The University of the State of New York

The State Education Department
State Review Officer
www.sro.nysed.gov

No. 23-010

Application of a STUDENT WITH A DISABILITY, by her 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 Philippe Gerschel, attorneys for petitioner, by Philippe Gerschel, 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 a decision of an impartial hearing officer (IHO) which denied her request for compensatory education and prospective changes to the student's educational program to remedy respondent's (the district's) failure to offer or provide appropriate educational services to her daughter for the 2021-22 school year. The district cross-appeals from that portion of the IHO's decision which ordered the district to reimburse the parent for the cost of unilaterally-obtained special education teacher support services (SETSS). The appeal must be sustained in part. The cross-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 IDEA (20 U.S.C. §§ 1400-1482), namely a local 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

The student began "receiving services" while in preschool and during the 2019-20 school year (kindergarten) she received one session per week of speech-language therapy (Parent Exs. B at p. 1; E at p. 1). The student attended a "mainstream" nonpublic school during the 2020-21 school year where she repeated kindergarten because she had "not mastered most of her letters/phonemes and basic CVC words" (Parent Ex. B at p. 1; see Parent Ex. G ¶ 13).

The CSE convened on October 23, 2020 and developed an IESP for the student (Parent Ex. B at p. 1). The October 2020 CSE determined that the student was eligible for special education as a student with a speech or language impairment and recommended that the student receive five periods per week of direct SETSS in a group, two 30-minute sessions per week of individual speech-language therapy, one 30-minute session per week of group counseling services, and one 30-minute session per week of individual counseling services (id. at pp. 1, 8).

In August 2021 the parent obtained a private neuropsychological evaluation of the student and in the resulting report the evaluator recommended, among other things, an increase in the amount of SETSS the student received from one period per day to two, or ten sessions per week, and continuation of counseling and speech-language services (Parent Ex. E at pp. 1, 5).

The parent continued the student's placement at the nonpublic school for the 2021-22 school year (first grade) (Parent Exs. C at pp. 1, 3, 15; G ¶ 13). Beginning on September 1, 2021, a private agency, Lead Remedial Services, delivered five hours of SETSS per week to the student (Parent Exs. F ¶¶ 8-9; G ¶¶ 3, 10).

In a letter to the district dated September 5, 2021, the parent indicated that she consented to the services included in the October 2020 IESP but had been unable to locate providers who would accept the district's standard rate (Parent Ex. D). The parent informed the district that, therefore, the parent would "implement the IEP on [her] own and seek reimbursement or direct payment from the [district]" (id.). The parent requested that the district inform her if it could offer "any alternative options" (id.).

A. Due Process Complaint Notices and Subsequent Events

In a due process complaint notice dated September 13, 2021, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) during the 2021-22 school year (Sept. 13, 2021 Due Process Compl. Not.).[1, 2] Initially the parent requested a pendency

[1] There are three different due process complaint notices present in the hearing record, only one of which was entered into evidence as an exhibit. The due process complaint dated September 13, 2021 will be cited as "Sept. 13, 2021 Due Process Compl. Not." The due process complaint dated February 9, 2022 will be cited as "Parent Ex. A." The due process complaint dated June 13, 2022 will be cited as "June 13, 2022 2nd Amended Due Process Compl. Not." The district's record certification states that the second amended due process complaint notice was received on June 13, 2022 although it bears the date of the earlier amended due process complaint notice.

[2] While both of the parties and the IHO refer to the district's obligation to offer the student a FAPE for the 2021-22 school year, it is understood that the parent wanted equitable services for the student from the district pursuant to Education Law § 3602-c and that she seeks relief for the district's failure to offer or provide appropriate services under that statute.

order to "implement the IEP dated 10/23/2020" (id. at p. 2).[3] The parent asserted that the district had failed to implement the October 2020 IESP and that the parent had been unable to secure SETSS and related services providers using the district's offered "online resources to locate SETSS and related service providers" (id.). The parent also related that she had been able to locate "appropriate service providers independently for the 2021-22 school year at their prevailing rate" (id.). As a proposed resolution the parent requested a finding that the district's failure to implement the recommended IESP denied the student a FAPE, an order for the district to fund the providers located by the parent at their prevailing rate, and an order for a bank of compensatory SETSS and related services for those services which were not delivered during the 2021-22 school year (id. at p. 3).

According to the parent, on November 15, 2021, she submitted the August 2021 private neuropsychological evaluation report to the CSE and requested that the CSE reconvene to determine the student's programming (Parent Ex. F ¶¶ 4, 5).

A CSE convened December 21, 2021, reviewed the results of the August 2021 private neuropsychological evaluation and developed an IESP for the student (Parent Ex. C at pp. 1-5). The December 2021 CSE changed the student's special education eligibility category to other health-impairment and recommended that the student receive seven periods per week of direct SETSS in a group, two 30-minute sessions per week of individual speech-language therapy, one 30-minute session per week of group counseling services, one 30-minute session per week of individual counseling services, and three 30-minute sessions per week of individual occupational therapy (OT) (Parent Ex. C at pp. 1, 12-13; see Parent Ex. B at p. 1).[4]

Beginning after December 21, 2021, the private agency, Lead Remedial Services, increased the number of weekly hours of SETSS delivered to the student to seven (Parent Exs. F ¶ 9; G ¶ 10).

The parent filed an amended due process complaint notice dated February 9, 2022, which modified the specifics of the parent's complaint by requesting an updated pendency order reflecting the recommendations set forth in the December 2021 IESP (Parent Ex. A). The parent referenced the August 2021 private neuropsychological evaluation that was reviewed by the December 2021 CSE which recommended, among other things, an increase in SETSS to 10 sessions per week (id. at p. 2).

The parent filed a second amended due process complaint notice on or about June 13, 2022, which added a claim that the December 2021 CSE failed to appropriately consider the August 2021 private neuropsychological evaluation, failed to follow that evaluation's recommendation for

[3] Although the parent at times refers to the October 23, 2020 education program as an IEP, it was actually an IESP, crafted to provide special education and related services to the student who was parentally placed at a private nonpublic school within the district (see Parent Ex. B at p. 1). There is no material dispute that the parent wanted an IESP for the student for the 2021-22 school year, not an IEP.

[4] The student's eligibility for special education, either as a student with a speech or language impairment as found by the October 2020 CSE or as a student with an other health-impairment as found by the December 2021 CSE, is not in dispute (see 34 CFR 300.8[c][9], [11]; 8 NYCRR 200.1[zz][10], [11]).

10 sessions of SETSS per week, and failed to offer a FAPE on that basis (June 13, 2022 2nd Amended Due Process Compl. Not. at pp. 2-4).

B. Impartial Hearing Officer Decision

An impartial hearing convened on April 29, 2022 and concluded on December 6, 2022 after six days of proceedings (Tr. pp. 1-41).[5] In a decision dated December 16, 2022, the IHO found that the district denied the student a FAPE for the failure to implement the student's IESPs during the 2021-22 school year (IHO Decision at pp. 6-7).[6]

Initially, the IHO determined that, while it may be permissible for a district to include parents in the process of identifying a particular provider when the parent is willing to do so, the responsibility to redress the circumstance where the parent is unable to locate a provider is not shifted permanently away from the district (IHO Decision at p. 5). Next, the IHO found that the student was entitled to the services set forth in the October 2020 and December 2021 IESPs during the 2021-22 school year and that there was no dispute that the district had not provided any of those services to the student (id. at pp. 5-6).[7] The IHO held that the district's "failure to implement the IESP[] constituted a denial of FAPE to the student" for the 2021-22 school year (id. at p. 6). The IHO found that the parent had "secured part of the aforementioned services through a private provider" and sought an "enhanced rate" for these services (id.).

The IHO declined to alter the student's program going forward to include the 10 periods of SETSS the parent requested, on the ground that the CSE retained the authority to craft an IESP for the student (IHO Decision at p. 6).

For relief, the IHO ordered that, upon receipt of invoices and supporting documents, the district would be required to directly fund or reimburse the parent for "SEIT/SETSS services" in the frequency set forth in the October 2020 and December 2021 IESPs from providers chosen by the parent "to be paid at market rate to be determined by the [district's] implementation unit" (IHO Decision at p. 7).

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[5] Neither party appeared at the April 29, 2022, May 3, 2022, or May 6, 2022 hearing dates, and the district did not appear at the September 2, 2022 or October 25, 2022 hearing dates (see Tr. pp. 1-22). Only one day of proceedings was devoted to the presentation of evidence on the merits of the parent's claims and requests for relief (see Tr. pp. 23-41). On that date, the district representative was not prepared to go forward with the hearing and had not made any evidentiary disclosures (Tr. pp. 23-32). Accordingly, the district did not present any evidence to show that it offered or provided the student with appropriate equitable services for the 2021-22 school year.

[6] The IHO also issued an order of consolidation dated October 10, 2022 denying consolidation of this matter with another due process complaint notice filed by the parent (see Interim IHO Decision).

[7] The IHO noted that there was a "pendency order, which was based upon the student's said IESP" (IHO Decision at p. 6). However, a written pendency order is not present in the record. It does appear that the district funded related services in the amount called for in the IESPs during the pendency of the hearing, as the parent's affidavit testimony states that the parent was seeking "an order that the [district] continue to fund the other related services for the rest of the school year, as per the IESP dated 12/21/2021" (Parent Ex. F ¶ 15). In any event, any dispute about the related services due to the student during the 2021-22 school year is no longer at issue in the appeal and cross-appeal, and the only service that remains in dispute in this matter is the provision of SETSS to the student.

IV. Appeal for State-Level Review

The parent appeals, arguing that the IHO erred in failing to alter the student's IESP to include 10 sessions of SETSS per week as recommended in the private neuropsychological evaluation for the 2021-22 school year. The parent also argues that the IHO erred by failing to order compensatory education to remedy the district's failure to include the full 10 sessions of SETSS in the student's IESP during the 2021-22 school year, and requests a bank of 75 hours of SETSS.

In an answer the district asserts that the IHO correctly determined that the student's October 2020 IESP provided sufficient SETSS services in the form of five sessions per week, and correctly determined that after receipt of the private neuropsychological evaluation the CSE modified the student's IESP to include seven sessions per week in December 2021. The district asserts that the evaluative information available to the CSEs was sufficient and the CSEs supported their decisions in the IESPs. The district next asserts that the IHO correctly declined to order compensatory education, arguing that the parent privately obtained SETSS as a remedy for the district's failure to implement the IESPs, which amounts to a unilateral placement for which no compensatory education can be awarded. Further, the district contends that the parent did not demonstrate why 75 hours of compensatory SETSS would remedy the denial of FAPE. As for a cross-appeal, the district contends that the IHO erred in awarding district funding for the costs of the unilaterally-obtained SETSS because there was inadequate proof that the parent was legally obligated to pay the costs of the SETSS provided by the private agency that delivered the services during the 2021-22 school year.

In an answer to the cross-appeal, the parent contends that she has demonstrated a legal obligation to pay for the services for which she seeks reimbursement and direct payment and offers a copy of a contract executed between the parent and the private agency that delivered the services as additional evidence (see Answer to Cross-Appeal Ex. A).

In a reply, the district contends that the parent's answer to the cross-appeal should be rejected as untimely and that the parent's offered additional evidence should not be considered.

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]).[8] "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.).[9] 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.

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

Because the district does not appeal the IHO's determination that it failed to implement the student's SETSS during the 2021-22 school year, there is no dispute that the district failed to meet its obligation under Education Law § 3602-c to provide the student with equitable services. Thus, generally speaking, the necessary inquiry is limited to the district's cross-appeal of the IHO's order directing the district to reimburse and directly fund the cost of the student's privately provided SETSS and the parent's request for compensatory equitable services, although further discussion of the appropriateness of the December 2021 IESP is set forth below in order to address the remaining remedies sought by the parent.

[8] 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]).

[9] 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.).

A. Unilaterally-Obtained SETSS

As the district conceded that it failed to meet its burden to show that it implemented the October 2020 and December 2021 IESPs, I next turn to the parent's requested relief. However, first, an additional comment about the district's failure to implement the IESPs is warranted as the hearing record indicates that the district delegated the obligation to find a SETSS provider to implement the IESP to the parent (see Parent Ex. F ¶ 7). I concur with the IHO that this procedure is manifestly unreasonable because it is the district's nondelegable responsibility to ensure that services are delivered, whether in accordance with an IESP, an IEP, or pursuant to the stay put rule, and cost is not a permissible reason to defer or avoid the obligation to implement a student's services (see Application of a Student with a Disability, Appeal No. 20-087; Educ. Law § 3602-c[2][a]; [7][a]-[b] [providing that "[b]oards 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" and that the cost for services is recoverable from the district of residence, either directly with the consent of the parent for a district of location to share information or through the Commissioner of Education and the State Comptroller]).

While districts cannot deliver special education services called for by their educational programming in an unauthorized manner, due at least in part to the requirements that school officials and employees remain accountable under the statutory and regulatory mechanisms put in place by state and federal authorities, districts can be made to pay for a privately obtained parental placement, a process that is essentially the same as the federal process under the IDEA. "Parents who are dissatisfied with their child's education can unilaterally change their child's placement during the pendency of review proceedings 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], cert. denied, 141 S. Ct. 1075 [2021], reh'g denied, 141 S. Ct. 1530 [2021]; see Florence Cty. Sch. Dist. Four v. Carter, 510 U.S. 7, 14 [1993] ["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."]). Thus, as a practical matter this kind of dispute can really only be effectively examined using a Burlington/Carter unilateral placement framework because the administrative due process system was not designed to set rate-making policies for what has grown into a completely unregulated cottage industry of independent special education teachers that parents within the New York City Department of Education are increasingly reliant upon, an industry that is not authorized by the State in the first place.[10]

Accordingly, the parent's request for district funding of the SETSS delivered to the student by Lead Remedial Services during the 2021-22 school year must be assessed under this framework; namely, having found that the district failed to implement the October 2020 and December 2021 IESPs, the issue is whether the SETSS obtained by the parent from Lead Remedial

[10] The State Education Department only permits local educational agencies to contract for the use of teachers and personnel in private settings that have been approved by the Commissioner of Education, and upon such approval the State's rate setting unit routinely addresses the issue of establishing local rates that districts may pay such private entities (see http://www.oms.nysed.gov/rsu/).

Services constituted an appropriate unilateral placement of the student such that the cost of the SETSS is reimbursable to the parent upon proof that the parent has paid for the services, or, if appropriate, should be directly paid by the district to the provider.

Here, the appropriateness of the SETSS delivered to the student by Lead Remedial Services is not in dispute; rather, the district in its cross-appeal contends that the IHO erred in awarding district funding for the cost of the SETSS delivered by Lead Remedial Services to the student during the 2021-22 school year because there was no proof that the parent had a legal obligation to pay for the services for which she sought payment.

However, the evidence in the hearing record, as supplemented by the additional evidence submitted by the parent, supports a finding that the parent was financially obligated to fund the costs of the SETSS delivered to the student by Lead Remedial Services during the 2021-22 school year.

The hearing record includes affidavit testimony from the parent and the director of Lead Remedial Services (Parent Exs. F; G). In her testimony, the parent states that after failing to locate providers for the student "on the list that [wa]s published on the [district] website" the parent contacted Lead Remedial Services and "signed a contract which obligate[ed] [her] to pay for these services in the event that the [district] d[id] not pay [Lead Remedial Services] for services provided" (Parent Ex. F ¶¶ 7, 8, 10). Further, the parent states that Lead Remedial Services then provided five hours per week of SETSS for the period of September 1, 2021 through December 21, 2021 and seven hours per week for the remainder of the 2021-22 school year (id. ¶ 9). These amounts conform to the SETSS mandated in the October 2020 and December 2021 IESPs (Parent Exs. B; C).

The director of Lead Remedial Services also testified to the contract with the parent and the amount of SETSS provided by the agency during the 2021-22 school year, in accord with the parent's testimony, and stated that Lead Remedial Services charged a rate of $165 per hour of SETSS (Tr. p. 36; Parent Ex. G ¶¶ 6, 10).

The above testimony concerning the existence of the contract is corroborated by the additional evidence of the contract between Lead Remedial Services and the parent executed on June 6, 2021 (Answer to Cross-Appeal Ex. A).[11] The contract stipulates, among other things, that

[11] Generally, documentary evidence not presented at an impartial hearing is considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]). The factor specific to whether the additional evidence was available or could have been offered at the time of the impartial hearing serves to encourage full development of an adequate hearing record at the first tier to enable the IHO to make a correct and well supported determination and to prevent the party submitting the additional evidence from withholding relevant evidence during the impartial hearing, thereby shielding the additional evidence from cross-examination and later springing it on the opposing party, effectively distorting the State-level administrative review and transforming it into a trial de novo (see M.B. v. New York City Dep't of Educ., 2015 WL 6472824, at *2-*3 [S.D.N.Y. Oct. 27, 2015]; A.W. v. Bd. of Educ. of the Wallkill Cent. Sch. Dist., 2015 WL 1579186, at *2-*4 [N.D.N.Y. Apr. 9, 2015]). However, both federal and State regulations authorize SROs to seek additional

Lead Remedial Services is contracted to provide SETSS to the student during the 2021-22 school year, that the parent was "responsible for any unpaid balance on services we provide[d] that [we]re not covered by the [district]" and that the parent must cooperate with the CSE in evaluations and CSE meetings and must communicate with Lead Remedial Services about any developments concerning the student's IESP (id.).[12]

Based on the foregoing, the evidence in the hearing record supports a finding that the parent was financially obligated to fund the costs of the SETSS delivered to the student by Lead Remedial Services during the 2021-22 school year and there is no reason to disturb the IHO's award of district funding for the costs of the services.[13]

B. SETTS—Number of Sessions

1. Equitable Services

Initially, although, as set forth above, the district has not challenged the IHO's determination that it failed to implement the SETSS mandated in the student's IEP, it is necessary to further discuss the parent's allegations regarding the district's failure to offer appropriate equitable services in order to review the parent's remaining requests of relief.

In particular, as the parent alleges, the district failed to show that the amount of SETSS recommended in the December 2021 IESP was appropriate to meet the student's needs. The district bears the burden of proof on this question but did not enter any evidence or present any

evidence if necessary, and SROs have accepted evidence available at the time of the impartial hearing when necessary (34 CFR 300.514[b][2][iii]; 8 NYCRR 279.10[b]; Application of a Student with a Disability, Appeal No. 08-030; Application of a Child with a Disability, Appeal No. 00-019 [finding it necessary to accept evidence available at the time of the impartial hearing to determine the student's pendency placement]). Here, the parent submits a copy of a contract dated June 6, 2021, executed between the parent and Lead Remedial Services, the private agency that delivered the SETSS, as additional evidence (see Answer to Cross-Appeal Ex. A). Under these circumstances, where the additional evidence is consistent with and corroborates testimonial evidence in the hearing record and where the district did not fully participate in the impartial hearing process and only raised concerns about the existence of a contract on the last day of the impartial hearing, I do not find that this is an instance where the concerns set forth above are at play (see Tr. pp. 37-39). Therefore, I will consider the June 2021 contract as additional evidence necessary to render a decision.

[12] To the extent that the district takes issue with the contract because it does not specify the frequency, rate or the total amount of SETSS to be provided by Lead Remedial Services, the Second Circuit has held that some blanks that the parties did not fill in in a written agreement would not render an entire contract void and indicated that in the case before it that "the contract's essential terms—namely, the educational services to be provided and the amount of tuition—were plainly set out in the written agreement, and we cannot agree that the contract, read as a whole, is so vague or indefinite as to make it unenforceable as a matter of law" (E.M., 758 F.3d at 458). In the present matter, the written contract identifies the educational services to be delivered (SETSS) and the duration of the services (the 2021-22) school but not the rate for the services (Answer to Cross-Appeal Ex. A). Further, the evidence in the hearing record shows that Lead Remedial Services performed its obligations under the agreement by providing the student with SETSS during the 2021-22 school year (Parent Exs. F; G).

[13] As neither party has challenged the language in the IHO's order, which provided that the district would be required to fund the services "at market rate to be determined by [the district's] implementation unit based upon the lowest rates paid to such provider or comparable providers for the same or similar students," the question of the rate for the services will not be further discussed.

witnesses at the impartial hearing to support its contention that the December 2021 IESP offered the student appropriate equitable services, and, on appeal, relies on the parent's evidence and the content of the IESP in support of its argument.

The evaluator who conducted the August 2021 private neuropsychological recommended 10 hours of SETSS per week, stating the following:

> In considering the current findings and school reports, it is suggested that even though [the student] is receiving SETSS services on a daily basis, her academic progress is not what it should be. It is felt that this is not necessarily due to her attention or behavior, but she is a child in whom these factors can be exacerbated when she encounters difficulty in the classroom. It is thus recommended that [the student] receive an increase in the amount of SETSS services. This increase needs to reflect the fact that she does need direct work in acquiring basic academic skills in reading and writing, but also to some degree in math. At the same time, her difficulties with memory also require additional support on a daily basis for acquisition of skills and content taught. Thus, it is recommended that SETSS services be increased to two periods per day or ten periods per week. It would be helpful if some of these services were also performed on a push-in basis in the classroom during instructional time so as to avoid unnecessary transitions which would be a particular problem when considering [the student's] organizational issues

(Parent Ex. E at p. 5).

The district points to the student's academic strengths, identifies some skills which were at or above grade-level, and notes the other services and recommendations in the IESP that address the student's needs; however, the December 2021 CSE agreed that the student required an increase in the amount of SETSS over those called for in the October 2020 IESP (compare Parent Ex. B at p. 8, with Parent Ex. C at p. 12). Yet, the district did not offer evidence of the CSE's rationale for the recommendation for seven hours of SETSS.

In light of the above, I find that the district did not meet its burden to prove that the December 2021 CSE's recommendation for seven periods of SETSS per week was appropriate for the student for the 2021-22 school year.

2. Compensatory Education

Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). The purpose of an award of compensatory education is to provide an appropriate remedy for a denial of a FAPE (see E.M. v. New York City Dep't of Educ., 758 F.3d 442, 451 [2d Cir. 2014]; Newington, 546 F.3d at 123; Newington, 546 F.3d at 123 [holding that compensatory education is a remedy designed to "make up for" a denial of a FAPE]; see also Doe v. E. Lyme, 790 F.3d 440, 456 [2d Cir. 2015]; Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005] [holding that, in fashioning an appropriate compensatory education remedy, "the inquiry must be fact-specific,

and to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"]; Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1497 [9th Cir. 1994]). Accordingly, an award of compensatory education should aim to place the student in the position he or she would have been in had the district complied with its obligations under the IDEA (see Newington, 546 F.3d at 123 [holding that compensatory education awards should be designed so as to "appropriately address[] the problems with the IEP"]; see also Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1289 [11th Cir. 2008] [holding that "[c]ompensatory awards should place children in the position they would have been in but for the violation of the Act"]; Bd. of Educ. of Fayette County v. L.M., 478 F.3d 307, 316 [6th Cir. 2007] [holding that "a flexible approach, rather than a rote hour-by-hour compensation award, is more likely to address [the student's] educational problems successfully"]; Reid, 401 F.3d at 518 [holding that compensatory education is a "replacement of educational services the child should have received in the first place" and that compensatory education awards "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA"]).

A progress report dated February 8, 2022 completed by the student's SETSS provider stated that it was "essential that [the student] continue to receive as much SETSS services as possible to address her many academic deficits" (Parent Ex. H at p. 3). Affidavit testimony from Lead Remedial Services' director outlines the services provided during the 2021-22 school year and discusses the progress the student made during the school year, but also states that the student "ha[d] significant delays in multiple areas and require[d] an increase in her weekly SETSS periods," as recommended in the August 2021 private neuropsychological report (Parent Ex. G ¶ 18). The director also stated that the December 2021 CSE failed to heed the recommendation and that although the student had shown signs of progress with her SETSS providers, the student's "academic and social delays warrant[ed] the need for increased services . . . [and] require[d] implementation of 10 periods of SETSS on a 1:1 basis per week" (id. ¶¶ 19-21).

During the impartial hearing, the parent requested a bank of 75 hours of SETSS, calculating those services based on 25 weeks of school during the 2021-22 school year after the December 2021 CSE meeting during which there was a deficit of three periods of SETSS per week (Parent Ex. F ¶ 14; Parent Post-Hr'g Br. at pp. 1-2). Conversely, the district did not submit any evidence proposing an appropriate compensatory remedy (see Tr. pp. 37-39).

On appeal, the district's main argument against an award of compensatory education relates to the parent already having unilaterally obtained SETSS as relief. Some courts have held that compensatory education is not available as an additional or alternative remedy when reimbursement for the costs of a unilateral placement is also at issue for the same time period (see D.F. v. Collingswood Borough Bd. of Educ., 694 F.3d 488, 498 [3rd Cir. 2012] [holding that "[b]ecause compensatory education is at issue only when tuition reimbursement is not, it is implicated only where parents could not afford to 'front' the costs of a child's education"]; P.P. v. West Chester Area Sch. Dist., 585 F.3d 727, 739 [3rd Cir. 2009] [holding that "compensatory education is not an available remedy when a student has been unilaterally enrolled in private school"]; but see V.W. v. New York City Dep't of Educ., 2022 WL 3448096, at *5–7 [S.D.N.Y. Aug. 17, 2022] [finding that awards of tuition reimbursement and compensatory education are not mutually exclusive and that an award of "both education placement and additional services may

be necessary to provide a particular student with a FAPE"]; I.T. v. Dep't of Educ., State of Hawaii, 2013 WL 6665459, at *7-*8 [D. Haw. Dec. 17, 2013] [finding that the student was entitled to compensatory education for services the student received at the nonpublic school]).

The Second Circuit Court of Appeals has not directly addressed this question and, generally, appears to have adopted a broader reading of the purposes of compensatory education than the Third Circuit (compare P.P., 585 F.3d at 739 [finding that "[t]he right to compensatory education arises not from the denial of an appropriate IEP, but from the denial of appropriate education"], with Doe v. E. Lyme, 790 F.3d 440, 456-57 [2d Cir. 2015] [treating compensatory education as an available equitable remedy for a denial of a FAPE so as to effectuate the purposes of the IDEA and put a student in the same position he or she would have been in had the denial of a FAPE not occurred]). Unlike the Third Circuit, the Second Circuit's approach to compensatory education may leave room for unique circumstances where an award of compensatory education may be warranted where, for example, a student is unilaterally placed but the parent's request for tuition reimbursement is denied under a Burlington/Carter analysis (see Application of a Student with a Disability, Appeal No. 16-050), or where a student is unilaterally placed but additional related services are required in order for the placement to provide the student with a FAPE (see V.W., 2022 WL 3448096, at *5–7). Further, one court has recently endorsed a combined award of tuition reimbursement and compensatory education based on a denial of FAPE for the same time period (V.W. v. New York City Dep't of Educ., 2022 WL 3448096, at *5-*6).

Here, under the circumstances presented, an award of reimbursement for unilaterally-obtained services and an award of compensatory education instruction for the same time period would not be duplicative, particularly given the different violations underlying the remedies. That is, in this matter, the parent sought and unilaterally obtained SETSS from Lead Remedial Services as a form of self-help to remedy the district's failure to implement the student's IESPs. However, the parent seeks the compensatory education for the inappropriate recommendations of the December 2021 CSE. Thus, this appears to be one of the rare instances where both awards are appropriate for the same time period.

Having found no impediment to the award of compensatory education based on the five hours of unilaterally-obtained SETSS already delivered, and finding no basis to adopt a calculation other than that proposed by the parent, the evidence in the hearing record supports an award of 75 hours of compensatory education to be delivered to the student by the district.

3. Prospective Relief

The parent also alleged that the IHO erred in declining to change the student's IESP program going forward to include ten hours of SETSS.

Generally, an award of prospective relief in the form of IEP amendments and the prospective placement of a student in a particular type of program and placement, under certain circumstances, has 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"]).

At the time of the IHO decision in December 2022, the 2021-22 school year at issued had ended and presumably the CSE had an opportunity to craft an IEP or IESP that met the student's needs for the 2022-23 school year (IHO Decision at pp. 6, 7; 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]). In the event that the parent disagrees with the recommended programming for the 2022-23 school year, the appropriate course would be to begin a new impartial hearing. Accordingly, there is no basis to modify the IHO's denial of relief in the form of prospective IEP amendments.

VII. Conclusion

There being no appeal of the IHO's determination that the district failed to provide the student with equitable services during the 2021-22 school year, and having found that the IHO correctly ordered district funding for the costs of the unilaterally-obtained private SETSS, there is no basis to modify those portions of the IHO's decision. However, the evidence in the hearing record also supports an award of 75 hours of compensatory education in the form of SETSS.

I have considered the parties' remaining contentions and find I need not address them in light of my determinations herein.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's decision dated December 16, 2022, is modified by reversing those potions which denied the parent's request for compensatory SETSS; and,

IT IS FURTHER ORDERED that the district is directed to provide the student with 75 hours of 1:1 SETSS as compensatory education to be used no later than two years from the date of this decision.

Dated: **Albany, New York**
March 31, 2023

SARAH L. HARRINGTON
STATE REVIEW OFFICER