The University of the State of New York

The State Education Department
State Review Officer
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No. 22-146

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:
Law Office of Natan Shmueli, attorneys for respondent, by Galiah Harel, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Brian Davenport, 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 the district to fund the cost of special education teacher support services (SETSS) provided to her son during the 2020-21 school year. The appeal must be sustained in part.

II. Overview—Administrative Procedures

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

During the 2019-20 school year, the student was in pre-kindergarten and received special education itinerant teacher (SEIT) services, speech-language therapy, occupational therapy (OT),

and counseling (Parent Ex. B at p. 1). During the school year, a functional behavioral assessment (FBA) of the student was conducted and a behavioral intervention plan (BIP) was put in place to address the student's targeted behaviors, including behaviors described as aggressive/hurting others, noncompliance, and off-task (id.). The student was also struggling academically, with weaknesses reported in letter identification, comprehension, making inferences, and expressive language, as well as recognition of numbers, counting, and basic addition (id. at pp. 1-2). Although the student was reportedly making improvements in his ability to sit for longer periods of time with intermittent reinforcement, on a "bad day" the student could "barely sit for 15 seconds at a time" (id. at p. 2).

A CSE convened on March 19, 2020 and found the student eligible for special education as a student with a speech-language impairment (Parent Ex. B at p. 1). Noting that the student was parentally placed in a nonpublic school, the CSE developed an IESP for the student with a projected implementation date of September 1, 2020 (id. at pp. 1, 14). The IESP included recommendations for the student to receive five periods per week of direct SETSS in a group in the general education classroom and five periods per week of direct SETSS in a group in a separate location, as well as three 30-minute sessions per week of individual OT, three 30-minute sessions per week of individual speech-language therapy, and one 30-minute session per week of individual counseling (id. at p. 12).

The district issued an authorization letter, dated August 24, 2020, for the parent to obtain a maximum of 10 hours per week—360 hours in total—of SETSS for the student by an authorized provider, beginning on September 1, 2020 and ending on June 30, 2021 (Parent Ex. C).

According to the parent, she contacted several providers from the district's list of authorized providers, but, as of September 1, 2020, was unable to find a SETSS provider who was willing to provide services to the student at the district's rate (Parent Ex. D).

According to an affidavit of its controller, Diamond Achieving Corp. agreed to provide the student with 10 hours per week of SETSS during the 2020-21 school year at a rate of $150.00 per hour and during the 2020-21 school year the agency provided the student with a total of 325.01 hours of SETSS (Parent Ex. E at ¶¶ 2, 6; see Parent Exs. F; I).

On October 19, 2020, the district sent the parent a prior written notice indicating that the student was parentally placed in a nonpublic school and that the March 2020 CSE recommended that the student receive an IESP, including SETSS, individual counseling, individual OT, and individual speech-language therapy (Dist. Ex. 3 at p. 1). Under a box intended for a description of other options considered, the notice indicated that a recommendation of "Related Services Only" was considered but rejected due to "Corrected Setss Mandate" (id. at p. 2). Additionally, under a box intended to set forth other factors relevant to the proposed or refused action, the notice indicated "Corrected Setss Mandate" (id.). Finally, the notice indicated that the recommended services would be put in place on November 2, 2020 (id.).

A. Due Process Complaint Notice

In a due process complaint notice dated January 3, 2021, the parent asserted that the student was authorized to receive 10 hours per week of SETSS for the 2020-21 school year, which were

set forth in his last IESP and which he required, but that the district failed to inform the parent how the IESP would be implemented (Parent Ex. A at p. 1). The parent further asserted that she was unable to locate a SETSS provider at the district's "standard rates" for the 2020-21 school year and that the provider located by the parent who was willing to deliver services to the student "was only willing to do so at a rate higher than the standard [district] rate" (id.). The parent requested an award of "ten hours of SETSS services per week at an "enhanced rate for the 2020-21 school year," as well as an order directing the district to fund the SETSS provider and all related services set forth on the student's last IESP for the 2020-21 school year (id. at p. 2).

B. Subsequent Events

A CSE convened on May 14, 2021, and finding the student continued to be eligible for special education as a student with a speech or language impairment, developed an IESP for the student with a projected implementation date of May 28, 2021 (Dist. Ex. 1). The May 2021 CSE recommended that the student receive five periods of direct group SETSS per week in a separate location, along with related services consisting of three 30-minute sessions per week of individual OT, three 30-minute sessions per week of individual speech-language therapy, and one 30-minute session per week of individual counseling (id. at p. 9).

On October 6, 2021, the parent filed a due process complaint notice raising allegations regarding the 2020-21 and 2021-22 school years (IHO Ex. II). Related to the 2020-21 school year, the same school year that is at issue in this proceeding, the parent acknowledged that on October 19, 2020, the district "revised" the student's March 2020 IESP reducing the recommendation for SETSS to five periods per week (id. at p. 1). According to the parent, the district revised the March 2020 IESP without convening a CSE and without notifying her of the change (id.). Within the October 2021 due process complaint notice, the parent sought compensatory education for SETSS not provided to the student during the 2020-21 school year and summer 2021 (id. at p. 2). For the 2021-22 school year, the parent asserted that the May 2021 IESP was not reasonably calculated to enable the student to make progress (id.). According to the parent, the student continued to require a program that included 10 hours per week of SETSS (id.).

C. Impartial Hearing Officer Decision

The parties appeared for a prehearing conference on January 5, 2022 (Tr. pp. 1-16), during which counsel for the district stated the district's position that the 10 hours per week of SETSS was a clerical error and counsel for the parent responded by indicating that the student needed 10 hours per week of services and that he received those hours (Tr. pp. 3-4). After a second prehearing conference held on February 4, 2022, the parties proceeded to an impartial hearing on April 4, 2022, which concluded on May 24, 2022 after two days of hearings (Tr. pp. 17-183).

In a decision dated September 17, 2022, the IHO denied the parent's request for district funding of 10 hours per week of SETSS for the 2020-21 school year (IHO Decision at pp. 4-11). Initially, the IHO noted that the parent had filed a separate proceeding seeking relief for the 2020-21 school year; however, the IHO also noted that the parent withdrew the other matter after this matter was heard (id. at pp. 3-4). The IHO then determined that the parent knew that the March 2020 IESP recommendation for 10 periods per week of SETSS was a clerical error and that she consented to the October 2020 IESP correcting the recommendation (id. at pp. 6-7). The IHO

found that the parent's testimony that she was not aware of the clerical error was controverted by an October 19, 2020 email from the district as well as by her presence at the May 2021 CSE meeting which continued a recommendation for five periods of SETSS per week (id. at pp. 8-9). The IHO also found that the parent's witness was evasive and non-responsive when asked to explain the student's need for 10 periods per week of SETSS (id. at pp. 9-10). Therefore, finding that the parent's account lacked credibility, the IHO denied the parent's request for 10 periods per week of SETSS for the 2020-21 school year (id. at p. 11). The IHO further indicated that the parent's attempt to bring the same claim for the 2020-21 school year in two separate due process proceedings was deceptive and constituted another ground for dismissing the parent's complaint (id. at p. 10).

The IHO went on to find that the district denied the student a FAPE because it did not implement the recommended five periods per week of SETSS for the 2020-21 school year (IHO Decision at pp. 10-11); however, the IHO determined that the parent's request for relief of five periods per week of SETSS was moot because the student received the recommended service as part of a pendency agreement in another proceeding (id. at p. 11).

The IHO directed the district not to fund or reimburse the parent for SETSS that were already provided to the student as part of pendency in the separate proceeding and ordered that the district was entitled to reimbursement from the parent if it "paid for more than 5 SETSS hours mandated by the IESP of March 19, 2020, corrected and submitted to the Parent on October 19, 2020" (IHO Decision at p. 12).

IV. Appeal for State-Level Review

The parent appeals from the IHO's decision denying her request for district funding of 10 periods per week of privately obtained SETSS. Initially, the parent asserts that the IHO erred in finding that the district established that the recommendation for 10 periods per week of SETSS was a clerical error. According to the parent, the district failed to implement the March 2020 IESP and failed to inform the parent that changes were being made to the student's IESP. The parent further contends that the IHO improperly relied on testimony from another proceeding and an October 2020 email that was not introduced into evidence. According to the parent, her testimony established that the student was recommended for and received 10 hours per week of SETSS at the beginning of the 2020-21 school year and that the district failed to meet its burden of proving otherwise. The parent further asserts that the hearing record supports finding that the student needed 10 hours per week of SETSS to receive an educational benefit and that the district failed to meet its burden of showing that five hours per week of SETSS was sufficient for the student to make educational progress. Additionally, the parent contends that the IHO erred in finding that the parent's request for five periods per week of SETSS was moot due to pendency arising from the parent's other proceeding, as that proceeding was filed in October 2021, after the conclusion of the 2020-21 school year and that pendency therefore could not apply to the 2020-21 school year.[1] The parent also asserts that the IHO erred in finding her requests were duplicative, as the subsequent proceeding only sought compensatory services and did not seek reimbursement for

[1] The parent attaches a copy of the October 6, 2021 due process complaint notice to the request for review as additional evidence (Req. for Rev. Ex. A). However, the October 6, 2021 due process complaint notice was already included as part of the hearing record (IHO Ex. II).

services provided during the 2020-21 school year and was also withdrawn. Finally, the parent contends that the IHO erred in finding that the district was entitled to reimbursement from the parent for SETSS provided in excess of five hours per week. As relief, the parent requests that the district be directed to fund 10 hours per week of SETSS for the student for the 2020-21 school year at a rate of $150 per hour.

The district answers, generally denying the allegations contained in the request for review and asserting that the hearing record supports a finding that the student was entitled to only five periods per week of SETSS for the 2020-21 school year. According to the district, the March 2020 recommendation for 10 periods per week of SETSS was a clerical error and the student was properly informed about the mistake when it was changed.[2] The district contends that the parent's due process complaint notice was limited to the issue of whether the student was authorized to receive 10 hours per week of SETSS, which the district asserts was addressed by evidence that the recommendation was a clerical error and that the parent was aware of the error. The district requests that the parent's argument that five period per week of SETSS was inappropriate be dismissed as outside the scope of the hearing. The district concedes that it was required to provide five hours per week of SETSS to the student during the 2020-21 school year, that it failed to implement five periods per week of SETSS, and that pendency in the subsequent proceeding did not cover payment of the five periods per week of SETSS. Nevertheless, the district asserts that the parent is not entitled to any payment for SETSS because the hearing record does not include any evidence of an obligation for the parent to pay the SETSS provider.

V. Applicable Standards

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

However, under State law, parents of a student with a disability who have privately enrolled their child in a nonpublic school may seek to obtain educational "services" for their child by filing a request for such services in the district of location where the nonpublic school is located on or before the first day of June preceding the school year for which the request for services is made (Educ. Law § 3602-c[2]).[3] "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

[2] In response to the parent's assertion that the IHO relied on evidence not included in the hearing record, the district attaches a copy of the October 2020 email relied on by the IHO to its answer (Answer Ex. 1).

[3] 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]).

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.).[4]

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

Initially, as the parties agree that the IHO erred in finding the parent's request for relief was moot based on the student's entitlement to pendency services, that issue will not be further discussed, and the IHO's determination on this point is reversed.[5] I now turn to the remaining issues to be addressed on appeal.

[4] 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.).

[5] To the extent the IHO also found that the act of filing multiple due process complaint notices concerning the same school year was "deceptive, unethical, and a violation of the False Claim Act" and "compel[ed] further denial of the Parent's request for the relief sought," this was error (IHO Decision at p. 10). State regulations set forth mechanisms for managing the concerns about duplicative matters raised by the IHO, including by requiring new complaints filed while a matter is pending before an IHO or within one yar of withdrawal of a complaint based on the same or substantially similar claims be assigned to the same IHO, allowing for consolidation of matters, and permitting an IHO under certain circumstances to order a withdrawal be with prejudice (8 NYCRR 200.5[j][3][ii][a]; [6]). Moreover, doctrines of res judicata and collateral estoppel would further act to prevent a party from pursuing duplicative matters once an issue or claim was addressed on the merits (see K.B. v. Pearl River Union Free Sch. Dist., 2012 WL 234392, at *4 [S.D.N.Y. Jan. 13, 2012]; Grenon v. Taconic Hills Cent. Sch. Dist., 2006 WL 3751450, at *6 [N.D.N.Y. Dec. 19. 2006]). Here, the hearing record does not support a finding that the bare act of filing the two complaints warrants dismissal of the present matter.

A. Procedural Compliance: CSE Process and Parental Participation

The parent appeals the IHO's determination that the student was not entitled to 10 hours per week of SETSS because the recommendation for 10 periods per week of SETSS contained in the March 2020 IESP was a clerical error.

The IDEA contains detailed provisions that set forth the required content and procedure for developing an IEP, including provisions that specify the procedure for making changes to an IEP (20 U.S.C. § 1414[d][3]-[D], [F]). Both the IDEA and State and federal regulations provide that an IEP can be modified by the development of a new IEP by the CSE, or pursuant to an amendment by agreement (20 U.S.C. § 1414[d][3][D], [F]; 34 CFR 300.324[a][4], [6]; 8 NYCRR 200.4[f], [g]). To change an IEP by agreement, the parents and district may agree not to convene a CSE meeting and instead develop a written document to amend or modify the student's current IEP (20 U.S.C. § 1415[d][3][D]; 34 CFR 300.324[a][4][i]; 8 NYCRR 200.4[g][2]). State regulations expressly provide that if a district wishes to amend a student's IEP by agreement, the district must provide the parent with a written proposal to amend the IEP and the parent must agree in writing to the proposed amendments (8 NYCRR 200.4[g][2]). As noted above, an IESP must be developed "in the same manner" as an IEP (Educ. Law § 3602-c[2][b][1]).

In this instance, it is undisputed that the March 2020 IESP contained a recommendation for a total of 10 periods per week of SETSS (Parent Ex. B at p. 12). The IESP included two separate recommendations for five periods per week of SETSS, with one to be located in the general education classroom and the other in a separate location (id.). According to the parent, at the time of the March 2020 CSE meeting she was told that the student would receive five hours of SETSS in the classroom and five hours of SETSS outside of the classroom (Tr. pp. 95-96).[6] Additionally, the district provided the parent with an authorization form, dated August 24, 2020, for the parent to obtain 10 hours per week of SETSS for the student for the 2020-21 school year (Parent Ex. C).

The first indication that the March 2020 CSE may have inadvertently included a recommendation for 10 periods per week of SETSS in the March 2020 IESP was in an October 19, 2020 correspondence between a district special education teacher and the parent (see Dist. Ex. 3; Answer Ex. 1).

According to the special education teacher, she called the parent on October 19, 2020 and informed the parent that the student's IESP was "going to be corrected to five periods" and the parent did not indicate that the five periods was an error (Tr. pp. 52-53, 75). She later explained that she would not have referred to it as a reduction but would have explained that the pullout service was a mistake and she was "simply calling [the parent] to get her permission, and let her know that it was being corrected" (Tr. p. 62). She indicated that the parent provided verbal permission (Tr. p. 62).

[6] The parent was the only witness who testified who was also present at the March 2020 CSE meeting (Tr. pp. 58-59, 95; Parent Ex. B at p. 14). The district special education teacher who testified about the SETSS recommendation being a clerical error was not present at the March 2020 CSE meeting and she could not explain why the March 2020 CSE made its recommendations (see Tr. pp. 78-80).

The parent acknowledged that she received a telephone call in October 2020; however, she testified that "[t[here was definitely no discussion of any errors or changes or anything of that nature" (Tr. p. 98). According to the parent, she learned of the change in the SETSS recommendation from 10 hours per week to five hours per week from her attorney in May 2021 (Tr. pp. 98-99).

In assessing these two conflicting accounts, the IHO found the district's account to be more credible, based primarily on an October 19, 2020 email (IHO Decision at pp. 6-7).[7] With its answer, the district submits a copy of the October 19, 2020 email from the district special education teacher to the parent (Answer Ex. 1). The email notes "revision" in the subject line, and simply states "Please confirm receipt" (id.). The message, as forwarded from the parent to her attorney on July 1, 2021, also indicates that the email included attachments consisting of a prior written notice revision and a revised IESP for the student (id.). The hearing record includes a prior written notice dated October 19, 2020 which indicated that there was a correction to the recommendation for SETSS (Dist. Ex. 3). Although reference was made to an October 2020 IESP during the hearing (Tr. pp. 43-44), in a letter clarifying the hearing record, the parties agreed that a copy of the October 2020 IESP was not entered into the hearing record.

The special education teacher testified she sent the parent an email with a copy of the corrected IESP and she explained that if the parent had a problem with the IESP she would have expected the parent to contact her and inform her of the problem (Tr. p. 63). According to the special education teacher, she was not contacted by the parent after sending the corrected documents (Tr. pp. 65-66). In contrast, the parent initially testified that she did not recall receiving the documents via email (Tr. p. 110). Then, in reviewing the documents, the parent testified that she saw the attachment when she received the email; however, she testified that she did not notice anything that indicated the student's IESP had been changed (Tr. pp. 126-27). Counsel for the parent attempted to explain the parent's testimony, indicating that the parent was busy and did not have time to review documents as she had already received an IESP that she was in agreement with (Tr. p. 127).

Considering the above, there is some support for the IHO's factual determination that the parent was aware of and acquiesced to the October 2020 revision to the March 2020 IESP. Nevertheless, in light of the applicable legal standards, the district's change in services cannot be deemed proper. According to State regulation, a district may only effect a substantive change in an IEP without a CSE meeting at the parent's request or if "the school district provides the parent with a written proposal to amend a provision or provisions of the IEP that is conveyed in language understandable to the parent and . . . informs and allows the parent the opportunity to consult with the appropriate personnel or related service providers concerning the proposed changes and the parent agrees in writing to such amendments" (8 NYCRR 200.4[g][2][ii]).[8] There is nothing in

[7] According to the IHO, the email was available to both parties as it was an exhibit in a separate due process proceeding between the parties (IHO Decision at p. 7). The email was also reviewed during the course of the hearing in this matter; however, it does not appear to have been entered into evidence (Tr. pp. 117-28).

[8] To the extent that the district might argue that the parent's written agreement was not required because it was only correcting a clerical error, the Second Circuit has held that parents are entitled to "rely on the text of the IEP as it stands" at the time of their placement decision (Bd. of Educ. of Yorktown C. Sch. Dist. v. C.S., 990 F.3d

the hearing record indicating that the parent agreed to the October 2020 IESP in writing; rather, the district special education teacher testified that the parent's permission for the change was given verbally (Tr. pp. 62-63).

If the district was unable to obtain the parent's written consent, it could have held a CSE meeting to effectuate the change. Holding a CSE meeting to amend the student's IESP would have allowed the parent to participate and provide input in the amendment. It is well established that "[t]he core of the [IDEA] is the cooperative process that it establishes between parents and schools" (Schaffer v. Weast, 546 U.S. 49, 53 [2005]). The IDEA sets forth procedural safeguards that include providing parents the opportunity to participate in the decision-making process regarding their child's educational placement (20 U.S.C. §§ 1414[e]; 1415[b][1]; 34 CFR 300.116; 300.327; 300.501[c]; see Burlington, 471 U.S. at 368 [noting that "the Act emphasizes the participation of the parents in developing the child's educational program and assessing its effectiveness"]; Rowley, 458 U.S. at 186 n.6; [explaining that, in enacting the IDEA, Congress sought "to maximize parental involvement in the education of each handicapped child"]). Accordingly, the district's failure to properly change the student's IESP by way of a CSE meeting or an amendment by written agreement significantly impeded the parents' ability to participate in the decision-making process regarding the development of the student's IESP.

B. Remedy

As relief, the parent requests an order directing the district to fund 10 periods per week of SETSS for the 2020-21 school year at a rate of $150.00 per hour.

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

152, 168 [2d Cir. 2021] [finding that the district could not make a unilateral change to amend an IEP during the resolution period to correct an error in the recommended program]).

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 10 hours (or periods) per week of individual SETSS must be assessed under this framework; namely, having found that the district failed to implement the student's recommended educational program, the issue is whether the 10 hours of SETSS 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. 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.[9]

As determined by the IHO, the district denied the student a FAPE because it did not implement the five hours per week of SETSS recommended for the student in the October 2020 IESP (IHO Decision at pp. 10-11). Here, there is no dispute as to the appropriateness of five hours per week of SETSS, and the only dispute is the necessity of the additional five hours per week of SETSS delivered to the student during the 2020-21 school year. However, having determined that the change in the recommendation for SETSS from 10 hours per week to five hours per week was improper, it would follow that rather than permit the improper change in the student's programming, the proper course would be to allow the student to benefit from the 10 hours per week of SETSS recommended in the March 2020 IESP for the entirety of the 2020-21 school year. Accordingly, the 10 hours per week of SETSS is essentially the same service as was recommended in the March 2020 IESP and it is not necessary to make further inquiry as to the appropriateness of this service.

However, the district asserts on appeal that it should not be required to pay for the SETSS delivered to the student during the 2020-21 school year because the hearing record does not include sufficient evidence to show that the parent is financially responsible for the costs of the SETSS.

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

[9] While the IHO declined to award direct funding or reimbursement for SETSS because the IHO believed the district was obligated to pay for SETSS pursuant to pendency in a separate proceeding (IHO Decision at p. 11), the district concedes on appeal that the other proceeding was filed in October 2021—after the end of the 2020-21 school year (Answer ¶18). Accordingly, the IHO's finding using pendency as a basis to deny the parent's request for relief must be reversed.

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]).

Turning to the services provided to the student, the hearing record shows that the parent arranged for the student to receive a total of 325.01 hours of SETSS during the 2020-21 school year (Parent Ex. E at ¶¶2, 6; see Parent Exs. F; I). According to the parent, she entered into a written contract with the agency that delivered the student's SETSS services (Tr. pp. 108-09). The contract was not entered into evidence; however, the parent testified that she agreed to pay a rate of $150.00 per hour for the agency to provide SETSS to the student (Tr. pp. 106-07). In addition, the agency produced invoices showing the services provided to the student during the 2020-21 school year and the rate charged for those services (Parent Ex. F). Finally, as of the time of the hearing, the parent had not paid any money to the agency (Parent Ex. E at ¶8), yet, the parent did not present any evidence that she was unable to pay for the costs of the SETSS delivered to the student by the agency.

Under these circumstances, as the parent has established a financial obligation for the costs of the SETSS delivered to the student and there is no evidence in the hearing record regarding the parents' financial resources, such as a copy of a recent tax return or evidence regarding the parent's assets, liabilities, income, or expenses, rather than awarding direct payment to the agency that delivered the SETSS, a more appropriate award is to require the district to reimburse the parent for the costs of the SETSS delivered to the student by the agency during the 2020-21 school year upon the parent's submission of proof of payment.

VII. Conclusion

As discussed above, the evidence in the hearing record does not support the IHO's determination that the October 2020 IESP was a proper amendment of the student's March 2020 IESP. Moreover, there is no question that the district failed to implement SETSS for the student during the 2020-21 school year. Given the determination that the district failed to provide the student with appropriate services on an equitable basis, the IHO erred in failing to order relief and an appropriate remedy is for the district to reimburse the parent for the costs of the SETSS provided to the student by the agency during the 2020-21 school year upon presentation of proof of payment.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision, dated September 17, 2022, is modified by reversing those portions which found that the parent's January 3, 2021 due process complaint notice set forth claims that were duplicative and moot, that the October 2020 IESP was a proper amendment to the March 2020 IESP, and that the district would not be required to fund and/or would be entitled to reimbursement for funding the costs of more than five hours per week of SETSS delivered to the student during the 2020-21 school year; and

IT IS FURTHER ORDERED that the district shall reimburse the parent for the costs of the 325.01 hours of SETSS delivered to the student during the 2020-21 school year at the rate of $150 per hour upon presentation of proof of payment.

Dated: **Albany, New York**
February 27, 2023

SARAH L. HARRINGTON
STATE REVIEW OFFICER