The University of the State of New York

The State Education Department
State Review Officer
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No. 22-088

Application of a STUDENT WITH A DISABILITY, by his parent, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

Appearances:
Thrive Advocacy, LLC, attorneys for petitioner, by Raquel Gordon, Esq.

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

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request for respondent (the district) to fund the costs of the student's special education teacher support services (SETSS) for the 2021-22 school year. The appeal must be dismissed.

II. Overview—Administrative Procedures

When a student who resides in New York is eligible for special education services and attends a nonpublic school, Article 73 of the New York State Education Law allows for the creation of an individualized education services program (IESP) under the State's so-called "dual enrollment" statute (see Educ. Law §3602-c). The task of creating an IESP is assigned to the same committee that designs educational programing for students with disabilities under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482), namely a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law §§ 3602-c; 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts related to IESPs, State law provides that "[r]eview of the

recommendation of the committee on special education may be obtained by the parent or person in parental relation of the pupil pursuant to the provisions of [Education Law § 4404]," which effectuates the due process provisions called for by the IDEA (Educ. Law § 3602-c[2][b][1]). Incorporated among the procedural protections of the IDEA and the analogous State law provisions is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to 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 in this case has been parentally placed in the same nonpublic school since he began receiving school-aged services, where, according to the parent's testimony, he continued to receive eight hours per week of special education itinerant teacher (SEIT) services, occupational therapy (OT), and counseling services (see Tr. pp. 66-68).[1]

When the student was in fourth grade (2020-21 school year), a CSE convened on October 15, 2020 to conduct the student's annual review and to develop an IESP, which reflected a projected implementation date of October 29, 2020, and a projected annual review date of October 15, 2021 (see Dist. Ex. 3 at pp. 1-2, 11). The IESP indicated that the student continued to receive SETSS via pendency (id. at p. 2). As noted in the October 2020 IESP, although a SETSS report had been requested from the provider and the CSE had extended an invitation to the SETSS provider to attend the CSE meeting, the CSE was not provided with the requested report and the SETSS provider was unable to attend the scheduled meeting (id.). At that time, the student's teacher from the nonpublic school had completed a "Teacher Progress Report 2020-2021," which indicated the student's "Reading Proficiency (Grade Level)" as "3.8" and a "Teacher Estimate" as "3.8"; in the same progress report, the student's teacher reported the student's "Math Proficiency (Grade Level)" as "3.2" and a "Teacher Estimate" as "3.2" (Dist. Exs. 2 at p. 2; 3 at p. 1).

Finding that the student remained eligible for special education as a student with an other health-impairment, the October 2020 CSE recommended the following related services to meet the student's identified needs: two 30-minute sessions per week of individual OT, two 30-minute

[1] State law defines SEIT services (or, as referenced in State regulation, "Special Education Itinerant Services" [SEIS]) as "an approved program provided by a certified special education teacher . . . , at a site . . . , including but not limited to an approved or licensed prekindergarten or head start program; the child's home; . . . or a child care location" (Educ. Law § 4410[1][k]; 8 NYCRR 200.16[i][3][ii]; see "[SEIS] for Preschool Children with Disabilities," Office of Special Educ. Field Advisory [Oct. 2015], available at http://www.p12.nysed.gov/specialed/publications/2015-memos/documents/SpecialEducationItinerantServicesforPreschoolChildrenwithDisabilities.pdf; "Approved Preschool Special Education Programs Providing [SEIT] Services," Office of Special Educ. [June 2011], available at http://www.p12.nysed.gov/specialed/publications/SEITjointmemo.pdf). In addition, SEIT services are "for the purpose of providing specialized individual or group instruction and/or indirect services to preschool students with disabilities" (8 NYCRR 200.16[i][3][ii] [emphasis added]; see Educ. Law § 4410[1][k]). Thus, while the hearing record refers to the individual special education teacher services the student continued to receive as a school-aged student during the 2018-19, 2019-20, and 2020-21 school years via pendency as SEIT services, it is inconsistent with State regulation and policy for a school district to deliver a service designed exclusively for preschool students to a school-aged student. Instead, as SETSS is not defined by State regulations, the individual special education teacher services the student received under pendency while he attended a regular education classroom at the nonpublic school more closely resembles direct consultant teacher services (see 8 NYCRR 200.1[m][1]; 200.6[d]). Nevertheless, for the purpose of clarity, the special education teacher services delivered to the student under pendency during the 2018-19, 2019-20, and 2020-21 school years, as well as the SETSS delivered thereafter to the student during the 2021-22 school year under pendency, will be referred to as SETSS, and not as SEIT (or SEIS) services, in this decision.

sessions per week of individual counseling, and one 30-minute session per week of counseling services in a group (see Dist. Ex. 3 at pp. 1, 8; see generally Dist. Ex. 4).[2, 3]

According to the evidence in the hearing record, the student attended a regular education classroom at the nonpublic school during the 2021-22 school year with approximately 22 students and 1 teacher (see Tr. pp. 55-57).

A. Due Process Complaint Notice

By due process complaint notice dated September 10, 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). As relevant to this appeal, the parent asserted that the October 2020 CSE failed to recommend any individual special education teacher services for the student (id. at pp. 1-2). The parent also asserted that the district failed to sufficiently evaluate the student prior to the October 2020 CSE meeting and, therefore, the CSE had no basis upon which to terminate the student's "last agreed upon services, specifically the elimination of all special education instruction" (id. at p. 1). In addition to invoking the student's pendency rights, the parent sought the following as relief for the district's alleged violations: the implementation and funding of eight hours per week of individual SETSS, two 30-minute sessions per week of individual counseling, and two 30-minute sessions per week of individual OT (id. at pp. 2-3). Alternatively, the parent requested the implementation of, and the recommendation for, 10 hours per week of individual SETSS, at an enhanced rate; and for the district to issue related services authorizations (RSAs) (or a "similar funding mechanism") for the student's OT and counseling services (id. at p. 3). The parent also requested an order directing the district to fund evaluations of the student in "all areas of [the student's] needs with evaluator(s) to be chosen by the parent" (id.).

B. Events Post-Dating the Due Process Complaint Notice

On October 26, 2021, the parties fully executed a pendency form, which reflected their agreement that the following constituted the student's pendency placement: a 12-month school year program consisting of eight hours per week of individual SETSS with payments made directly to the provider ("Special Edge" agency), two 30-minute sessions per week of individual OT (with payment via the issuance of an RSA), and two 30-minute sessions per week of individual counseling services (with payment via the issuance of an RSA) (Parent Ex. B at pp. 1-2). The pendency form further reflected that the parties had agreed that the student's IEP, dated March 30, 2016, formed the basis for the student's pendency placement (id. at p. 1).[4]

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[2] The student's eligibility for special education and related services as a student with an other health-impairment is not in dispute (see 34 CFR 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

[3] As set forth in the district's prior written notice, the October 2020 CSE relied on the following evaluative information to develop the student's October 2020 IESP: an October 2018 social history, an October 2018 classroom observation, a December 2018 educational evaluation report, an October 2020 counseling report, and an October 2020 teacher report (see Dist. Ex. 4 at pp. 1-2).

[4] Neither party submitted the March 30, 2016 IEP into the hearing record as evidence (see generally Tr. pp. 1-81;

When the student was in fifth grade (2021-22 school year, a CSE convened on November 10, 2021 to conduct the student's annual review and to develop an IESP with a projected implementation date of November 29, 2021 and a projected annual review date of November 10, 2022 (see Dist. Exs. 6 at p. 1; 7 at p. 1; see generally Dist. Ex. 8).[5] According to the CSE meeting comments, an "Agency SETSS provider" (identified more specifically as the "SETSS supervisor") participated at the meeting (Dist. Ex. 7 at p. 2). The meeting comments also noted that a "SETSS report [had been] submitted a few minutes prior to [the] meeting time" (id.).[6] As reflected in the November 2021 IESP, at that time the student's "independent reading level [wa]s estimated to fall at the [four]th grade level," and in mathematics, the student's "estimated level for math problem solving f[ell] approximately at [the third] grade level" (Dist. Ex. 6 at p. 2; see Dist. Ex. 5 at pp. 1, 4-5). Finding that the student remained eligible for special education as a student with an other health-impairment, the November 2021 CSE recommended that the student receive four sessions per week of SETSS in a group, two 30-minute sessions per week of individual OT, two 30-minute sessions per week of individual counseling, and one 30-minute session per week of counseling services in a group (see Dist. Ex. 6 at pp. 1, 9).

C. Impartial Hearing Officer Decision

On March 17, 2022, the parties proceeded to an impartial hearing, which concluded on May 27, 2022, after four days of proceedings (see Tr. pp. 1-81). In a decision dated June 3, 2022, the IHO found that the district failed to offer the student a FAPE for the 2021-22 school year because the student's IESP was "created after the parent requested an impartial hearing"; therefore, the IHO concluded that the district failed to sustain its burden of proof (see IHO Decision at pp. 5-7).[7]

Parent Exs. A-F; Dist. Exs. 1-8). According to the due process complaint notice, the student was in preschool during the 2016-17 school year and received eight hours per week of individual SEIT services and two 30-minute sessions per week of individual OT, which were described as an "appropriate constellation of services" to meet the student's needs (Parent Ex. A at p. 1). In the final decision, the IHO noted that the student had received eight hours per week of SETSS services under pendency for the past three school years (i.e., 2018-19, 2019-20, and 2020-21) (see IHO Decision at p. 7).

[5] According to the district's prior written notice, the November 2021 CSE relied on the following evaluative information to develop the student's November 2021 IESP: an October 2018 social history, an October 2018 classroom observation, and a December 2018 educational evaluation report (see Dist. Ex. 8 at pp. 1-2).

[6] Neither the November 2021 IESP nor the CSE meeting comments indicated how often the student had been receiving SETSS at that time (see generally Dist. Exs. 6; 7). In addition, the "SETSS report" referenced in the meeting comments was not submitted into the hearing record as evidence (see generally Tr. pp. 1-81; Parent Exs. A-F; Dist. Exs. 1-8).

[7] The IHO indicated in the decision that because district exhibits "6, 7, and 8" post-dated the parent's due process complaint notice (September 10, 2021), he would not accept or review those documents for the decision (IHO Decision at p. 2). However, at the impartial hearing, the IHO admitted district exhibits 6, 7, and 8 into the hearing record as evidence "at that moment" and over the parent's objections to those documents as being created after the date of the due process complaint notice, but then the IHO indicated that he would "make a decision whether or not [he] w[ould] accept them" (Tr. pp. 26-29). Generally speaking, if the IHO is uncertain about admitting a document into the hearing record as evidence, the IHO may find it helpful to consider labeling the document for

With respect to the SETSS provided to the student, the IHO, after examining the evidence, found that the hearing record failed to contain sufficient credible evidence that the student made "meaningful progress . . . to favor the parent" (IHO Decision at pp. 7-10).[8] The IHO also determined that the behavior plan created for the student had not been "created by any person with the credentials to create such a plan"; similarly, the IHO found that the student "needed a sensory plan, [and] it was not created by any person with the credentials to create such a plan" (id. at p. 10). The IHO also found that the hearing record lacked evidence to establish that the "student received any SETSS during the 2021-2022 school year" (id.).[9] In addition, the IHO concluded that the parent had not paid the agency responsible for delivering the SETSS, the hearing record failed to contain any evidence that the parent "could not pay for such services," and the parent was "not seeking reimbursement" (id.). The IHO further determined that the parent had "no legal financial responsibility without a contract between the agency and the parent," and moreover, the hearing record did not include any evidence of a contract between the parent and the agency (id.). As a result, the IHO dismissed the parent's due process complaint notice because the parent failed to "show an appropriate plan for the student" and because the parent had "no legal financial liability with the agency," noting further that the hearing record lacked evidence of the parent's "inability to pay for tuition or services" (id.). As a final point, the IHO indicated that, if the foregoing was not sufficient for a dismissal, he further denied "any payment to the agency due to insufficient evidence as to services rendered and administrative expenses beyond the fee (a fee unknowing) to the provider" (id.).

IV. Appeal for State-Level Review

The parent appeals, arguing initially that the IHO erred by failing to make a finding with regard to her allegation that the evaluations the district relied upon to create the October 2020 IESP were not adequate. The parent also argues that the IHO erred by finding that the hearing record failed to contain evidence that the student received any SETSS during the 2021-22 school year or that the student required SETSS and related services. Next, the parent contends that the IHO improperly denied the parent's request to fund SETSS, and denied funding for even for those services deemed appropriate by both parties. The parent also contends that the IHO improperly

identification purposes only, subject to its admission into the hearing record with the appropriate authentication or foundation. State regulations do not provide any mechanism for an IHO to accept a document into the hearing record as evidence, only to later determine—as occurred in this case and outside the parties' presence—that the documents were no longer considered to be part of the evidence in the hearing record. Alternatively, the IHO could admit the documents into the hearing record as evidence, but then determine what weight, if any, must be afforded to that evidence in reaching his or her conclusions about the issues in the case.

[8] The IHO previously noted in the decision that, after three years of receiving eight hours per week of individual SETSS, the student was "a year and a half behind in reading" (IHO Decision at p. 7). In addition, the IHO noted that the provider who delivered services to the student during the 2021-22 school year was not presented as a witness at the impartial hearing (id.).

[9] Specifically, the IHO indicated that although the parent's witness testified that the SETSS provider delivered services for approximately 1.5 hours per day, Monday through Friday, the witness later clarified that the student's nonpublic school closed at noon on Fridays and therefore, she was unsure of the schedule for the student's services on Fridays (see IHO Decision at pp. 7-9). As a result, the IHO found that there was "no evidence at all that the student received what the agency was seeking payment for, eight hours a week" (id. at p. 9).

concluded that the parent was required to incur debt to an agency in order to receive funding for services, and moreover, the IHO erred by finding that the parent had no legal financial liability to the agency. As relief, the parent seeks an order finding that the student is entitled to eight hours per week of individual SETSS at a rate of $150.00 per hour, two 30-minute sessions per week of individual OT, and two 30-minute sessions per week of individual counseling (both OT and counseling via the issuance of RSAs). Alternatively, the parent seeks a finding that the student is entitled to the implementation of, and a recommendation for, 10 hours per week of individual SETSS at an enhanced rate, and OT and counseling funded via RSAs. In addition, the parent seeks a declaratory finding that the district failed to appropriately evaluate the student in all areas of suspected disability and an award of funding to evaluate the student in all areas of suspected disability by providers selected by the parent.

In an answer, the district responds to the parent's allegations and generally argues to uphold the IHO's decision in its entirety.[10]

In a reply, the parent responds to the district's allegations and generally repeats arguments made in the request for review.[11]

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

[10] The district affirmatively asserts in the answer that it is not challenging the IHO's finding that the district failed to offer the student a FAPE for the 2021-22 school year; as such, this determination has become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

[11] The parent prepared, served, and filed a reply to the district's answer in this case. However, State regulation limits the scope of the parent's reply to "any claims raised for review by the answer . . . that were not addressed in the request for review, to any procedural defenses interposed in an answer . . . or to any additional documentary evidence served with the answer" (8 NYCRR 279.6[a]). In this instance, the district's answer does not include any of the necessary conditions precedent triggering the parent's right to compose a reply. As such, the parent's reply fails to comply with the practice regulations and will not be considered.

(Educ. Law § 3602-c[2]).[12] "Boards of education of all school districts of the state shall furnish services to students who are residents of this state and who attend nonpublic schools located in such school districts, upon the written request of the parent" (Educ. Law § 3602-c[2][a]). In such circumstances, the district of location's CSE must review the request for services and "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an [IEP]" (Educ. Law § 3602-c[2][b][1]). The CSE must "assure that special education programs and services are made available to students with disabilities attending nonpublic schools located within the school district on an equitable basis, as compared to special education programs and services provided to other students with disabilities attending public or nonpublic schools located within the school district (id.).[13]

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. Unaddressed Issue

Initially, the parent argues that the IHO failed to address her claim in the due process complaint notice alleging that the district failed to sufficiently evaluate the student prior to the October 2020 CSE meeting. The parent notes that, pursuant to State regulation, an IHO's decision concerning whether a student received a FAPE must be "'made on substantive grounds.'" Absent sufficient evaluative information, the parent contends that the CSE had no basis upon which to terminate the student's SETSS that he "had received up to that point." The parent also argues that she objected to the "removal of SETSS" at the October 2020 CSE meeting, and the CSE failed to provide her with "whatever documentation" was referenced at the meeting. In addition, the parent asserts that a follow-up CSE meeting was never held, despite being told of this plan at the CSE meeting; instead, the district issued the October 2020 IESP, which failed to include a recommendation for SETSS.

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

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

In light of the foregoing, the parent asserts that the district failed to conduct proper evaluations of the student and failed to rely on "any substantial basis for removing the individualized special education." Consequently, the parent contends that the IHO failed to "make a finding that the [district] failed to base its determination on adequate evaluations," which warranted a further conclusion that the recommendation for four hours of SETSS per week in the November 2021 IESP was also "lacking any substantive rationale." As a result, the parent argues that her own evidence that the student required eight hours per week of SETSS—as the "last agreed upon plan with the [d]istrict"—was the only evidence remaining for the IHO to rely on to reach a conclusion, and thus, the IHO erred by denying the requested SETSS and funding for those services.

In response, the district argues that because it has not appealed the IHO's finding that it denied the student a FAPE for the 2021-22 school year, the parent's allegation that the IHO failed to address her claim that the October 2020 CSE failed to sufficiently evaluate the student is no longer at issue on appeal.

Consistent with the parent's contention, a review of the IHO's decision reflects that the IHO did not address the parent's claim alleging that the district failed to sufficiently evaluate the student prior to the October 2020 CSE meeting (see generally IHO Decision). When an IHO has not addressed claims set forth in the due process complaint notice, an SRO may consider whether the case should be remanded to the IHO for a determination of the claims that the IHO did not address (8 NYCRR 279.10[c]; see also Educ. Law § 4404[2]; F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 589 [S.D.N.Y. 2013] [indicating that the SRO may remand matters to the IHO to address claims set forth in the due process complaint notice that were unaddressed by the IHO], citing J.F. v. New York City Dep't of Educ., 2012 WL 5984915, at *9 n.4 [S.D.N.Y. Nov. 27, 2012]; see also D.N. v. New York City Dep't of Educ., 2013 WL 245780, at *3 [S.D.N.Y. Jan. 22, 2013]). Here, the IHO should have made a determination regarding the district's alleged failure to sufficiently evaluate the student, as asserted in the due process complaint notice, in the first instance. In the event of an administrative or judicial review, in which the reviewing body might disagree with a singular finding, it is important to have the remaining issues and the rationales addressed, even briefly (cf. F.B., 923 F. Supp. 2d at 589). Also, such an analysis serves as a guide to the district as to whether it should undertake corrective action in the future in order to comply with the IDEA.

However, at this juncture, I am loathe to remand for further proceedings, or to undertake an independent analysis of this issue, which the parent raised in the due process complaint notice as a basis upon which to conclude that the district failed to offer the student a FAPE for the 2021-22 school year (see Parent Ex. A at p. 2-3). This is especially true where, as here, the IHO determined that the district failed to offer the student a FAPE for the 2021-22 school year on other grounds, which the district does not appeal, and therefore, an analysis of the specific issue raised by the parent would not affect the outcome of this matter.

As a reminder, generally 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]).

Thus, to the extent that the student may be due for a reevaluation based upon the district's obligation to evaluate the student at least once every three years, the district must comply with its obligations to do so.

B. Relief

1. Funding for Unilaterally-Obtained SETSS

One form of relief available to the parent for the district's failure to offer a FAPE is tuition reimbursement, or as sought here, direct funding of SETSS. Generally, a board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 252 [2d Cir. 2009]). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

In other words, districts can be made to pay for special education services privately obtained for which a parent paid for or has become legally obligated to pay for, a process that is essentially the same as the federal process under IDEA. "Parents who are dissatisfied with their child's education can unilaterally change their child's placement . . . and can, for example, pay for

private services, including private schooling. They do so, however, at their own financial risk. They can obtain retroactive reimbursement from the school district after the [IESP] dispute is resolved, if they satisfy a three-part test that has come to be known as the Burlington-Carter test" (Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 526 [2d Cir. 2020] [internal quotations and citations omitted]; see Carter, 510 U.S. at 14 [finding that the "Parents' failure to select a program known to be approved by the State in favor of an unapproved option is not itself a bar to reimbursement."]).

Accordingly, the parent's request for eight hours (or periods) per week of individual SETSS must be assessed under this framework; namely, having found that the district failed to provide appropriate equitable services, the issue is whether the eight hours of SETSS (which there is some evidence a provider from the Special Edge agency delivered as SETSS to the student under pendency and was directly funded by the district to the agency),[14] constituted an appropriate unilateral placement of the student such that the cost of the SETSS are reimbursable to the parent or, alternatively, should be directly paid by the district to the provider upon proof that the parent has paid for the services or is legally obligated to pay but does not have adequate funds to do so (see Parent Ex. B at pp. 1-2).[15] As a result, the cost of the SETSS, under the Burlington-Carter test, must be fully reimbursed or directly funded by the district unless, as a matter of equitable considerations, the costs sought to be reimbursed are excessive or otherwise should be reduced or, in the case of direct funding, the parent has not demonstrated a legal obligation to pay the costs and an inability to do so.

Here, although the hearing record does not definitively establish how Special Edge became engaged to provide SETSS to the student for the 2021-22 school year—that is, via the parent privately or unilaterally obtaining SETSS for the student from the agency or via an already existing relationship between the parent and the agency arising from the provision of SETSS to the student under pendency for the past three years or via the student's pendency placement during the current administrative hearing process—the hearing record conclusively establishes through the parent's own testimony that she has not paid the Special Edge agency for providing services to the student for the 2021-22 school year (see Tr. p. 73). Thus, because there is no evidence that the parent has actually paid any money for which she must be reimbursed, this matter is in a subset of more complicated cases in which the financial injury to the parent and the appropriate remedy are less clear.

[14] In the request for review, the parent acknowledges in a footnote that any liability the parent may have incurred for SETSS for the 2021-22 school year was "covered" via the pendency agreement (Req. for Rev. p. 8, n.3; see generally Parent Ex. B).

[15] Pursuant to the pendency agreement executed by both parties—which remains in effect throughout the duration of the administrative hearing process—the student was to receive, in part, eight hours (or periods) per week of individual SETSS with payments made directly to the Special Edge agency provider (Parent Ex. B at pp. 1-2). The parent does not assert that the student did not fully receive the pendency placement services or that the district has not paid for the pendency placement services (see generally Req. for Rev.; Answer). Consequently, there does not appear to be any dispute as to the provision of, or payment for, the eight hours (or periods) per week of individual SETSS already provided to the student under pendency during the 2021-22 school year.

The Second Circuit Court of Appeals has held that a direct payment remedy is an appropriate form of relief in some circumstances, and that "[i]ndeed, where the equities call for it, direct payment fits comfortably within the Burlington–Carter framework" (E.M. v. New York City Dep't of Educ., 758 F.3d 442, 453 [2d Cir. 2014]; see also Mr. and Mrs. A. v. New York City Dep't of Educ., 769 F. Supp. 2d 403, 430 [S.D.N.Y. 2011] [finding it appropriate to order a school district to make retroactive tuition payment directly to a private school where equitable considerations favor an award of the costs of private school tuition but the parents, although legally obligated to make tuition payments, have not done so due to a lack of financial resources]). However, unlike the E.M. case, the hearing record in this matter is devoid of any evidence that the parent is legally obligated to pay the agency or the provider for SETSS delivered to the student (see generally Tr. pp. 1-81; Parent Exs. A-F; Dist. Exs. 1-8). In fact, the parent testified that she had not entered into a contract with Special Edge for the provision of SETSS to the student for the 2021-22 school year (see Tr. p. 73). Moreover, to the extent that the parent relies on the affidavit of services entered into the hearing record as evidence of her financial obligation or liability to the Special Edge agency, her reliance on this document is misplaced (see Req. for Rev. p. 7, ¶ 4, citing Parent Ex. C). Upon review, the affidavit of services reflects that the agency was providing the student with eight hours per week of SETSS at the rate of $150.00 per hour for the 2021-22 school year and could continue to provide those services for the remainder of the school year, but it does not indicate that the parent entered into a contract with the Special Edge agency to provide those services, nor does the document reflect whether the parent would be responsible for the costs of those services (see Parent Ex. C). In addition, the affidavit of services was executed solely by the financial officer of at "Special Edge Support LLC," and was not countersigned by the parent, as generally required for the purpose of a contract for services (id.).

Consequently, while there is no real dispute as to the hourly rate of the SETSS provided to the student during the 2021-22 school year, or that, contrary to the IHO's finding, the student actually received SETSS during the 2021-22 school year even if solely as the result of the student's pendency placement, there is no indication in the hearing record that the parent paid for the services or is otherwise legally obligated to pay for such services (see generally Tr. pp. 1-81; Parent Exs. A-F; Dist. Exs. 1-8). As noted by the IHO in his decision, and the district in its answer, no contract between the parent and the Special Edge agency was included in the hearing record for the 2021-22 school year, and the affidavit of services for the 2021-22 school year did not set forth any information concerning whether the parent was financially responsible for the costs of those services (see IHO Decision at p. 7; Parent Ex. C). Therefore, and consistent with the IHO's decision to deny the parent's request to fund eight periods per week of individual SETSS for the 2021-22 school year, as there is no evidence in the hearing record—such as a written contract between the parent and the agency or an invoice directed to the parent revealing a legal obligation to pay—it is not possible to find that the parent incurred a financial obligation for the SETSS delivered to the student that would support an award of reimbursement relief for the 2021-22 school year.

As there is inadequate proof that the parent has expended any funds to pay for SETSS for the 2021-22 school year or is legally obligated to do so, it is not appropriate equitable relief in this

due process proceeding to require the district to either reimburse the parent for the costs of SETSS or to directly fund SETSS under the relevant legal standards discussed above.[16]

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

2. Prospective Placement

As an alternative form of requested relief, the parent seeks a "recommendation, and implementation of 10 hours, per week, of 1:1 [SETSS], provided at an enhanced rate, as well as [OT] and [c]ounseling, funded through RSAs or a similar funding mechanism" (Req. for Rev. at p. 9; see Parent Ex. A at p. 3). Although the parent does not explain the basis for this relief, it is generally consistent with requests to prospectively place students in a particular type of program and placement through IEP or, as in this case, IESP amendments, which, under certain circumstances, can have the effect of circumventing the statutory process, pursuant to which the CSE is tasked with reviewing information about the student's progress under current educational programming and periodically assessing the student's needs (see Adams v. Dist. of Columbia, 285 F. Supp. 3d 381, 393, 396-97 [D.D.C. 2018] [noting with approval the hearing officer's finding "that the directives of IDEA would be best effectuated by ordering an IEP review and revision, rather than prospective placement in a private school"]; see also Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *16 [E.D.N.Y. Oct. 30, 2008] [noting that "services found to be appropriate for a student during one school year are not necessarily appropriate for the student during a subsequent school year"]).

Here, the parent's requested relief is not supported by the evidence in the hearing record and is unwarranted. At this point, the school year at issue—2021-22—is over and, in accordance with its obligation to review a student's IEP at least annually, the CSE has already produced an IESP that will be in effect through the start of the 2022-23 school year, that is, the November 2021 IESP, which has not been the subject of a due process proceeding (see also Eley v. Dist. of Columbia, 2012 WL 3656471, at *11 [D.D.C. Aug. 24, 2012] [noting that prospective placement is not an appropriate remedy until the IEP for the current school year has been completed and the parent challenges the IEP for the current year]). As such, the more appropriate course is to limit review in this matter to remediation of past harms that have been explored through the

[16] To be clear, the equitable determinations made herein—that is, that the parent is not entitled to the relief sought because the hearing record is devoid of evidence to support an award of either tuition reimbursement for, or direct funding of, the SETSS delivered to the student during the 2021-22 school year—would be the same regardless of whether a determination was made finding that the SETSS provided to the student were appropriate.

development of the underlying hearing record concerning the October 2020 IESP. To award specific changes to the student's IESP would, in effect, provide an award for the 2022-23 school year that bears no relation to whether or not the district's recommended program or placement for that year is appropriate. Indeed, such an award would demonstrate that prospective placements almost always serve to circumvent the statutorily required CSE process and generally, except in rare circumstances not present here, constitute an improper usurpation of the CSE's role by the due process system, rather than serve as appropriate remediation for the district's denial of a FAPE to the student for the time periods claimed. Therefore, the parent's requests to prospectively place the student through changes to his IESP and to direct a funding source for the any related services recommended for the student for the 2022-23 school year are denied.

VII. Conclusion

In summary, the hearing record fails to include evidence sufficient to reverse the IHO's finding that the parent was not entitled to direct funding of the student's SETSS for the 2021-22 school year, or alternatively, an order directing the district to modify the student's IESP to include a recommendation for 10 hours per week of individual SETSS.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
September 6, 2022

SARAH L. HARRINGTON
STATE REVIEW OFFICER