a letter dated March 15, 2022, composed by an individual identified as the director of specialized programs at the foster care agency (see IHO Ex. X at Ex. 2). The letter indicates that the foster parent was "responsible for the day to day care of the [student]," and would take the student to "all of her medical and educational appointments" (id.). The letter further noted, however, that the student's father "retain[ed] parental rights" and included a telephone number for contact (id.). Exhibit 4 is duplicative of District Exhibit 2, entered into the hearing record as evidence at the impartial hearing held on March 29, 2022: a "Final Order on Petition for Custody on Default," dated March 10, 2017, which in relation to the student's mother, awarded the student's father with sole, legal, and physical custody of the student (compare IHO Ex. X at Ex. 4, with Dist. Ex. 2).

In a decision dated May 12, 2022, the IHO initially reviewed the procedural history of the case by summarizing the district's motions to dismiss and the parties' respective positions as argued within the motions, as well as the parent's responses to the motions, concerning the issue of standing (see IHO Decision at pp. 1-6, 16). With regard to standing, the IHO found that "no new evidence that addressed the issues was subsequently admitted into the [hearing] record," and the IHO incorporated by reference the prior two interlocutory decisions issued in March 2022 (id. at p. 10). After reciting the applicable statutory and regulatory definitions of a "parent," the IHO concluded that, even assuming for the sake of argument that a legal presumption arose in favor of the student's biological parent, guidance from the United States Department of Education further clarified that the relevant federal regulation "'applie[d] in "cases where a foster parent and a biological or adoptive parent attempt[ed] to act as the parent" concurrently'" (id. at pp. 10-11).[15] The IHO determined that the foster parent met the "statutory definition of a parent for the purposes of standing," and the district failed to present any evidence "establishing otherwise" (id. at p. 11). In addition, the IHO found that, with respect to "educational decision-making authority," the district provided no evidence to support its assertions that the student's father's "rights remained intact," other than offering statements from "a lawyer, a case planner, and a foster care director," which the IHO found to be conclusory and devoid of any context or specificity, "such as a court order from any foster care proceedings" (id. at pp. 11-12).

Additionally, the IHO determined that, assuming the student's father "retained authority to make educational decisions" and that a legal presumption arose in his favor pursuant to State regulation, the district failed to present evidence that the student's father was "attempting to act 'concurrently' for educational purposes" (IHO Decision at p. 12). The IHO noted that, as evidence on this point, the district only presented "third-party conversations" and failed to provide any "direct evidence of any person that has had actual communication" with the student's father (id.). The IHO opined that the district's lack of communication with the student's father was not a result of a "lack of opportunity," noting that the director of the foster care agency responsible for the student—who the district presented as a witness at the impartial hearing—testified about "multiple discussions per week" with the student's father, as well as "monthly meetings that occur[red] during which educational discussions" took place (id.). The IHO further noted that the district did not offer any "documentary evidence memorializing these meetings" (id.). In addition, the IHO found that while the foster care agency "apparently disagree[d] with the [f]ather's decision to revoke consent for services and intend[ed] to bring it up at the next court proceeding, . . . , there [wa]s no documentary evidence establishing his position, such as an email, a writing, or any signed document directly attributing his words to him" (id. [internal citation omitted]). Overall, the IHO determined that the hearing record was devoid of any "written evidence" that the student's father "revoked consent," as required by regulation, and moreover, the student's father did not appear at the impartial hearing even though the district "seemingly ha[d] the opportunity to contact him" (id.). Consequently, the IHO concluded that the evidence in the hearing record failed to establish that the student's father was "'attempting to act concurrently' with the [f]oster [p]arent in terms of

[15] While not exhaustively defined, the phrase "'attempting to act as a parent' is generally meant to refer to situations in which an individual attempts to assume the responsibilities of a parent under the Act" (Parent, 71 Fed. Reg. 46567 [Aug. 14, 2006]). An "individual may 'attempt to act as a parent' under the Act in many situations; for example, if an individual provides consent for an evaluation or reevaluation, or attends an IEP Team meeting as the child's parent" (id.).

educational decision making," and therefore, the parent had standing to seek an impartial hearing (id. at pp. 12-13).

Next, the IHO turned to an analysis of whether the SETSS the student received were appropriate (see IHO Decision at pp. 13-16). Initially, the IHO concluded that the district failed to offer the student a FAPE for the 2021-22 school year (id. at p. 14). The IHO noted that, based on its position that the parent did not have standing, the district opted to not present evidence with respect to FAPE because the district contended that providing the student's "educational information would violate the Family Educational Rights and Privacy Act [(FERPA)]" (id.). Next, and as relevant to this appeal, the IHO found that the SETSS delivered to the student were "wholly appropriate" and that the parent's request to be reimbursed for the costs of the SETSS at an enhanced rate of $150.00 per hour was reasonable (id. at pp. 14-16).

In light of the foregoing, the IHO ordered the district to continue to fund the costs of the student's SETSS for 7.5 hours per week at $150.00 per hour for the remainder of the 2021-22 school year (see IHO Decision at p. 16).

IV. Appeal for State-Level Review

The district appeals, arguing that the IHO erred by finding that the district failed to present sufficient evidence that the student's father was attempting to act concurrently with the parent for educational purposes, and therefore, erred by finding that the parent had standing to seek an impartial hearing and to make educational decisions concerning the student. In addition, the district argues that the IHO erred by finding that this case involved an issue of "concurrent authority" between the parent and the student's father. Alternatively, the district contends that because the evidence established that the student's father retained the legal right to make educational decisions for the student, and the evidence also established that the student's father refused consent for an evaluation of the student and to provide services to the student, the district had no obligation to offer the student a FAPE for the 2021-22 school year. As relief, the district seeks to reverse the IHO's finding that the district failed to offer the student a FAPE for the 2021-22 school year and to reverse the IHO's order directing the district to fund the student's SETSS for the 2021-22 school year.[16]

In an answer, the parent responds to the district's allegations and generally argues to uphold the IHO's decision in its entirety. Additionally, the parent contends that the issues raised in the request for review—that is, whether the district offered a FAPE and whether the district was obligated to provide SETSS to the student—are moot because neither party appealed the IHO's interim decision on pendency, which ordered the district to provide the student with 7.5 hours per week of SETSS and related services from the date of the due process complaint notice through the conclusion of the administrative proceedings.

[16] To the extent that the district does not appeal the IHO's findings that the SETSS delivered to the student for the 2021-22 school year were appropriate and that the enhanced rate of $150.00 per hour for the SETSS was reasonable, these determinations have become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

In a reply to the parent's answer, the district responds to the parent's argument that the issues raised in the request for review are moot.

V. Discussion

In arguing that the IHO erred by finding that the district failed to offer the student a FAPE, the crux of the district's argument focuses on whether the parent had standing to seek an impartial hearing for the student and relatedly, who possessed educational decision-making rights with regard to the student. Specifically, the district argues that the foster parent did not have standing; the student's father retained his legal right to make educational decisions; and as a result, the district was not obligated to offer the student a FAPE because the student's father either did not consent to the initial provision of special education services under the CPSE or he later revoked his consent for services, and moreover, because the student's father refused to consent for an evaluation of the student prior to the student entering kindergarten.

After independently reviewing the hearing record and upon consideration of the parties' respective arguments on appeal, the evidence does not support the district's arguments to reverse the IHO's findings that the foster parent had standing and that the district failed to offer the student a FAPE for the 2021-22 school year. Instead, the evidence in the hearing record demonstrates that the IHO carefully and accurately recounted the issues to be resolved at the impartial hearing, the positions of the parties, as well as the procedural and factual background of the case (see IHO Decision at pp. 1-10). In addition, the hearing record reflects that the IHO repeatedly and accurately identified and analyzed the district's shifting arguments and evolving evidence in two interlocutory decisions related to the district's motions—and, again, in the final decision on the merits—with regard to whether the parent had standing in this case by relying on the relevant facts and proper legal standards in order to reach her conclusions of law on this issue (id. at pp. 10-13). Similarly, my independent review of the hearing record leads me to find that, based on the district representative's decision to not present any evidence with regard to the issue of FAPE, the IHO relied on the proper legal standards to conclude that the district failed to sustain its burden to establish that it offered the student a FAPE (id. at pp. 13-14). Her decision also shows that the IHO carefully recited and considered the testimonial and documentary evidence presented by both parties on the issues of standing and FAPE, and further, that she carefully marshaled and weighed the evidence in support of her conclusions (id. at pp. 10-16).

Turning to the issue of standing, under the IDEA and State law a parent may seek an impartial hearing regarding "any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child" (20 U.S.C. § 1415[b][6][A]; Educ. Law § 4404[1]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 531 [2007]). Given that the IDEA and State law permit a parent to seek an impartial hearing, the next question that logically arises is who may be considered a parent. The IDEA defines parent to include a "natural, adoptive, or foster parent of a child (unless a foster parent is prohibited by State law from serving as a parent)" (20 U.S.C. § 1401[23][A]). Federal and State regulations similarly provide that "parent" includes a "foster parent, unless State law, regulations, or contractual obligations with a State or local entity prohibit a foster parent from acting as a parent" (34 CFR 300.30[a][2]; see 8 NYCRR 200.1[ii][2]).

The district's arguments on appeal focus on the alleged fact that because the father's parental rights with respect to the student have not been terminated pursuant to Family Court Act

article 6, he retained the authority to make educational decisions on behalf of the student, which, according to the district, presumptively precluded the foster parent from having standing to act as a parent and to pursue an impartial hearing on the student's behalf. However, the issue of standing is far simpler.

State regulation provides that, unless a judicial decree or order provides otherwise, "when one or more than one party is qualified under paragraph (1) of this subdivision to act as a parent, the birth or adoptive parent must be presumed to be the parent unless the birth or adoptive parent does not have legal authority to make educational decisions for the student" (8 NYCRR 200.1[ii][3]). However, foster parents are qualified to act as parents not under 8 NYCRR 200.1(ii)(1), but under 8 NYCRR 200.1(ii)(2); therefore, State regulation does not require a presumption in favor of the student's father in this instance. Accordingly, both the student's father and the foster parent may act as a "parent" in this case, and both possess standing to pursue an impartial hearing on the student's behalf pursuant to State regulation. The evidence indicates that on the one hand that the rights of the student's father have not been terminated, but on the other hand, the student was placed with a relative, that there was a need for change in the custodial arrangements, and a need to grant the relative the status of a foster parent for an as yet unknown period of time.

As noted above, federal regulation includes a foster parent within the definition of "parent" under the same subsection as a biological or an adoptive parent of the student (34 CFR 300.30[a][1]-[2]). Federal regulation, in language similar to State regulation, provides that the "biological or adoptive parent, when attempting to act as the parent under this part and when more than one party is qualified under paragraph (a) of this section to act as a parent, must be presumed to be the parent for purposes of this section unless the biological or adoptive parent does not have legal authority to make educational decisions for the child" (34 CFR 300.30[b][1]). Analysis from the United States Department of Education regarding this provision clarifies that it applies "in cases where a foster parent and a biological or adoptive parent attempt to act as the parent" concurrently (Parent, 71 Fed. Reg. 46566-67 [Aug. 14, 2006]).

On appeal, the district initially contends that the IHO erred by finding that the district failed to present sufficient evidence to establish that the student's father was acting concurrently for educational purposes. On this point, the district asserts that the hearing record contained unrebutted testimony from the director of the foster care agency that the student's father retained his parental rights and educational decision-making rights. More specifically, the district argues that the director's unrebutted testimony about the regular communications between the student's father and the foster care agency, his participation in monthly conferences with the foster care agency that included discussions of the student's educational needs, and her testimony that the student's father was planning for the student's return to his home constitute sufficient evidence to establish that the student's father was acting concurrently and was involved in making educational decisions for the student.

However, there is no basis to overturn the IHO's findings because contrary to the district's assertions, the aforementioned evidence, while unrebutted, is not sufficiently probative of whether the student's father was acting concurrently for educational purposes because it only establishes, at a minimum, that the student's father had contact with the foster care agency—not with the district, itself—with respect to educational decision-making. To be clear, the hearing record is devoid of any evidence that the district made efforts to follow the procedures envisioned by the

IDEA and communicate directly with the student's father, other than perhaps some time ago when the CPSE attempted to contact the student's father seeking his participation in the March 2020 CPSE meeting for the student (see generally Jan. 13, 2022 Tr. pp. 1-14; Feb. 15, 2022 Tr. pp. 15-41; Mar. 4, 2022 Tr. pp. 42-97; Mar. 15, 2022 Tr. pp. 42-69; Mar. 29, 2022 Tr. pp. 70-130; Parent Exs. A-F; Dist. Exs. 1-3; IHO Exs. I-XIV). Although it became clear that the student had been placed in the care of the foster parent, there is no district records showing that CSE personnel then made any recent efforts to mail, email or telephone the student's father, and as pointed out by the IHO the district when to a third party, the foster care agency, try to identify the current wishes of the student's father. Therefore, while it is plausible that this evidence speaks to the student's father expressing his thoughts and preferences to the foster care agency concerning the student's education, the district did not present any reliable or probative evidence that the student's father expressed those thoughts to the district or otherwise contributed to the educational decision-making related to the student that would lead to the conclusion that the student's father was acting concurrently. Thus the IHO's view of the facts was correct, especially when a foster parent who met the definition of a parent under IDEA became involved and expressed the desire to continue special education services that the student had been receiving.

Thus, contrary to the district's arguments—and consistent with the IHO's weighing of the evidence in this case—there is no indication in the hearing record that the student's father has "attempt[ed]" to act concurrently as a "parent" to the student under the IDEA, and the district presents no further evidence to overturn the IHO's finding that this presumption in favor of the student's father did not apply in this case (see, e.g., Appeal of Rivers, 42 Ed. Dep't Rep. 86, Decision No. 14,784 [2002] [holding that despite a lack of clarity in the hearing record regarding educational decision making capacity, a father would be considered his children's custodian for residency purposes when there was "absolutely no evidence in the record that the children have any other responsible adult claiming to be their parent or guardian"]). Consequently, the issue of standing is relatively straightforward based on State and federal regulations, which confer standing to the foster parent; therefore, there is no reason to depart from the IHO's finding that the foster parent had standing to request the impartial hearing on the student's behalf. Because the foster parent had standing, the foster parent had the right to an impartial hearing at which the district was required to meet its burden of produce relevant, reliable evidence showing why it was not required to provide the student with appropriate special education services, and the foster parent had the right to confront the district's witnesses and/or offer her own evidence in response.

Alternatively, the district contends that this is not a case involving concurrent authority. On this point, the district argues that, contrary to the IHO's decision, the evidence in the hearing record established that the student's father retained his educational decision-making rights and that he exercised those rights by refusing to consent to an initial evaluation or reevaluation of the student. In support of this argument, the district points to the March 2017 Family Court Order awarding the student's father with sole, legal, and physical custody of the student, which the district submitted to the IHO in support of its motion to renew and reargue its motion to dismiss, to establish that the student's father retained his educational decision-making rights.

In the IHO's March 2022 interlocutory decision on the district's motion to renew and reargue, the IHO gave little weight to March 2017 Family Court Order because, subsequent to that court order, the student was placed within the care and custody of her foster parent, and the district had not explained the relevance of the March 2017 Order on his educational decision-making

authority in light of the student's removal from her father's care and custody (see IHO Ex. XI at pp. 1-2). That case was brought, and that order addressed the rights of the student's mother. The IHO explained further that the March 2017 Family Court Order also did not address whether the student's father was attempting to act concurrently as a parent for the purposes of educational decision-making (id. at p. 1). The IHO was correct, because in 2017 the Family Court could not have addressed the later change in custodial arrangements that came with the appointment of the foster parent in February 2021. To the extent that the district now points to the Family Court order as prima facie evidence of the student's father's parental rights, the district does not address the unreliability of that evidence with respect to the foster parent, as previously determined by the IHO (compare Req. for Rev. ¶¶ 6, 14, with IHO Ex. XI at pp. 1-2, and IHO Decision at pp. 5, 10-13). Thus, when faced with the question of the February 2021 appointment of the foster parent, there is no reason to give the March 2017 Family Court Order entered against the student's mother any more weight than the IHO already did in her decision denying the district's motion to renew and reargue and in the decision on the merits.

On appeal, the district does not argue that the IHO failed to consider this evidence or misunderstood this evidence, but merely seeks for the undersigned to weigh the evidence more heavily in the district's favor and to affirmatively conclude that the same evidence demonstrated that the student's father retained the sole right to make educational decisions on behalf of the student. I decline to do so. Moreover, upon reviewing the evidence in the hearing record, the district's own evidence—namely, the March 2022 letter penned by the district's witness (i.e., the director of the foster care agency)—is equivocal, at best, as it indicates that the foster parent would be "taking [the student] to all of her medical and educational appointments" (Dist. Ex. 1). But in the very next sentence, the director indicated that the student's father "retain[ed] parental rights" and then provided a telephone number by which to contact the student's father (id.). Another document produced by the district—an April 2021 email—reflects a conversation between a district social worker and the student's case planners (see Dist. Ex. 3). The email exchange referenced a previous discussion between the district social worker and the case planners, but it does not address whether any discussions took place between the district and the student's father or reference any prior contact between the district and the student's father (id.).

Even assuming without deciding whether the student's father retained his parental rights to make educational decisions for the student, the IHO properly concluded that the district had not presented sufficient, reliable evidence to conclude that the student's father exercised those rights by failing to consent to the initial provision of special education services (via the CPSE) or later revoking that consent, or by failing to consent to an initial evaluation or reevaluation of the student (see IHO Decision at p. 12). As noted briefly by the IHO, federal regulation requires that a parent exercise such rights in writing, and the district has not presented any documentary evidence to substantiate the testimonial evidence about the father's alleged actions (id., citing 34 CFR 300.300]b][4]).

On appeal, the district asserts that because the student's father retained his educational decision-making rights, the district was required to obtain his consent for an initial evaluation of the student and to obtain his consent for the provision of special education. However, as the IHO determined, the district failed to present any documentary evidence as required by federal regulation.

In addition, the district's argument is legally unsound. The evidence in the hearing record demonstrates that an initial evaluation had already been conducted and the student had been found eligible for special education through the evaluation process conducted under the CPSE, and the hearing record does not include any evidence demonstrating that the timeframe that triggered the district's obligation to reevaluate the student triennially (i.e., at least once every three years) had elapsed or that the CSE determined that the educational or related services needs of the student warranted a reevaluation (see generally Jan. 13, 2022 Tr. pp. 1-14; Feb. 15, 2022 Tr. pp. 15-41; Mar. 4, 2022 Tr. pp. 42-97; Mar. 15, 2022 Tr. pp. 42-69; Mar. 29, 2022 Tr. pp. 70-130; Parent Exs. A-F; Dist. Exs. 1-3; IHO Exs. I-XIV).

The district's contention that an evaluation was required because the student was transitioning from preschool programming to school age programming is not supported by federal or State law, and the district certainly may not simply "close" the case and stop the continuation of special education services on the basis that an evaluation of the student had not conducted at that time. A district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]).

Prior to evaluating a student, a district must provide the parent with prior written notice that "describes any evaluation procedures [the district] proposes to conduct" (20 U.S.C. §§ 1414[b][1]; 1415[b][3], [c][1]; 34 CFR 300.300[a][1][i]; 300.503[a], [b][1]; 8 NYCRR 200.5[a][1], [2], [5][i]). Subject to certain exceptions, a school district must obtain informed parental consent prior to conducting an initial evaluation (14 U.S.C. § 1414[a][1][D][i][I]; 34 CFR 300.300[c]; 8 NYCRR 200.5[b][1][i]; see Letter to Sarzynski, 51 IDELR 193 [OSEP 2008]).[17] A

[17] Consent is defined in federal and State regulations as meaning that the parents have been informed of all relevant information in their native language or other mode of communication, that they understand and agree in writing to the activity for which consent is sought, that the written consent form fully describes the activity for which consent is sought, lists any records that will be released and the people to whom any records will be released, and

district must also obtain parental consent prior to conducting a reevaluation of a student with a disability (34 CFR 300.300[c][i]; 8 NYCRR 200.5[b][1][i]). However, for a reevaluation "informed parental consent . . . need not be obtained if the [school district] can demonstrate that—[i]t made reasonable efforts to obtain such consent; and [ii] [t]he child's parent has failed to respond" (34 C.F.R. §300.300[c][2]; see also, 8 NYCRR 200.5[b][1][i][b]). In addition, "[i]f the parent refuses to consent to the reevaluation, the public agency may, but is not required to, pursue the reevaluation by using the consent override procedures" (34 CFR 300.300[c][1][ii]).

Federal and State regulations also require the district to document in "a detailed record" its "reasonable efforts" to obtain the parent's written informed consent (8 NYCRR 200.5[b][1]; see 34 CFR 300.300[a][1][iii], [c][1], [d][5]). As to the provision of special education services, according to the IDEA and federal and State regulations, a district "must obtain informed consent" from the parent of a student with a disability "before the initial provision of special education and related services" to the student (20 U.S.C. § 1414[a][1][D][i][II]; 34 CFR 300.300[b][1]; 8 NYCRR 200.5[b][1][ii]). In addition, the district must make "reasonable efforts to obtain informed consent" from the parent, which requires that the district keep a record of attempts to secure such consent through "detailed records of telephone calls made or attempted and the results of those calls; copies of correspondence sent to the parent and any responses received; and detailed records of visits made to the parent's home or place of employment and the results of those visits" (34 CFR 300.300[b][2], [d][5]; 300.322[d]; see 8 NYCRR 200.5[b][1]; Parental Consent for Services, 71 Fed. Reg. 46633-34 [Aug. 14, 2006]). When a parent fails to respond to a request for consent or refuses to consent to the provision of special education and related services, the district will not be considered to be in violation of the requirement to make a FAPE available to the student because of the failure of the district to provide the student with the special education and related services for which district sought consent (20 U.S.C. § 1414 [a][1][D][ii][III][aa]; 34 CFR 300.300[b][3][ii]; 8 NYCRR 200.5[b][4][i]).

Furthermore, State regulation provides that a revocation of consent for the provision of special education and related services must be in writing and the district must provide prior written notice before ceasing provision of special education programs and services (8 NYCRR 200.5[b][5][i]; see 20 U.S.C. § 1415[b][3], [c][1]; 34 C.F.R. 300.503; 8 NYCRR 200.5[a]). Additionally, upon a parental revocation of consent, the district is precluded from continuing to provide special education programs and services and from using mediation or due process procedures to obtain agreement or a ruling that the services may be provided to the student; additionally, a district shall not be considered to be in violation of the requirement to make a FAPE available to the student because of the failure to provide the student with further special education programs and services (8 NYCRR 200.5[b][5][i]-[iii]; see 34 C.F.R. 300.300[b][4]). The district is also not required to convene a meeting of the CSE, develop an IEP for the student, or amend the student's education records to remove any references to the student's receipt of special education programs and services because of the revocation of consent (8 NYCRR 200.5[b][5][iv]-[v]; see 34 C.F.R. 300.300[b][4]). Once the district has properly discontinued the provision of special education and related services, the student becomes a general education student and the district may place the student in accordance with the placement procedures of general education students (see Parental Revocation of Consent for Special Education Services, 73 Fed. Reg. 73,011, 73,013

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further that the parent must be aware that the consent is voluntary, may be revoked at any time, and if revoked, that revocation is not retroactive (34 CFR 300.9; 8 NYCRR 200.1[l]).

[Dec. 1, 2008]). The district must treat a subsequent evaluation request by a parent as a request for an initial evaluation (Letter to Cox, 54 IDELR 60 [OSEP 2009]).

Simply stated, absent any such written evidence that the district sought consent from the student's father, that the district documented its attempts to obtain his consent, or that the student's father provided the district with a written revocation of his consent for services, the weight of the reliable evidence in the hearing record does not support the district's contention that it was under no obligation to offer the student a FAPE because the student's father did not consent to a reevaluation of the student. Accordingly, there is no basis to depart from the IHO's determination that the district is responsible for funding the costs of the student's SETSS for 7.5 hours per week at $150.00 per hour for the 2021-22 school year.

Nevertheless, in the event that the student's father does not want the student to receive special education and related services going forward, the father may exercise that right by revoking consent in writing provided that he continues to retain educational decision-making authority at the time of such a written revocation (see 8 NYCRR 200.5[b][5]). Additionally, it is worth noting that at this point, the district has made multiple motions in front of the IHO regarding standing and has appealed the IHO's ruling based on the student's father's perceived wishes; however, there is no indication in the hearing record that the district has attempted to contact the student's father regarding this proceeding or attempted to notify the student's father of the provision of services to the student. As discussed above, there have been multiple opportunities where the district either could have or should have provided the student's father with prior written notice of its actions (see 8 NYCRR 200.5[a] [prior written notice "must be given to the parents of a student with a disability a reasonable time before the school district proposes to or refuses to initiate or change the identification, evaluation, educational placement of the student or the provision of a free appropriate public education to the student"). Considering the above, the district will be directed to deliver a copy of this decision to the student's father, absent an intervening court order to the contrary.

VI. Conclusion

In summary, the IHO properly determined that the foster parent had standing to pursue an impartial hearing on the student's behalf and that the district failed to offer the student a FAPE for the 2021-22 school year. However, absent an intervening court order to the contrary, the student's father is permitted to receive information regarding the student's education and the district is directed to provide the student's father with a copy of this decision by certified mail at his current or last known address.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
July 21, 2022

JUSTYN P. BATES
STATE REVIEW OFFICER