The University of the State of New York

The State Education Department
State Review Officer
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No. 22-155

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:
Gulkowitz Berger, LLP, attorneys for petitioner, by Shaya M. Berger, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Nathaniel R. Luken, 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, among other things, denied her request for increased special education teacher support services (SETSS) for the 2022-23 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 § 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

On July 30, 2014, a CSE met and determined that the student was eligible for special education as a student with a speech or language impairment (Dist. Ex. 1 at p. 1). The July 2014

CSE developed an IESP for the student in which it recommended he receive three periods per week of group special education teacher support services (SETSS) delivered in English and two 30-minute session per week of individual speech-language therapy delivered in English (id. at p. 6).[1, 2] The July 2014 IESP indicated that the student was parentally placed in a nonpublic school (id. at p. 9).

The student has been the subject of prior administrative proceedings, which resulted in two unappealed IHO decisions pertaining to the 2019-20 and 2020-21 school years (dated October 19, 2020 and May 6, 2022, respectively) (Parent Ex. C; Dist. Ex. 2).

A report of the student's progress in SETSS dated January 18, 2022 was created by a private agency, Succeed, Inc. (Succeed), which indicated that the student had been receiving eight periods per week of SETSS from the agency (Parent Ex. E at p. 1).

On March 4, 2022, a CSE met and determined that the student remained eligible for special education as a student with a speech or language impairment (Parent Ex. B at p. 1). The March 2022 CSE developed an IESP for the student in which it recommended he receive five periods per week of group SETSS delivered in English (id. at p. 7). The IESP indicated that at the time it was developed the student had been receiving eight periods of SETSS weekly (id. at p. 1). With regard to speech-language services that had been previously recommended for the student, the IESP indicated that the "Parent reported that [the student] has not been receiving speech and language. [The CSE t]eam explained the importance of receiving all recommended services. Parent requested that it be removed from the IESP" (id. at p. 3). In a prior written notice dated March 4, 2022, the district described the CSE's 10-month school year programming recommendations for the 2022-23 school year and indicated that the evaluative information considered by the CSE consisted of a February 25, 2019 psychoeducational report, a February 7, 2019 social history update, a March 4, 2022 special education itinerant teacher (SEIT) report and a March 4, 2022 parent interview (Dist. Ex. 4 at pp. 1-2).

On July 1, 2022, the parent signed a contract for the 2022-23 school year with Succeed to provide the student with 1:1 special education services in the form eight hours per week of SETSS for a 12-month school year (Parent Ex. H).

A. Due Process Complaint Notice

By due process complaint notice dated July 5, 2022, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2022-23 school year (Parent Ex. A at p. 1). More specifically, the parent asserts that she prevailed in a prior due process proceeding in October 2020 and the parent "disputes any subsequent program the [district] developed that removed the extended school year/summer services and/or reduced the services on

[1] SETSS is not defined in the State continuum of special education services (see 8 NYCRR 200.6).

[2] The student's eligibility for special education as a student with a speech or language impairment is not in dispute (see 34 CFR 300.8[c][10]; 8 NYCRR 200.1[zz][11]).

the IEP, and also disputes any act the [district] may have taken to deactivate or declassify the student from being eligible to receive services" (id.).

Further, the parent asserted that the district did not provide service providers to implement the student's special education services for the 2022-2023 school year and she was not able to locate service providers to work with the student at the district's standard rates (Parent Ex. A at p. 1). However, the parent indicated that she was able to find providers who were willing to provide the student with all required services for the 2022-23 school year, albeit at rates higher than the standard district rate (Parent Ex. A at p. 1).

The parent also requested a hearing to address pendency and asserted that the last program she agreed with was the program ordered in the prior unappealed IHO decision dated October 19, 2020, which awarded a 12-month extended school year program consisting of eight periods per week of SETSS (Parent Ex. A at p. 1).

As relief, the parent requested an order directing that the student receive eight periods per week of SETSS at an enhanced rate for the entire extended 12-month 2022-23 school year and that the district be directed to fund the student's "special education teacher provider/agency" to effectuate those services (Parent Ex. A at p. 2).

B. Impartial Hearing and Impartial Hearing Officer Decision

On August 5, 2022, the parties participated in a prehearing conference before the Office of Administrative Trials and Hearings (OATH), which the IHO reduced to a prehearing conference summary and order, dated August 5, 2022 (see generally Pre-Hr'g Conf. Sum. & Order). A combined impartial hearing was conducted on both pendency and the merits on August 26, 2022 and concluded after one day of proceedings (see Tr. pp. 1-49; IHO Decision at p. 3).

During the impartial hearing the parent introduced twelve documents into the hearing record including a copy of the unappealed IHO decision dated October 19, 2020 and a pendency agreement dated October 4, 2021 (see Parent Exs. A-L). In the unappealed October 2020 IHO decision, the IHO found that the district denied the student a FAPE for the 2019-20 school year, that the student was entitled to eight periods of individual SETSS per week for a 12-month school year, and that the parent was entitled to an enhanced rate of $150 per hour for her unilaterally obtained SETSS (Parent Ex. C at pp. 8-11).[3] In that case, the IHO found that the student required the programming based upon unrefuted testimony regarding the student's attending, focusing, social-emotional and academic issues (id. at p. 8). Thereafter, the evidence indicates that another due process proceeding had been initiated in July 2021, and according to the October 2021 pendency program agreement, the parties agreed that the district would fund eight hours of SETSS

[3] The unappealed October 2020 IHO decision was a part of a prior administrative proceeding commenced by the parent's due process complaint notice dated July 15, 2019 (Parent Ex. C at p. 3).

per week for the 12-month 2021-22 school year based upon the unappealed October 2020 IHO decision (Parent Ex. J). [4, 5]

The district introduced four documents into evidence including an unappealed IHO decision dated May 6, 2022 (Dist. Exs. 1-4). In the unappealed May 2022 IHO decision, the IHO found that the district denied the student a FAPE for the 2020-21 school year,[6] however, the IHO rejected the parent's requested relief finding that the hearing record lacked objective evidence that the student needed twelve months of services or that the district should have recommended eight periods of SETSS per week instead of five periods in the student's November 17, 2020 IESP (Dist. Ex. 2 at pp. 5, 8).[7] The IHO in the May 2022 decision did not make findings regarding pendency or the appropriateness of SETSS services for the student (see generally Dist. Ex. 2).

The IHO in the present matter issued final decision dated October 14, 2022 determining that the district denied the student a FAPE for the 2022-23 school year and that the student's pendency was based upon the most recent unappealed May 6, 2022 IHO decision consisting of five periods per week of SETSS for a 10-month school year (IHO Decision at pp. 11-13).

Further, the IHO determined that the rate of $195 per hour for the parentally obtained SETSS was fair and reasonable (IHO Decision at p. 12). The IHO noted that the district provided no evidence or testimony to rebut the reasonableness of the enhanced rate (id.). The IHO credited the testimony of the educational director of Succeed that Succeed charged a rate of $195 per hour for SETSS for the 2022-23 school year (Tr pp. 40-41; IHO Decision at pp. 11-12).

Next, The IHO noted that the district's argument was that the Burlington/Carter standard should apply in this matter because the parent sought a private SETSS provider which is analogous to a unilateral placement in a non-approved or private school setting and that the burden should be shifted to parent to prove the appropriateness of such placement (IHO Decision at p. 12). The parent's argued that the Burlington/Carter standard should not apply because this matter does not involve tuition reimbursement, but the parent provided Burlington/Carter evidence in the alternative (id. at p. 4). The IHO determined that the Burlington/Carter standard was not the appropriate standard for this matter because the district failed to offer the student appropriate special education services, "the deficiencies alleged by the parent in the [due process complaint notice] are, for purposes of crafting relief, deemed true to the extent not contradicted by the hearing record" (IHO Decision at p. 13).

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[4] The parent argues in this appeal that the IHO should have considered the October 2021 pendency agreement as a basis for pendency because it is the last agreed upon program which was implemented (Req. for Rev. ¶ 19).

[5] Pursuant to monthly vendor service invoices dated from July 2021 to June 2022, for the 2021-22 school year Succeed provided the student eight periods of SETSS per week from July 2021 to June 2022 (see Parent Ex. L).

[6] The IHO in that proceeding concluded that the district failed to meet its burden of proof because documents alone were insufficient proof if witness testimony was not offered by the district.

[7] The unappealed May 2022 IHO decision was a part of a prior administrative proceeding commenced by the parent's due process complaint notice dated October 22, 2020 (Dist. Ex. 2 at p. 2). The IHO in that case ultimately denied both parties' requested relief because neither party met their burden (see generally Dist. Ex. 2).

The IHO further noted that the documentary evidence presented by the district was insufficient to defend its recommended service program to the student (IHO Decision at p. 13).[8]

However, the IHO made an alternative determination using the Burlington/Carter standard for this case (see IHO Decision at pp. 13-14). The IHO found that the district failed to meet its burden, finding that the evidence in the hearing record offered "no explanation as to how the CSE made its recommendation, how the [IESP] appropriately describes the student, or whether the [IESP] was meaningfully calculated to confer an educational benefit" and that the district therefore failed to offer the student a FAPE (id. at p. 13). The IHO determined that the parent had met her burden in proving that Succeed offered an educational program which met the student's need based on the testimony of the educational director of Succeed (id. at p. 14). With regard to equitable considerations, the IHO determined that the weight of the evidence established that the parent cooperated with the district and the CSE's efforts to develop the IESP (id.). The IHO further determined in the alternative that the equitable considerations supported the parent's claim for an enhanced rate per hour for SETSS services and direct funding because the district provided no evidence or testimony during the impartial hearing to rebut the reasonableness of the enhance rate (id. at pp. 12-14).[9]

For relief, the IHO ordered the following:

> 1. That the [district] shall, provide Student with services retroactive to the first day of the 2022-2023 10-month school year during the pendency of this matter, consisting of SETSS, Direct Group Service in English, five (5) periods per week with the Parents preferred licensed provider at an enhanced rate of $195/hr. to be paid directly to provider within 14 days unless Parent provides proof of payment within 10 days for reimbursement; and
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> 2. That the [district] shall pay the cost of the mandated services of SETSS, Direct Group Service in English, five (5) periods per week with the Parents preferred licensed provider at an enhanced rate of $195/hr. for the remainder of the 2022-2023, 10- month school year paid directly to provider; and
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> 3. That the [district] shall re-evaluate Student in all areas of suspected need and/or disability within 60 days of this order; and
>
> 4. The CSE shall re-convene and hold a meeting to develop a new IEP/IESP for Student to address the full range of Student's issues and disabilities in

[8] The district does not deny that the student was entitled to SETSS (IHO Decision at p. 13; see generally Tr. pp. 1-49; Parent Exs. A-L; Dist. Exs. 1-4).

[9] The IHO in her October 14, 2022 decision noted that the administrative hearing record was silent as to the search or research the parent undertook to find a district provider, or any other provider to provide services at the district's standard rate and that there was no evidence that the parent notified the CSE that she was obtaining unilateral services for the student prior to her due process complaint notice filed July 5, 2022 (IHO Decision at p. 12). However, since the district failed to defend its position in this matter, the IHO found the rate of $195 per hour for SETSS was fair and reasonable (id.).

> accordance with the requirements of 34 C.F.R.Sec.300.320 & 300.324(a)(1)&(2); 8NYCRR Sec 200.4(d)(2)&(3), within 30 days of the completion of the evaluations ordered above.

(IHO Decision at pp. 14-15).

IV. Appeal for State-Level Review

A. Parent's Appeal for State-Level Review

The parent appeals and asserts that the IHO, upon finding that the May 2022 decision constituted pendency, erred by assuming that the pendency placement was appropriate for the student going forward. The parent contends that the IHO in failing to conduct an analysis or make specific findings that identify an appropriate program for the student for the 2022-2023 school year with respect to an appropriate amount of SETSS per week or whether the student was entitled to 12-month services.[10]

According to the parent, the IHO should have concluded that eight hours per week of SETSS for a 12-month school year was the appropriate program for the 2022-23 school year. The parent alleges that the district failed to meet its burden demonstrating that the recommended programming in the March 2022 IESP was appropriate for the student, offering no witnesses to explain why it recommended only five periods per week of SETSS. The parent argues she presented the following evidence which shows that the student required eight hours per week of SETSS over a 12-month school year: (1) a report by a pediatric neurologist; (2) a progress report created by the student's Succeed SETSS provider; and (3) an affidavit and live testimony of the educational director of Succeed.[11] Further, the parent contends that the record fully supports a finding that the student should be entitled to a 12-month extended school year.[12]

Additionally, the parent alleges that the IHO erred in determining that the unappealed May 6, 2022 IHO decision was the basis for the student's pendency programming. The parent argues that the prior IHO neither made any findings regarding on the student's appropriateness of programming proposed by the district nor establish what the student's programming should be from the date of the May 2022 IHO decision and thus cannot serve as a basis for determining the

[10] In her request for review, the parent agrees with the IHO that the Burlington/Carter analysis was not appropriate in this matter. However, as discussed further below, the district's argument that the Burlington/Carter analysis was the appropriate standard for this case because the parent's private SETSS provider is analogous to a unilateral placement in a non-approved or private school setting is correct and is further supported by the fact that the parent's request relief for the district failure to offer a FAPE during the 2022-23 school year was direct funding of her unilaterally obtained SETSS (see Application of a Student with a Disability, Appeal No. 22-146).

[11] For clarity, the report by a pediatric neurologist is Parent Exhibit D dated May 14, 2021 and the progress report created by the student's Succeed SETSS provider is Parent Exhibit E dated January 18, 2022.

[12] The parent also claims that the March 2022 IESP was based off the district's last psychoeducational assessment that was done on February 25, 2019, more than 3 years ago at the time of the March 2022 CSE meeting thus the assessment was out of date and the district was out of compliance (citing 8 NYCRR 200.4[b][4]), however, this argument was not raised initially in the parent's due process complaint and therefore, I will not further discuss this argument raised for the first time on appeal (see generally Parent Ex. A).

student's pendency placement. In the alternative, the parent argues that the basis for pendency in this case is the last agreed to program by both parties that was implemented and set forth in the unappealed October 19, 2020 IHO decision. The parent alleges that the IHO's reliance on Application of a Student with a Disability, Appeal No. 21-239 is misplaced arguing that in that matter the SRO held that pendency orders, which are interim and not based on findings of fact, cannot establish pendency, and further, that an unappealed decision does not preclude consideration of evidence as to what the parties last agreed upon placement was and what was the last implemented program.[13]

For relief, the parent requests, among other things, reversal of the IHO's order directing only five periods of SETSS for a 10-month school year. The parent also seeks a finding that the student's pendency is based on the unappealed October 19, 2020 IHO decision consisting of a 12-month program of eight periods per week of SETSS retroactive to the filing date in this matter and that the student be placed in a 12-month extended school year program consisting of eight periods per week of SETSS as an appropriate program for the 2022-23 school year.

B. Request for Additional Evidence

After the initiation of this appeal and a preliminary review of the hearing record to ensure that the hearing record was adequate regarding the prior proceedings over which the parties were arguing. The undersigned directed the submission of additional documentary evidence and offered the parties an opportunity to be heard regarding whether the additional evidence should be considered (see 8 NYCRR 279.10 [b]).[14] Namely, the district was directed to file a copy of the February 25, 2019 psychoeducational assessment and the February 7, 2019 social history update both of which were referenced in the district's prior written notice dated March 4, 2022 (see Dist. Ex. 4 at p. 2); a copy of the April 3, 2019 IESP which was referenced in both the October 2020 and May 2022 IHO decisions (see Parent Ex. C at p. 3; Dist. Ex. 2 at p. 2); a copy of the November 7, 2020 IESP for the 2020-21 school year and any assessment or evaluation conducted by the district in 2019 as part of the student's mandated triennial revaluation both of which were referenced in May 2022 IHO decision (see Dist. Ex. 2 at pp. 6-7); and a copy of any IEEs conducted at public expense pursuant to the prior order(s) of an IHO which were referenced in the October 2020 IHO decision (see Parent Ex. C at p. 3).

In response, the district submitted a copy of the following additional evidence: an April 3, 2019 IESP, a November 17, 2020 IESP, a November 13, 2020 educational progress report from Succeed, a February 21, 2019 psychoeducational evaluation report and a February 7, 2019 social history update. [15] The undersigned directed the submission of additional evidence because of the

[13] As further described below the parents prevail on their argument on the merits, and it is not necessary to delve deeply into to the party's dispute regarding pendency. Suffice it to say, the parents are correct insofar as the IHO erred in finding that the unappealed May 2022 IHO decision was the basis of the student's pendency placement because that decision merely indicates that both parties failed to produce evidence that was sufficient to identify an appropriate placement.

[14] The parties did not object to the consideration of the additional documentary evidence.

[15] For purposes of this decision, the April 3, 2019 IESP is being cited as SRO Ex. 1 and paginated with numbers

lack of an adequate hearing record to address whether either the programming proposed by the district or the parent's preferred programming for the student for the 2022-2023 school year was appropriate and whether the student required 12-month services.[16]

C. District's Answer

In an answer, the district makes statements that say very little about the parent's appeal. On the one hand, the district states that "1. Respondent admits the allegations contained in Paragraphs 1 & 2 of the [request for review],"[17] and district further states that "2. Respondent denies the allegations in the remaining paragraphs of the [request for review]" as a "general denial." On the other hand, district concedes the case on the merits and agrees with the parent that the IHO erred by failing to award 8 sessions of SETSS per week for the district's failure to offer the student a FAPE for the 12-month 2022-23 school year and argues that the parent's evidence established that the services from Succeed were appropriate for the student under the second Burlington/Carter criteria. In contrast to its agreement with the parent on the merits of her claims, the district argues on a procedural basis to uphold the IHO's determination that pendency be based upon the unappealed May 2022 IHO decision calling for 5 sessions of SETSS per week for a 10-month school year.[18]

1-19; the November 17, 2020 IESP is being cited as SRO Ex. 2 and paginated with numbers 1-12; the November 13, 2020 educational progress report from Succeed is being cited as SRO Ex. 3 and paginated with numbers 1-2; the February 21, 2019 psychoeducational evaluation report is being cited as SRO Ex. 4 and paginated with numbers 1-7; and the February 7, 2019 social history update is being cited as SRO Ex. 5 and paginated with numbers 1-2.

[16] More specifically, the undersigned sought information regarding the student's language needs since the student was classified by the CSE as a student with a speech or language impairment (Parent Ex. B at p. 1). Moreover, there is evidence in the record that the student is unable to communicate in English however, the student's recommended related services are to be delivered in English (id. at p. 7; SRO Ex. 3 at p. 2). Federal and State regulations require that school district's ensure that assessments used to determine whether a student is a student with a disability and the content of the student's IEP are provided and administered in the student's native language or other mode of communication and in the form most likely to yield accurate information on what the student knows and can do academically, developmentally and functionally, unless it is clearly not feasible to so provide or administer (see 34 CFR 300.304[c][1][ii]; 8 NYCRR 200.4[b][6][a]). I encourage the CSE, if it has not done so already to complete the required bilingual evaluation of the student to determine his need for special education programs and services and develop an IEP or IESP that accurately reflects his special education needs.

[17] Paragraphs one and two identify the parent, student and district and note that the district is responsible to provide the student with special education services.

[18] As an initial matter, I find that the IHO erred in relying on the unappealed May 2022 IHO decision for the basis of the student's pendency program. The unappealed May 2022 IHO did not establish an appropriate program for the student within the decision and did not find in favor of either party (see Dist. Ex. 2). I am also not entirely clear as to the parties continued disagreement regarding pendency as the district does not dispute that the student is entitled to a program consisting of eight periods of SETSS per week for a 12-month school year (see Answer). Moreover, as described further below, there is no need for the undersigned to resolve the particulars of the party's pendency dispute as the district concedes that the student's unilateral placement is appropriate (id.).

V. Applicable Standards

A board of education must offer a free appropriate public education (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]).[19] "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.).[20] Thus, under State law an eligible New York State resident student may be voluntarily enrolled by a parent in a nonpublic school, but at the same time the student is also enrolled in the public school district for the purpose of receiving special education programming under Education Law § 3602-c, services for which a public school district may be held accountable through an impartial hearing.

[19] 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]).

[20] 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.).

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 neither party has appealed the IHO's determinations that the district failed to meet its burden to prove that it offered the student a FAPE for the 2022-23 school year; that the parent's unilaterally obtained SETSS was appropriate; and that the rate of $195 per hour for the unilaterally obtained SETSS was fair and reasonable, those findings have become final and binding on the parties and will not be further discussed (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]). Accordingly, the remaining issues to be addressed relate to relief sought by the parties.[21]

It appears that the parties still differ over whether the case should be analyzed as a unilateral placement case, but that notwithstanding that disagreement, the parties agree that the IHO erred by failing to award the parent her requested relief of eight periods per week of SETSS for the entire 12-month 2022-23 school year after finding that the parent's unilaterally obtained SETSS provider was appropriate. As such, the district agrees that the parent's unilaterally obtained services are appropriate for the student.

While Burlington and Carter are both well known federal cases in the area of disability law, State law also recognizes that there are cases in which the parents have unilaterally placed their child and commence a due process proceeding to seek reimbursement related relief and assigns the parties respective burdens of production and persuasion (see Educ. Law 4404[1][c]). With regard to whether this case should be analyzed as a unilateral placement case, there can be no doubt that it is. First, Succeed has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7), and the CSE is not authorized to implement the student's services through the auspices of that private agency. State law indicates that the district of location must provide the IESP services to a dually enrolled student with a disability, except that a district may, with the consent of the Commissioner, be authorized to contract with boards of cooperative educational services for the provision of services.[22] Succeed is none of these things, and the IHO had no

[21] Further, neither party has appealed the IHO's orders for the district to reevaluate the student in all areas of suspected needs and/or disability within sixty school days of the order; and for the district's CSE to reconvene and hold a meeting to develop a new IEP or IESP for the student to address the full range of the student's issues and disabilities within thirty days of the completion of the evaluations ordered, those findings have become final and binding on the parties and will not be further discussed (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

[22] State policy also prohibits school districts from outsourcing its basic function of providing instruction to students. In a July 29, 2009 guidance document, the State also clarified that a school district does not have the authority "to provide core instructional services through contracts with nonprofit and other entities" ("Clarifying Information [R]elated to Contracts for Instruction," Office of Special Educ. Mem. [July 2009], available at http://www.p12.nysed.gov/resources/ contractsforinstruction/documents/contractsforinstruction2009.pdf). In response to several questions from the field, the State issued further guidance ("Q and A related to Contracts for

evidence to rely upon that indicated that the district selected Succeed to provide the student's special education instruction. To the contrary, the evidence in the hearing record shows that on July 1, 2022, the parent signed a contract for the 2022-23 school year with Succeed to provide SETSS to the student at a frequency of eight hours per week for a 12-month school year (Parent Ex. H). The contract specified the rate for SETSS as $195 per hour and indicated that if the district did not pay for the provision of the services rendered to the student, the parent "agree[d] to pay Succeed's rate of SETSS services of $195 an hour for the 2022-2023 school year." (id.). According to an affidavit of the educational director of Succeed, Succeed was to provide eight hours per week of SETSS to the student for the 2022-23 school year starting July 1, 2022 and continuing through until the end of the school year (Parent Ex. G at ¶ 12). [23] Accordingly, the IHO erred in finding that the parent's selection and placement of the student with Succeed was not a unilateral placement, and neither the parent's due process complaint notice nor a finding that the district failed to sustain its burden of proof that it offered a FAPE changes that.

The next issue to be addressed would be whether, as a matter of equitable considerations, the costs sought to be reimbursed or directly funded should be reduced or denied (see Application of a Student with a Disability, Appeal No. 21-138). In this case, neither party appealed the IHO's determination that the rate of $195 per hour for the unilaterally obtained SETSS was fair and reasonable, there appears to be no need for the undersigned to further engage in an equitable considerations analysis. Briefly, the evidence in the hearing record shows that equitable considerations would not warrant a reduction or denial. Given the parties' agreement that the student should have been provided with 12 month services, the district had the obligation in this matter to convene a CSE to develop and implement both an IEP and an IESP for the student and there is no evidence in the hearing record that the parent obstructed or was uncooperative in the district's efforts to meet its obligations under the IDEA (see, e.g., C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 840 [2d Cir. 2014] [noting that "[i]mportant to the equitable consideration is whether the parents obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA"]). [24]

Instruction" Office of Special Educ. Mem. [June 2010], available at http://www.p12.nysed.gov/resources/contractsforinstruction/documents/contractsforinstruction2010covermemo.pdf). The State explained the statutory instances in which school districts were authorized to contract for the instruction of students including Education Law § 305(33) (for supplemental educational services, which section has since been repealed); Education Law § 3202(6) (students that are hospitalized or institutionalized); Education Law §3602-e (approved prekindergarten programs); Education Law §§4401(2) and 4402(2)(b) (special education services with other school districts, BOCES, State-operated and State-supported schools, approved private schools and the State University at Binghamton which are approved by the Commissioner of Education); Education Law § 4401(2)(n) (transition services for students with disabilities in programs such as vocational training programs approved by certain state agencies) (id.).

[23] The educational director of Succeed testified that there was an error in her affidavit and that the date the student started receiving SETSS for the 2022-23 school year was July 1, 2022 and not July 1, 2021 as written (Tr at p. 33).

[24] As noted above the parties have not disputed the IHO's directive to reevaluate the student. The district is also reminded that State guidance has indicated that Education Law § 3602-c does not require school districts to provide dual enrollment services to students with disabilities during the summer, unlike a district's obligation during the course of the regular school year, within an IESP (see "Chapter 378 of the Laws of 2007 – Guidance

Based on the forgoing, I find that IHO's decision should be modified to award the parent her requested relief of eight periods of SETSS per week for the 12-month 2022-23 school year for the district's failure to offer the student a FAPE. Further, I find that it is appropriate, due to the district's concession, to require the district to directly fund the cost of the student's unilaterally obtained SETSS beginning July 1, 2022 and continuing through the end of the 2022-23 school year as contracted for by the parent with Succeed (Parent Ex. H).[25] In the end, all the relief sought by the parent for the 12-month 2022-23 school year has been achieved by virtue of the district concession that the student was entitled to eight periods per week of SETSS and that the parent's unilaterally obtained SETSS provider is appropriate to address the student's needs.

VII. Conclusion

I have considered the parties' remaining contentions and find it is unnecessary to address them in light of my determinations above.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision dated October 14, 2022 is modified to direct the district to fund eight hours per week of SETSS provided by Succeed for the 2022-23 12-month school year at a rate of $195 per hour beginning July 1, 2022, upon the parents' submission of proof of attendance.

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

JUSTYN P. BATES
STATE REVIEW OFFICER

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 3206-c," VESID Mem. [Sept. 2007], available at http://www.p12.nysed.gov/specialed/publications/policy/documents/chapter-378-laws-2007-guidance-on-nonpublic-placements.pdf). However, State guidance also directs that for such dually enrolled (that is parentally placed) nonpublic school students who qualify for 12-month services (also known as extended school year services [ESY]) there is a need for an IESP for the regular school year and an IEP for 12-month services programming, resulting in a 10-month IESP and a 6-week IEP ("Questions and Answers on Individualized Education Program (IEP) Development, The State's Model IEP Form and Related Documents," at pp. 39-40, Office of Special Ed. [Apr. 2011], available at http://www.p12.nysed.gov/specialed/formsnotices/IEP/training/QA-411.pdf). Accordingly, if, after the reevaluation of the student, the CSE finds the student eligible for 12-month services and the parent continues to parentally place the student in a nonpublic school and seek dual enrollment services, the district must produce an IESP for the 10 month school year and an IEP for the 12-month services.

[25] The parent provided evidence of both a legal obligation and an inability to pay Succeed that supports an award of direct funding of the costs of the student's unilaterally obtained services (Parent Exs. H; I).