



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 23-018

**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 Abigail Hoglund-Shen, Esq.

## **DECISION**

### **I. Introduction**

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request for direct funding of the cost of her son's privately obtained special education teacher support services (SETSS) during the 2022-23 school year. Respondent (the district) cross-appeals from the IHO's decision to the extent that the IHO did not dismiss the parent's request for SETSS based on the timing of her request and ordered the district to conduct a full educational evaluation of the student. The appeal must be sustained in part. The cross-appeal must be dismissed.

### **II. Overview—Administrative Procedures**

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; *see* 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). 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 programming 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

In June 2019, the student was in fourth grade at a nonpublic school and the CSE found him eligible for special education as a student with a speech or language impairment (Dist. Ex. 3 at pp. 1, 2).<sup>1</sup> At that time, the CSE created an IESP for the student, recommending that he receive seven periods per week of direct SETSS in a group in Yiddish and three 30-minute sessions per week of individual speech-language therapy in Yiddish to be implemented at the nonpublic school beginning September 11, 2019 (*id.* at pp. 1, 7).<sup>2</sup>

The student's SETSS providers from All Kidz R Star Kidz, LLC (All Kidz) prepared a progress report dated December 2021 and June 2022 (June 2022 progress report), which indicated that the student "struggle[d] with a short attention span" and "struggle[d] in all academic areas" including reading, spelling, mathematics, and writing skills (Parent Ex. I at p. 1; *see* Parent Ex. H at p. 1). According to the progress report, the student was receiving seven hours of individual SETSS per week and required "both intensive individualized instruction as well as support to generalize skills within the classroom" (Parent Ex. I at p. 1). Further, according to the progress report the student's primary language was Yiddish and he required translation (*id.* at p. 3).

On July 1, 2022, one of the student's SETSS providers sent an email to the district which referenced an attachment from the student's teacher that described the student's struggles with "attaining and maintaining information taught," attributed to "severe short term memory issues, severe slow processing, and lack of critical thinking" (Parent Ex. E; *see* Parent Ex. I at p. 1). According to the SETSS provider, the student's "issues" caused him to "regress substantially over [s]ummer break which ha[d] been noted in the past and documented in the enclosed report" (Parent Ex. E). The SETSS provider indicated that in past years the student had refused summer services but that he was "at the point where he w[ould] be unable to receive a proper education if he continue[d] to regress over [s]ummer break" (*id.*). The attachment referenced by the SETSS provider in the July 1, 2022 email was a letter prepared by the teacher from the nonpublic school dated June 30, 2022, which indicated that the student had a considerable gap in his reading skills,

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<sup>1</sup> The June 2019 IESP was admitted into the hearing record as Parent Exhibit B and District Exhibit 3 and appear to be the same except for formatting (*compare* Parent Ex. B, *with* Dist. Ex. 3). Additionally, the pages of Parent Exhibit B are tilted slightly and are difficult to read (*see* Parent Ex. B). As such, District Exhibit 3 will be cited to in this decision.

<sup>2</sup> SETSS is not defined in the State continuum of special education services (*see* 8 NYCRR 200.6). As has been laid out in prior administrative proceedings, the term is not used anywhere other than within this school district and a static and reliable definition of "SETSS" does not exist within the district, and unless the parties and the hearing officer take the time to develop a record on the topic in each proceeding it becomes problematic (*see Application of the Dep't of Educ.*, Appeal No. 20-125). For example, SETSS has been described in a prior proceeding as "a flexible hybrid service combining Consultant Teacher and Resource Room Service" that was instituted under a temporary innovative program waiver to support a student "in the general education classroom" (*Application of a Student with a Disability*, Appeal No. 16-056), and in another proceeding it was suggested that SETSS was more of an a la carte service that is completely disconnected from supporting the student in a general education classroom setting (*Application of a Student with a Disability*, Appeal No. 19-047).

spelling skills, comprehension skills, writing skills and math skills compared to his peers (Parent Ex. F at p. 1; see Tr. pp. 49-50). According to the teacher, it was "crucial" that the student receive SETSS services in the summer (Parent Ex. F at p. 2).

On July 1, 2022, the student's father signed a contract for the student to receive seven periods of SETSS per week from "July 1, 2022 through June 30, 202[3] (12-month service period)" (Parent Ex. H).<sup>3, 4</sup>

### **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 "adequate special education and related services" and a free appropriate public education (FAPE) for the 2022-23 school year (see Parent Ex. A at p. 2). The parent asserted that the student's June 2019 IESP constituted the last agreed-upon educational program developed for the student, which included a recommendation for seven sessions per week of SETSS and related services (id. at p. 1). The parent noted that she "disputed any subsequent program the [district] developed that removed the extended school year/summer services and/or reduced the services on the [IESP]," as well as any actions the district may have taken to "deactivate or declassify" the student's eligibility for special education (id.). According to the parent, for the 2022-23 school year, the student required the "same special education services and the same related services each week as set forth on the [June 2019 IESP] but also require[d] these services during the summer of 2022, as he require[d] an extended 12-month school year to avoid substantial regression" (id.). In addition, the parent alleged that she could not locate providers at the district's "standard rates" for the 2022-23 school year, and therefore, she secured providers to deliver "all required services for the 2022-2023 school year, however, at rates higher than standard" district rates (id.). Lastly, the parent disagreed with the results of the district's most recent evaluations claiming the evaluations were no longer "timely and relevant" (id. at p. 2). The parent claimed that she "obtained [her] own independent [educational] evaluations" (IEEs) which were being used by her chosen SETSS providers to provide SETSS to the student for the 2022-23 school year (id.).

As relief, the parent requested a pendency hearing and an order requiring the district to "continue the student's special education and related services under the student's automatic pendency entitlement"; an order awarding seven sessions per week of SETSS at an enhanced rate for the 12-month, 2022-23 school year; an order directing the district to fund the student's SETSS for seven sessions per week at an enhanced rate for the entire 12-month, 2022-23 school year; an order awarding the provision of "all related services on the [IESP] for the entire 12-month school

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<sup>3</sup> It appears that the SETSS provider contract contains a typographical error. The contract indicates that the service period was "July 1, 2022, through June 30, 2022 (12-month service period)"; however, the contract also states, "The Agency is contracted to provide services for my child the entire duration of the school year" (Parent Ex. H). The reference to June 30, 2022 is presumed to be a typographical error and the correct service period is July 1, 2022 through June 30, 2023.

<sup>4</sup> As noted by the district in its answer and cross-appeal, the parent uses the terms "periods," "hours," and "sessions" interchangeably to reference the amount of SETSS the student received (compare Parent Ex. I at p. 1 and Parent Ex. G at ¶ 5, with Parent Ex. H at p. 2 and Parent Ex. A at p. 2; see generally Answer and Cross Appeal ¶ 4).

year"; and the issuance of related services authorizations (RSAs) if accepted by the parent's chosen providers or an order directing the district to fund the parent's chosen providers at each provider's rate; and an order awarding direct funding or reimbursement to the parent for the "costs of private evaluations [she] arranged for in order that the SETSS provider could provide adequate and appropriate special education services during the 2022-2023 school year" (Parent Ex. A at p. 2).

### **B. Prehearing Conference, Status Conferences, and Events Post-Dating the Due Process Complaint Notice**

On August 9, 2022, a district representative executed the pendency form submitted by the parent (see Parent Ex. A at pp. 3-4; Aug. 9, 2022 Pendency Implementation Form). According to the form, the June 2019 IESP formed the basis for the student's pendency placement, which consisted of the following: a 10-month program consisting of seven periods of direct, group SETSS per week in Yiddish and three 30-minute sessions per week of individual speech-language therapy in Yiddish (Aug. 9, 2022 Pendency Implementation Form).

The IHO conducted a prehearing conference with the parties on August 10, 2022 (Tr. pp. 1-11). During the prehearing conference, counsel for the parent indicated that this matter was "an implementation case," further adding that the parent "wanted summer services, and also an evaluation" (*id.* p. 4). The parent further clarified that she was looking for reimbursement for summer services and "an independent evaluation, at any point" (*id.* at pp. 4-6). The IHO asked the parent's attorney if she wanted to make a motion for interim evaluations, to which counsel for the parent responded "I'm not prepared to do any motions now. That's why I'm just trying to see if we can just extend the compliance date" (*id.* at p. 6). The IHO asked the parent's attorney what district evaluation the parent disagreed with, noting "you have a request for evaluations, and I'm not even clear what evaluations you want" (*id.* at pp. 6-7). The IHO further stated she did not "want to just start off the case with [an extension], especially when you have the independent evaluation request in there. I don't know if that's something you really want to pursue or not, in the interim." (*id.* at pp. 7-8). The IHO did not issue a compliance extension at the conclusion of the August 10, 2022 prehearing conference stating "I'm putting this on before . . . the next compliance date, and I want to hear what's going on with the case, and I want a comprehensive idea about what these evaluations are" (*id.* at p. 8).

On September 6, 2022, in response to the parent's request, All Kidz conducted a "formal academic achievements evaluation to assess [the student's] progress" (Parent Ex. C at p. 1).

On September 9, 2022, the district provided the parent with a response to the July 5, 2022 due process complaint notice (Dist. Ex. 1).

On September 16, 2022 and October 13, 2022, the IHO held status conferences (Tr. pp. 12-37).<sup>5</sup> During the September 16, 2022 status conference the parent's attorney stated that she received a resolution, the parties were "still negotiating," and the parent wanted an extension to continue the negotiations (Tr. p. 13). The IHO and parent's counsel had a brief discussion related to the parent's request for an independent evaluation, with counsel for the parent indicating the

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<sup>5</sup> The district did not appear at the status conference on September 16, 2022 (see Tr. pp. 12-18).

parent was working on evaluating the student and the IHO indicating she wanted to know if the parent wanted an interim evaluation (Tr. pp. 12-15).

During the October 13, 2022 status conference, the parent clarified the issues to be resolved during the impartial hearing stating that this case was about "reimbursement for an evaluation in addition to SET[S]S" and further indicating that the parent sought reimbursement for SETSS at an enhanced rate and reimbursement for an IEE at a specified amount (Tr. pp. 20-21).<sup>6</sup> The district responded and stated that it would be open to reimbursing the parent for an IEE but that the report submitted by the parent was not an evaluation but "an educational report that contains subtests of one evaluation tool" (Tr. p. 22). Further, the district claimed that the evaluation was not conducted by a psychologist (*id.*).<sup>7</sup>

### **C. Impartial Hearing Officer Decision**

The parties continued with impartial hearing dates devoted to the merits of the parent's claims on November 14, 2022 and November 16, 2022 (*see* Tr. pp. 38-94). In a final decision dated December 17, 2022, the IHO addressed three issues: (1) "Did the parent prove that the Summer [SETSS] services during the summer of 2022 w[ere] appropriate and was [there] proof that [the] Student would substantially regress during the 2022-2023 school year without such services provided deeming them appropriate"; (2) "D[id] the Equities favor [the] Parent per Prong III" of the Burlington/Carter standard; and (3) "[Was] the Parent entitled to funding for the September 2022 Woodcock Johnson Assessment conducted by [the] Student's [SETSS] provider?" (IHO Decision at pp. 5-6).<sup>8</sup>

The IHO found that the evidence presented at the impartial hearing did not support funding for services provided by All Kidz in summer 2022, summer 2023, or during the 10-month portion of the 2022-23 school year (IHO Decision at pp. 16-19).

At the start of the IHO's analysis, the IHO found that the "documentary evidence and testimony of [the student's SETSS provider was] unfortunate [and] disturbing" (IHO Decision at p. 16). After making this finding, the IHO determined that the documentary evidence showed the student had not progressed and had regressed over the past five years the student had been receiving special education because the student "[wa]s almost fifteen and in High School, yet he [wa]s reading at the level of a first grader," which was "lower than his academic function in June

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<sup>6</sup> The parent's attorney conceded that the IEE was conducted prior to the October 13, 2022 status conference and the parent was seeking reimbursement for it at that point (Tr. p. 21; *see* Parent Ex. C).

<sup>7</sup> The district further claimed that, based on the September 16, 2022 status conference transcript, the parent's counsel alluded that a "more comprehensive evaluation" of the student was in process, and the district needed additional information on that evaluation (Tr. p. 22). There is no other indication in the hearing record that any additional evaluations, aside from the September 6, 2022 assessment report, were conducted after the filing of the due process complaint notice (*see* Tr pp. 1-94; Parent Exs. A-M; Dist. Exs. 1-3).

<sup>8</sup> The IHO found that "[t]here is no dispute between the parties that [the] Student was entitled to seven period of SETSS a week in Yiddish for the ten-month school year as mandated in the 2019 IESP and should receive seven periods of SETSS during the 10-month school year" in addition to three 30-minute sessions per week of speech-language therapy (IHO Decision at p. 4; *see* Tr. pp. 45-70).

of 2019 according to the June 2019 IESP that [the] Parent agree[ed] with" (id.). The IHO found no evidence that summer services would have stopped the student from regressing, nor that it was necessary to stop substantial regression (id.). The IHO then found that since the student's SETSS provider and All Kidz has been working with the student since 2018 "one can only conclude the SETSS provided [wa]s not appropriate as [the student] ha[d] regressed" (id.). More specifically, the IHO found that the student's SETSS provider had a "laundry list of struggles and needs" for the student and the student was essentially functioning "at or below the level of an eight-year-old"; the IHO wondered "[how] this has happened" (id.).<sup>9</sup>

Further, the IHO held there was no evidence that seven periods per week of SETSS was an appropriate service for the student (IHO Decision at p. 17). According to the IHO, despite indications in the SETSS provider's affidavit testimony showing that the student's disabilities "appear extreme," the provider testified that the student's "underlying disabilities did not matter" (id.). The IHO questioned how the SETSS provider could "attack[] the problems and struggles of a Student without understanding the underlying cause" (id.).

Regarding summer services, the IHO found that the parent "failed to ask for summer services timely" and that there was no evidence the parent made a request for summer services (IHO Decision at p. 17). The IHO found that the only request for summer services was made on July 1, 2022; that, because the district had 60 days to complete an IEP for the student, it would not have been completed before the end of the summer, and that the evidence in the hearing record was insufficient to show substantial regression (id.).

Turning to issues related to equitable considerations, the IHO determined that there was no evidence the parent was in fact "responsible in any way for [SETSS] services, especially due to [SETSS provider's] repeated statements it was at [the student's school]'s insistence that Summer services be obtained" (IHO Decision at pp. 17-18). Further the IHO found that the parent failed to provide the district with a 10-day notice that she was obtaining summer services for the student (id. at p. 18).

As to the parent's request for an IEE, the IHO held that the parent "did not state with clarity what evaluations [she] disagreed with" when she requested to obtain an IEE and, further, that the district would not have to fund the Woodcock-Johnson IV assessment conducted by the SETSS provider (IHO Decision at p. 18). The IHO noted that the SETSS provider conducted an evaluation "every year 'at the start of school'" and thus the evaluation should have been considered part of the SETSS provider's process and "if anything should have been billed as part of SETSS" (id.).

The IHO denied the parent's requested relief; however, the IHO determined that, because "it is completely unknown what [the] Student's problems [we]re due to and if he [wa]s receiving appropriate instruction," the IHO ordered the district to conduct a full evaluation of the student,

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<sup>9</sup> The IHO noted that the SETSS provider "repeatedly blamed [the] Student for 'refusing' summer services that apparently according to her would have stopped 'substantial Regression,'" and that the student "[wa]s a child and not responsible for the determination of whether he should receive Summer Services" (IHO Decision at p. 16). Further, the IHO questioned how the SETSS provider believed the student was responsible for whether he attended summer school as the SETSS provider had described the student as having "what would appear to be a constellation of emotional and neurocognitive problems" (id.).

including: an individual psychological evaluation with IQ testing and other neuro-cognitive measures; a social history; an observation of the student in the student's classroom; an educational evaluation; an OT evaluation; a speech-language evaluation; and an assistive technology evaluation (IHO Decision at pp. 17-19). The IHO ordered the CSE to reconvene after the evaluations were completed, but within 60 days (id. at p. 19).

#### **IV. Appeal for State-Level Review**

The parent appeals and alleges that the IHO's decision must be "rejected and reversed as contrary to the facts and law." The parent notes that the IHO did not make a finding that the district failed to provide a FAPE and equitable services to the student for the 2022-23 school year and asserts that this was "the most obvious and undisputed egregious conduct that occurred in this case."

Turning to the IHO's findings regarding the timeliness of the parent's request for summer services, the parent alleges the IHO ignored the district's "responsibility to contact the Parent and schedule an[] IESP meeting more than two years prior to [the] Parent reaching out to the [district] to request summer services" and further that the parent cannot be found to be untimely in her request for summer services because the district was "required to initiate a review on its own long before [the] Parent took the initiative and reached out to help her child."

The parent next alleges that the IHO's denial of reimbursement for summer services because the parent failed to testify was misplaced. According to the parent, her position on summer services was presented through her attorney, which included a detailed record as to why summer services were appropriate, as well as testimony that the request for summer services came from the parent.

The parent further alleges that each of the IHO's reasons for finding the SETSS provided to the student to be inappropriate either had no basis in the hearing record or misconstrued the hearing record. The parent asserts that a number of factual statements in the IHO's decision were incorrect, specifically referencing the number of years between the June 2019 IESP and the September 2022 assessment (3, not 5), the age of the student at the time of the assessment (just turned 14, not almost 15), the student's grade during the 2022-23 school year (eighth grade, not in high school), the student's scores in reading subtests on the September 2022 assessment (mostly at a third-grade level, not first-grade). Additionally, the parent alleges that the IHO's findings regarding the SETSS provider misconstrued her testimony. Specifically, the parent objects to the IHO indicating that the student made decisions as to summer services, noting that the SETSS provider's testimony was that summer services would be of no benefit without the student's cooperation. The parent also objects to the IHO's finding that the SETSS provider deemed the student's underlying issues irrelevant asserting that the provider testified as to possible causes for the student's issues with short term memory and slow processing but responded that they were not relevant to how the request for summer services came about. Finally, the parent argues that, even though the IHO found the SETSS provider's services were not appropriate, both parties agreed that the student was entitled to seven periods of SETSS per week for the 2022-23 school year and, at a minimum, the IHO should have awarded 280 sessions of SETSS as compensatory education.



Lastly, the parent alleges that the IHO erred in not granting parent's request for funding of the September 2022 assessment. The parent asserts that she disagreed with the evaluations relied on in creating the student's last IESP in that those evaluations were no longer timely or relevant. According to the parent, the September 2022 assessment was an appropriate evaluation because it aided the SETSS provider in developing an appropriate program for the student.

Further, the parent asserts that she is financially obligated for both the September 2022 assessment and the services delivered by the SETSS provider.

As relief, the parent requests a reversal of the IHO's decision and an order awarding the student a summer program for the 2022-23 school year consisting of seven sessions of SETSS per week; a ten-month program for the remainder of the 2022-2023 school year consisting of seven sessions of SETSS per week and three 30-minute sessions of speech-language therapy per week; direct funding to the parent's chosen provider for the SETSS delivered at an enhanced rate; and direct funding to the parent's chosen provider for the September 2022 assessment at a specified cost.

In an answer and cross-appeal the district generally denies the material allegations contained within the parent's request for review. The district argues that the IHO correctly determined that the student was not entitled to receive 12-month services or equitable services for the 2022-23 school year. The district noted that the parent did not prove the appropriateness of the SETSS provided to the student and that the IHO found that the testimony of the SETSS provider was not credible. Additionally, the district argues that equitable considerations do not favor the relief requested by the parent because the parent did not provide the district with 10-day notice of her intent to unilaterally obtain services. Further the district claims that the IHO correctly denied the parent's request for funding of the September 2022 assessment as the parent did not identify a specific district evaluation with which she disagreed, because the assessment was not conducted by a psychologist, and because the assessment was part of the SETSS provider's process rather than an actual evaluation. Finally, the district claims that the parent is precluded from requesting compensatory education services for the first time on appeal.

As for its cross-appeal, the district argues that the IHO erred by not dismissing the parent's request for equitable services based on the parent's failed to provide a written notice of her request for equitable services by June 1, 2022 in accordance with State law and instead requested equitable services on July 1, 2022. The district further asserts that this issue is a jurisdictional defense and, therefore, the IHO had the authority to raise the issue sua sponte. Lastly, the district cross-appeals from the IHO's order directing the district to conduct a full set of evaluations, arguing that the IHO should not have addressed this as neither party requested evaluations from the district.

In an answer to the district's cross-appeal, the parent argues that she was not required to make a request for equitable services each year and that, after an initial request was made, the district was required to develop an IESP annually.

## **V. Applicable Standards**

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services

designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. 386, 399 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 580 U.S. at 404). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere

'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Andrew F., 580 U.S. at 403 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).<sup>10</sup>

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

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., 694 F.3d at 184-85 [2d Cir. 2012]).

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<sup>10</sup> The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Andrew F., 580 U.S. at 402).

## VI. Discussion

### A. 2022-23 School Year

Prior to reaching the merits of the parties' allegations, it is necessary to examine the appropriate framework for the special education services available to the student from the district. While the parent's claims related to the 12-month portion of the school year fall under the FAPE standard as outlined above in the applicable standards section and would require the development of an IEP, the student was attending a nonpublic school and the parent was seeking services from the district pursuant to an IESP for the 10-month portion of the 2022-23 school year. State guidance indicates that for dually enrolled students—that is students parentally placed in a nonpublic school—who qualify for 12-month services, the district of location is required to develop an IESP for the regular school year and the district of residence is required to develop an IEP for the 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>). In this instance, the district was both the district of residence and the district of location; accordingly, if required, the district should have developed an IEP for the 12-month portion of the school year and an IESP for the 10-month portion of the school year.

The parent claims the district failed to create a special education program for the student for the 12-month 2022-23 school year, which denied the student a FAPE. In this case, the parent desired a 12-month school year program for the student who attends a nonpublic school within the district, which would require the district to create an IEP to provide the student with services over summer 2022 and an IESP to provide services to the student while enrolled at his private school during the 10-month 2022-23 school year. The district did not create either an IESP or an IEP for the 2022-23 school year. During the November 14, 2022 hearing date, the district stated during its opening statement that it "[would] not be presenting any witnesses to defend the Prong I case in this matter" and did not offer or present any rebuttal evidence to the parent's claims (Tr. p. 50; see Parent Exs. A-M; Dist. Exs. 1-3).<sup>11</sup> The district did cross-examine the parent's witness (see Tr. pp. 65-94). There was no dispute between the parties during the impartial hearing that the student was entitled to seven periods of SETSS per week in Yiddish for the 10-month portion of the school year as mandated in the June 2019 IESP and should receive seven periods of SETSS during the 10-month school year (IHO Decision at p. 4; Tr. pp. 45-70).

#### 1. 10-month School Year

The district cross-appeals the IHO's decision, arguing that the student was not entitled to special education services for the 10-month portion of the school year pursuant to an IESP because

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<sup>11</sup> Prong I refers to the first prong of the Burlington/Carter analysis regarding whether a district offered a student special education services that were inadequate or inappropriate (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252).

the parent did not make a request for an IESP within the timeline provided by State law.<sup>12</sup> In her answer to the district's cross appeal, the parent alleges she was not required to request services again prior to the deadline and argues that the CSE was required to convene annually to review the student's IESP, which has not happened since 2019.

Initially, as noted above, for the 10-month portion of the school year, the parent requested special education through an IESP. 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]).<sup>13</sup> "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.)."<sup>14</sup>

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<sup>12</sup> The IHO did not make an explicit finding as to whether the district failed to provide the student a FAPE for the 12-month or 10-month portions of the 2022-23 school year; however, she seems to imply a denial of FAPE for the 10-month portion of the school year based on her determination that the parties agreed during the November 14, 2022 impartial hearing that the student was entitled to seven periods of SETSS per week in Yiddish for the 10-month portion of the school year (see IHO Decision pp. 1-26; Tr. pp. 45-70).

<sup>13</sup> 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]).

<sup>14</sup> 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

An IESP was created in June 2019 for the 2019-20 10-month school year (Dist. Ex. 3). However, there is no evidence in the hearing record that the parent requested services from the district for the 10-month 2022-23 school year in advance of the first day of June as required by Education Law § 3602-c and, in fact, the only request for special education services for the student included in the hearing record is the parent's email dated July 1, 2022, in which the parent requested 2022 summer services for the student (Parent Ex. E). Education Law § 3602-c—commonly referred to as the dual-enrollment statute—requires parents who seek to obtain educational services for students with disabilities enrolled at a nonpublic school to file a written request for such services in the student's district of residence 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][a]). The parent argues that she should not be required to request services again since the student is already known to the district as a student with a disability and thus had an obligation to review the student's IESP annually. However, the parent's assertion appears contrary to the statute as written. For example, in detailing the June first deadline, the statute does not differentiate between students already identified and receiving services pursuant to an IESP and those who are not; however, the law does make exceptions for students first identified as students with disabilities after the June first deadline (Educ. Law § 3602-c[2][a]).

Nevertheless, after review of the hearing record, I find that the district failed to raise the timeliness of the parent's request for 10-month services at the impartial hearing, and thus, that the defense was waived (see Tr. pp. 1-96). In raising this issue on appeal, the district concedes that it did not raise this issue during the impartial hearing, arguing instead that it should have been addressed by the IHO because it goes to subject matter jurisdiction (Answer with Cross-Appeal ¶28). However, at least one State level administrative decision, explicitly addressing waiver of the June first deadline, found that a district may through its actions waive it as a defense (Application of the Bd. of Educ., Appeal No. 18-088). Accordingly, without a further developed argument, there is insufficient basis to find that the June first deadline relates to subject matter jurisdiction as asserted by the district. Rather, in review of the parties' arguments, the defense raised in the district's cross-appeal fits more with other affirmative defenses, such as the defense of the statute of limitations, which require that they be raised at the initial hearing (see M.G. v. New York City Dep't of Educ., 15 F. Supp. 3d 296, 304, 306 [S.D.N.Y. 2014] [holding that the limitations defense is "subject to the doctrine of waiver if not raised at the initial administrative hearing" and that where a district does "not raise the statute of limitations at the initial due process hearing, the argument has been waived"]; see also R.B. v. Dep't of Educ. of the City of New York, 2011 WL 4375694, at \*4-\*6 [S.D.N.Y. Sept. 16, 2011] [noting that the IDEA "requir[es] parties to raise all issues at the lowest administrative level" and holding that a district had not waived the limitations defense by failing to raise it in a response to the due process complaint notice where the district articulated its position prior to the impartial hearing]; Vultaggio v. Bd. of Educ., Smithtown Cent. Sch. Dist., 216 F. Supp. 2d 96, 103 [E.D.N.Y. 2002] [noting that "any argument that could be raised in an administrative setting, should be raised in that setting"]).

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(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.*).

"By requiring parties to raise all issues at the lowest administrative level, IDEA 'affords full exploration of technical educational issues, furthers development of a complete factual record and promotes judicial efficiency by giving these agencies the first opportunity to correct shortcomings in their educational programs for disabled children.'" (R.B. v. Dep't of Educ., 2011 WL 4375694, at \*6 [S.D.N.Y. Sept. 16, 2011], quoting Hope v. Cortines, 872 F. Supp. 14, 19 [E.D.N.Y. 1995] and Hoelt v. Tucson Unified Sch. Dist., 967 F.2d 1298, 1303 [9th Cir. 1992]; see C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at \*12 [S.D.N.Y. Sept. 22, 2011]). In this matter, because the district did not raise the timeliness of the parent's request for 10-month services before the IHO, the hearing record is not fully developed in a way that would permit the undersigned to make a finding as to whether the parent violated the regulation and as such, I find that the district has waived the defense, the district's cross-appeal is dismissed, and the parent was entitled to 10-month services for the 2022-23 school year.

However, going forward, if they have not done so already, both parties should also return to using the appropriate CSE planning process called for by State law, and the parent should ensure that she adheres to the June 1 deadline for requesting section 3602-c services if she intends to place the student in a nonpublic school and seek dual enrollment services.

Beyond the question of the June first deadline raised by the district for the first time on appeal, the district did not otherwise attempt to counter any of the allegations raised in the parent's due process complaint notice pertaining to its obligation to provide appropriate special education services to the student on an equitable basis. Rather, at the November 14, 2022 impartial hearing, the district conceded that the student was entitled to seven periods per week of SETSS for the 10-month school year (Tr. p. 60). Yet, the district failed to meet its burden to prove that it provided the equitable services to which it conceded the student was entitled.

## **2. 12-month Services**

Prior to reaching the merits of the parties' dispute relating to the appropriateness of the unilaterally obtained SETSS, I must first address the parent's appeal from the IHO's determination that the student was not entitled to 12-month services for summer 2022. The IHO held that the parent's request for 12-month services was untimely and thus the district was under no obligation to offer a FAPE to the student for summer 2022. Further, the IHO held that there was no evidence that 12-month services "would have stopped regression or were necessary to stop substantial regression" (IHO Decision at p. 16). The parent argues that the IHO ignored that it was the district's responsibility to contact the parent and schedule a "[CSE] meeting more than two years prior to the Parent reaching out to the [district] to request summer services" (Req. for Rev. ¶ 9).

Initially, the IHO's finding that the parent's request for 12-month services was untimely appears to place the responsibility for requesting an IEP for the 12-month portion of the school year on the parent. However, as a general matter, the IDEA requires that at the start of each school year the district shall have an IEP in effect for each student with a disability who resides in the district (20 U.S.C. § 1414[d][2][A]). Additionally, the district has an obligation to review the IEP of a student with a disability periodically but at least annually, and the CSE, upon review, must revise a student's IEP as necessary to address: "[t]he results of any reevaluation"; "[i]nformation about the child provided to, or by, the parents" during the course of a review of existing evaluation

data; the student's anticipated needs; or other matters (20 U.S.C. 1414[d][4][A]; 34 CFR 300.324[b][1][ii][C]; 8 NYCRR 200.4[f][2][ii]).

While the Second Circuit has noted that "[a] local educational agency may not be required to offer an IEP if the parent's expressed intention is to enroll the child in a private school outside the district, without regard to any IEP" (Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 451 n.9 [2d Cir. 2015], citing Child Find for Parentally-Placed Private School Children with Disabilities, 71 Fed. Reg. 46,593 [Aug. 14, 2006]; but see J.S. v. Scarsdale Union Free Sch. Dist., 826 F. Supp. 2d 635, 665-66 [S.D.N.Y. 2001] [noting that the "district-of-residence's obligations do not simply end because a child has been privately placed elsewhere"]), that situation is not present here because, as noted above, even with the student being parentally placed at a nonpublic school for the 10-month school year, State guidance explains that an IEP should be developed if 12-month services are necessary.

State regulations require that students "shall be considered for 12-month special services and/or programs in accordance with their need to prevent substantial regression" (8 NYCRR 200.6[k][1]; see 8 NYCRR 200.1[eee]). "Substantial regression" is defined as "a student's inability to maintain developmental levels due to a loss of skill or knowledge during the months of July and August of such severity as to require an inordinate period of review at the beginning of the school year to reestablish and maintain IEP goals and objectives mastered at the end of the previous school year" (8 NYCRR 200.1[aaa]). State guidance indicates that "an inordinate period of review" is considered to be a period of eight weeks or more ("Questions and Answers Extended School Year 2017," Office of Special Educ. [Feb. 2017], available at <http://www.p12.nysed.gov/specialed/applications/ESY/esy-2017/documents/questions-and-answers-extended-school-year-2017.pdf>).<sup>15</sup>

Here, although the district argues that there is no evidence that the student ever needed 12-month services in prior school years (Ans. With Cross-Appeal ¶17), review of the June 2019 IESP shows that the parent and the student's teacher expressed concerns that the student's "severe short term memory issues" had caused him to "regress during extended breaks, especially in the summer" (Dist. Ex. 3 at p. 2). According to the parent and teacher input included in the IESP, it took the student "approximately three months to retrieve information taught over the previous school year," which "cause[d] him to lag considerably behind his peers" affecting him socially and in his ability to reach his goals (id.). The IESP reflected the opinion of the parent and the student's teacher that it was "very important to consider this issue, and allocate summer services to prevent regression" (id.). Further, the present levels of performance and individual needs section of the June 2019 IESP stated the student was "struggling immensely with severe short term memory for

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<sup>15</sup> Generally, a student is eligible for a 12-month school year service or program "when the period of review or reteaching required to recoup the skill or knowledge level attained by the end of the prior school year is beyond the time ordinarily reserved for that purpose at the beginning of the school year" ("Extended School Year Programs and Services Questions and Answers," VESID Mem. [Feb. 2006], available at <http://www.p12.nysed.gov/specialed/applications/ESY/2014-QA.pdf>). Typically, the "period of review or reteaching ranges between 20 and 40 school days," and in determining a student's eligibility for a 12-month school year program, "a review period of eight weeks or more would indicate that substantial regression has occurred" (id.; see D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at \*15-\*16 [E.D.N.Y. Sept. 2, 2011]; see also F.L. v. Bd. of Educ. of Great Neck Union Free Sch. Dist., 274 F. Supp. 2d 94, 125 [E.D.N.Y. 2017]).



visual material which affect[ed] retaining all academic skills including his sight word recognition" (*id.*).

Additionally, the hearing record also included more current information regarding the time it took the student to recoup skills or knowledge after summer breaks. The June 2022 progress report indicated that starting in September the student struggled recouping age-appropriate reading skills, writing skills, comprehension skills, and math skills (Parent Ex. F at p. 1). He regressed to the extent that he was unable to keep up with his classmates for the next three to four months, which caused the student to lag even further behind and negatively affected his self-esteem (*id.*).<sup>16</sup> He was struggling with fact finding skills needed for basic comprehension and was unable to write simple sentences and his math skills were limited to multiplication and division (*id.*). The teacher noted that the student continued to struggle spelling and reading words with long vowel sounds, vowel digraphs and consonant digraphs and noted his struggle with comprehension due to his lack of reading fluency, conceptualizing, fluid reasoning, memory issues, processing skills and organization (*id.* at pp. 1-2).

The SETSS provider testified that the parent contacted her to arrange 2022 summer services because the student's school contacted the parent reporting that the student was "really lagging terribly behind" and that "the gap is so huge, you must get the summer services" (Tr. p. 76). The SETSS provider agreed with the school that the student needed summer services to avoid substantial regression as long breaks were harmful to the student because it took him 8-10 weeks to recoup lost information previously mastered (Parent Ex. G ¶ 18). However, the student "refused it" because he "wanted to be free . . . in the summer" (Tr. p. 77). Further, the SETSS provider testified that the parent contracted for SETSS during summer 2022 because she "knew that there was no choice" (Tr. p. 79). The SETSS provider testified that the student never received summer services prior to 2022 (Tr. p. 75), and that the summer SETSS were provided in the student's school setting (Tr. p. 86).

The district did not present any evidence during the hearing to counter the above stated view of the student experiencing regression after summer breaks, which had been expressed to the district as early as June 2019; accordingly, the hearing record shows that the student exhibited substantial regression such that the student would be eligible for a 12-month school year program.

### **B. Unilaterally Obtained SETSS**

Having determined that the district failed to meet its burden to prove that it offered or provided the student a FAPE for summer 2022 or services on an equitable basis for the 10-month portion of the 2022-23 school year, the next issue to decide is whether the SETSS the parent obtained for the student were appropriate to address the student's needs. The IHO found that the SETSS the student received were not appropriate as there was evidence that the student regressed during the time SETSS were provided to him (IHO Decision at p. 16). The IHO stated that "there [wa]s no evidence that [the provider's] services [we]re appropriate or that seven periods a week of

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<sup>16</sup> An email from the student's parents and educational staff noted that the student demonstrated regression in the past over the summer break and noted that it had come to the point where the student was unable to receive a proper education if he continued to regress over the summer break noting that the student had agreed to attend summer services (Parent Ex. E).

SETSS with her company ha[d] resulted in appropriate services" (id.). The IHO also determined that it was "completely unknown what [the s]tudent's problems [we]re due to and if he [wa]s receiving appropriate instruction (or limited English proficiency)" (id. at p. 17). On appeal, the parent contends that the IHO misconstrued the evidence when finding that the student regressed during the period of time he was receiving SETSS.

Prior to reaching the substance of the parties' arguments, some consideration must be given to the appropriate legal standard to be applied. In this matter, the student has been parentally placed in a nonpublic school and the parent does not seek tuition reimbursement for the cost of the student's attendance there. The parent alleged that the district did not develop an IESP for the 2022-23 school year or an IEP for summer 2022 and she unilaterally obtained private services from All Kidz for the student and then commenced due process to obtain remuneration for the services provided by All Kidz. Accordingly, the issue in this matter is whether the SETSS obtained by the parent constituted appropriate unilaterally obtained services for the student such that the cost is reimbursable to the parent or, alternatively, should be directly paid by the district to All Kidz upon proof that the parent has paid for the services or is legally obligated to pay but does not have adequate funds to do so. "Parents who are dissatisfied with their child's education can unilaterally change their child's placement . . . and can, for example, pay for private services, including private schooling. They do so, however, at their own financial risk. They can obtain retroactive reimbursement from the school district after the [IESP] dispute is resolved, if they satisfy a three-part test that has come to be known as the Burlington-Carter test" (Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 526 [2d Cir. 2020] [internal quotations and citations omitted], cert. denied sub nom., Paulino v. NYC Dep't of Educ., 2021 WL 78218 [U.S. Jan. 11, 2021], reh'g denied sub nom., De Paulino v. NYC Dep't of Educ., 2021 WL 850719 [U.S. Mar. 8, 2021]; see Carter, 510 U.S. at 14 [finding that the "Parents' failure to select a program known to be approved by the State in favor of an unapproved option is not itself a bar to reimbursement."]).

The parent's request for privately-obtained SETSS must be assessed under this framework; namely, having found that the district failed to offer the student a FAPE or appropriate equitable services during the 2022-23 school year, the issue is whether the SETSS obtained by the parent from All Kidz constituted appropriate unilaterally obtained services for the student such that the cost of the SETSS is reimbursable to the parent upon presentation of proof that the parent has paid for the services or, alternatively, payable directly by the district to the provider upon proof that the parent is legally obligated to pay but does not have adequate funds to do so.

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998]). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (id. at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in

determining the appropriateness of the parents' placement" (Gagliardo, 489 F.3d at 112, quoting Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 207 [1982]). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether a unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether the placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] ["evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

The Second Circuit has set forth the standard for determining whether parents have carried their burden of demonstrating the appropriateness of their unilateral placement.

No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

(Gagliardo, 489 F.3d at 112, quoting Frank G., 459 F.3d at 364-65).

### **1. Student's Needs**

Although the student's needs—as identified in certain evaluations, reports, and testimony—are not directly in dispute, a discussion thereof provides context for the discussion of the remaining issue; namely, whether the SETSS the student received from All Kidz was appropriate to address the student's needs.<sup>17</sup>

According to the student's SETSS progress report dated June 2022, the student showed "very little interest in class activities," which appeared to be due to the student's short attention span (Parent Ex. I at p. 1). The progress report indicated that the student struggled in all academic

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areas including reading, spelling, mathematics, and writing skills and noted that he required special instruction, scaffolding, and breaking down information into smaller parts to assist him with his comprehension and ability to follow instructions, focus, and attend (id.). The June 2022 progress report noted that, although the student made moderate progress, "significant delays" persisted "in many areas," and he required both intensive individualized instruction as well as support to generalize skills within the classroom (id.).

The June 2022 progress report reflected that the student lagged behind his peers considerably in reading comprehension skills (Parent Ex. I at p. 2). By report, the student disliked reading, which the teacher opined was possibly due to his weak comprehension (id.). Notably, when the student read aloud, he did not properly apply his critical thinking skills to process or analyze what he read and he struggled to answer simple grade level questions (id.). The progress report indicated that the student did not engage in metacognitive tasks while reading or apply strategies of reading comprehension, and he presented with low vocabulary leading to additional weaknesses in comprehending text (id.). However, the progress report indicated that the student demonstrated basic comprehension when text was switched to "something significantly below grade level" (id.).

With regard to writing, the June 2022 progress report indicated that the student had not shown that he mastered the skill of distinguishing between oral expression and written expression or expressing himself properly in a style that suited written expression (Parent Ex. I at p. 2). The progress report also reflected that the student was not fluent in appropriate grammar or grade-level sentence structure or skilled in choosing effective and creative terminology to best express himself (id.). As a result of the stated weaknesses, the progress report indicated that the student might resort to using the simplest terms possible to communicate in writing and he had not yet mastered the ability to appropriately express his thoughts in formal language for essay writing (id.).

In mathematics the student was noted to present with deficits in foundational mathematics skills and he required "a lot of support to begin filling the gaps" as he was significantly behind grade level and required "a lot of support to understand the math concepts" (Parent Ex. I at p. 1). The June 2022 progress report indicated that the student was unable to keep up with or follow the material as presented in the classroom and he needed individualized attention to review the math concepts he was learning in school (id.). It was reported that, sometimes, the student seemed to have mastered a concept after receiving individualized support, but then later regressed or forgot, especially during times of pressure or testing time (id.). The student had not yet mastered multiplication facts with fluency to enable him to keep up with his grade level math curriculum (id.).

With respect to language, the June 2022 progress report noted that since the student's primary language was Yiddish, he required translation and that he learned best when given visual supports rather than being presented with oral language alone (Parent Ex. I at p. 3). By report, the student learned better experientially and may have had a hard time processing oral instruction by itself, especially when give a long stream of straight oral information, which he may have found difficult to process all at once (id.). The June 2022 progress report indicated that the student learned more effectively when oral instruction was broken down into very small and manageable pieces accompanied by visual supports and opportunities for him to engage in learning experientially (id.).

The June 2022 progress report indicated that the student, although generally cooperative during SETSS sessions, may respond to academic frustration or stress by choosing to give up trying (Parent Ex. I at p. 3). According to the progress report, the student required a significant amount of effort to achieve academically, which led to a regular pattern of choosing not to do his homework (id.). The progress report also indicated that the student was given preferential seating, which supported his focusing needs and enabled the teacher to notice when he was frustrated or required repetition due to his severe short-term memory and attention deficit (id. at p. 4).

Similarly, the June 2022 letter prepared by the student's teacher noted that the student presented with "a considerable gap" in academic skills compared to his peers and he required repetition as he exhibited "components" of ADHD (Parent Ex. F at p. 1). The teacher's letter noted that the student struggled with executive functioning skills such as information processing, following directions, and organizational skills, and that he also had difficulty in the areas of short-term memory, visual memory, auditory memory, and very slow processing, all of which affected his ability to attain and retain academic information (id. at pp. 1-2). This letter also indicated that the student's "lack of critical thinking skills [wa]s negatively affected by his processing struggles" (id. at p. 2).

Upon parent request for a "formal assessment" of the student's progress, on September 6, 2022 the SETSS provider administered the Woodcock-Johnson IV Tests of Achievement (Form B and Extended) (W-J IV) (Parent Ex. C). The hearing record indicates that the student's primary language is Yiddish and the September 2022 assessment report noted "the following modifications were made to the standardized testing procedures for the Tests of Achievement: require[d] translation" (Parent Ex. C at p. 1; see Parent Exs. F at p. 1; I at p. 3; Dist. Ex. 3 at p. 7). Review of the report does not provide additional information about the nature or extent of translation (see Parent Ex. C). Despite the lack of clarity regarding the administration, scoring, and interpretation of the W-J IV, the evaluator provided the following information concerning the student's academic abilities. The September 2022 assessment report described the student as being cooperative throughout the evaluation and presenting with typical conversational proficiency for his age, yet he was observed to be overly active and had difficulty attending to the tasks (id. at p. 1). According to the assessment report, the student appeared to be tense or worried, often distracted, sometimes responded too quickly to test questions, and gave up easily after attempting difficult tasks (id.). The SETSS provider reported that the student's overall academic achievement as measured by the W-J IV Broad Achievement standard score was in the very low range compared to same aged peers (id.).

The September 2022 assessment report included an interpretive overview, which indicated that the student's standard scores were within the low average range for five clusters (mathematics, broad mathematics, math calculation skills, math problem solving, and phoneme-grapheme knowledge) and seven tests (applied problems, calculation, writing samples, word attack, math facts fluency, number matrices, and spelling of sounds) (Parent Ex. C at pp. 1-2). Six clusters (reading, basic reading skills, written language, written expression, academic skills, and academic applications) and three tests (letter-word identification, passage comprehension, and sentence writing fluency) fell within the low range (id. at p. 2). Eight clusters (broad reading, reading comprehension, reading comprehension-extended, reading rate, broad written language, basic writing skills, academic fluency, and academic knowledge) and nine tests (spelling, sentence reading fluency, reading recall, editing, word reading fluency, reading vocabulary, science, social

studies, and humanities) fell within the very low range (id.). The September 2022 assessment report indicated that the student's performance suggested relative weaknesses in reading comprehension, reading comprehension-extended, reading rate, basic writing skills, sentence reading fluency, reading recall, editing, word reading fluency, reading vocabulary, academic fluency, and reading rate (id.). According to the assessment report, the student showed a relative strength in academic applications (id.). The SETSS provider reported that comparisons between the student's academic knowledge and his performance on several achievement clusters indicated that his performance was significantly higher than predicted in the areas of brief achievement, reading, basic reading skills, mathematics, broad mathematics, math calculation skills, math problem solving, written language, broad written language, written expression, academic skills, and academic applications (id.). Performance was significantly lower than predicted in reading rate (id.).

With respect to instructional recommendations, the September 2022 assessment report indicated that the student "may gain the most benefit" from reading instruction presented within the middle to late first grade range and from a program of supplemental reading interventions (Parent Ex. C at p. 2). According to the SETSS provider, the interventions should be explicit, (skills should be taught directly), intensive (a concentrated number of related learning opportunities should be provided), delivered with 1:1 direct instruction whenever possible, and should employ scaffolding learning principles with emotional support (id.). The SETSS provider recommended that the student's mathematics instruction be presented within the middle fourth grade to middle fifth grade range and that all math instruction be systematic and explicit (id.). Further, the SETSS provider recommended providing the student with numerous clear models of easy and difficult problems accompanied by verbalization of the thought processes involved in solving the problem, then guided practice with immediate corrective feedback to ensure that the student understood the lesson followed by independent practice to reinforce the learning objective (id.). Additionally, the SETSS provider opined that the student may benefit from a program of targeted and intensive mathematics interventions (id.). Lastly, the SETSS provider indicated that writing instruction presented within the late second grade to late third grade level "may be appropriate" for the student (id.).

The student's SETSS provider testified via affidavit dated November 7, 2022, that the student received seven hours per week of SETSS at school and/or the provider's service center (Parent Ex. G ¶¶ 2, 7). She stated that the student struggled in all academic areas, had severe short-term memory difficulties, and presented with dyslexia (id. ¶ 8). The SETSS provider testified that formal and informal evaluation results showed that the student's reading was at the third-grade level and his mathematics skills were commensurate with the fifth-grade level (id. ¶ 6). She also testified that the student struggled in a number of areas, including: executive functioning (organization, sequencing, time management, and inhibition control); awareness; inflexible thinking; focusing for an extended period of time; and following multi-step directions in the classroom (id. ¶ 8). According to the SETSS provider, the student struggled with reading, which negatively affected his comprehension and understanding of the plot, and she noted that the student was unable to repeat details of what he read or what was read to him (id.). She indicated that the student had difficulty remembering names he had just read, struggled with spelling and organization, which negatively affected his writing, and struggled to independently complete his homework (id.). She further testified that the student was unable to repeat details of a lesson and his responses were very vague (id.).

The SETSS provider stated that the student required: repetition as he struggled with processing information; redirection as he lost his place and didn't know where the class was up to; information to be broken down into small manageable tasks; verbal and visual prompting to answer "WH" questions; pre-teaching of vocabulary words and key terms of a lesson, and help to transition to a full regular education setting (Parent Ex. G ¶ 8). In her affidavit the SETSS provider stated that the student's academic struggles affected his behavior and self-esteem; he was more focused and attended better in a quiet 1:1 setting; he used avoidance behavior when he felt frustrated; and his struggles with sequencing affected his reading comprehension, math problem solving, critical thinking skills, and conceptualization and visualization abilities (*id.*).

## 2. Appropriateness of SETSS

Turning to the appropriateness of the unilaterally obtained SETSS, the parent argues that the IHO erred in finding that the SETSS provided by All Kidz was not appropriate. As stated above, a private school placement must be "proper under the Act" (*Carter*, 510 U.S. at 12, 15; *Burlington*, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs, or in this case, the parent's unilaterally obtain SETSS must offer an educational program which met the student's special education needs (see *Gagliardo*, 489 F.3d at 112, 115; *Walczak v. Fla. Union Free Sch. Dist.*, 142 F.3d 119, 129 [2d Cir. 1998]).

As discussed above, the district conceded that the student was entitled to seven periods per week of SETSS for the 10-month school year (Tr. p. 60), therefore, there is no material dispute in this matter that the type and frequency of services unilaterally obtained by the parents was appropriate.

The hearing record shows that by contract with All Kidz dated July 1, 2022, the parent arranged for the student to receive seven periods per week of SETSS from July 1, 2022 to June 30, 2023 at a specified rate (Parent Ex. H). The SETSS provider testified by affidavit, affirmed to on November 7, 2022, that she personally provided the student's SETSS during the 2022-23 school year through All Kidz (Parent Ex. G ¶ 2). According to the SETSS provider, the SETSS aimed to help the student make progress during the 2022-23 school year in the areas of: reading with proper intonation, with a focus on using commas and periods; reading comprehension (mental imagery, word study, words in context, and root words); reading recall; basic comprehension skills; critical thinking skills; spelling, word attack; sentence writing fluency; math multiplication and division; math fluency; writing, written expression, written language; sequencing and organization (*id.* ¶ 11). The SETSS provider further stated that the SETSS was aimed at managing the student's behavior and providing him with skills to manage distractions and focus, noting that the student's self-esteem improved and he made progress with respect to his ability to work independently (*id.*).

More specifically, according to the SETSS provider, the services were also helping the student to: increase knowledge of digraphs and diphthongs; improve spelling and reading; increase sight word knowledge to improve spelling and reading; increase vocabulary to improve comprehension and writing; increase word study including roots words, prefixes, and suffixes to improve comprehension and writing; improve grammar knowledge for reading, writing and comprehension; improve past, present and future tenses to improve writing and comprehension; improve handwriting; increase math fact fluency; increase multiplication fluency; increase long division; improve organization and sequencing; increase focusing for longer periods of time;

improve impulse control; increase the ability to focus with background noise; improve inflexible thinking; improve behavior when frustrated; improve short-term memory and recall; improve critical thinking/higher order thinking skills; increase ability to create mental imagery to improve comprehension and writing; increase the ability to do independent work; and improve awareness of time and space (Parent Ex. G ¶ 12).

In her affidavit, the SETSS provider indicated that she prepared specific interactive workbooks for the student, created specific chapter books for him to read independently, developed specific worksheets, graphs, mind maps, manipulatives, and flow sheets, and implemented "VAKT" modalities in lessons to assist the student with reading, reading comprehension, spelling, writing, and mathematics (Parent Ex. G ¶ 8). According to her affidavit, the SETSS provider indicated that she read books of interest to the student during sessions to build concepts, vocabulary, and visualization as well as to enable the student to identify with the author's ideas, piquing his curiosity and assisting his comprehension (*id.* ¶ 9).

Further, the SETSS provider stated that she created fluency sheets specifically geared for the student for word reading, sentence reading, and math fact fluency to increase his fluency level (Parent Ex. G ¶ 10). Because the student struggled with focusing and spatial awareness, she used "a program" immediately prior to the sessions to improve his focusing and awareness issues (*id.*). She indicated that the program she used with the student incorporated a metronome during the activity which had proven to be helpful with extending the student's focusing and concentration abilities (*id.*). To work on the student's reading recall she used graphs and mind maps that he could refer to when discussing or writing about a story he read or that was read to him (*id.*). According to the SETSS provider, the student used two different colored highlighters when reading to indicate information he felt would help him write an essay with details and proper sequencing (*id.*). The SETSS provider indicated that for math she used manipulatives, visuals, specific multiplication and division wipe off boards, dice, and card games to help the student master multiplication and division, and she created specific math sheets for the student with added colored pictures to clearly depict the problem solving question at hand, which helped him follow along step by step and enabled him to better comprehend the problem and work independently (*id.*).

According to the SETSS provider, she used the Davis Dyslexia Association International (DDAI) program for students with dyslexia to help the student focus on letter/sound association to improve his word reading and spelling, in addition to Orton-Gillingham for reading and spelling, ReadBright for phonics, diphthongs, and digraphs, and Lindamood Bell's Verbalization and Visualization program for comprehension (Parent Ex. G ¶¶ 11, 13-15; *see* Parent Ex. D at p. 2). She further testified that All Kidz used "Reading Rockets" for independent reading, the "Lucy Calkin writing program" and "Interactive" approach for writing and editing, and the "FIE program" for critical thinking strategies (Parent Ex. G ¶ 15). She used a book series called "Kids Speak" to expose the student to problem solving ideas, concepts, and stories about inventors, which created questions and research that helped the student build critical thinking skills (*id.* ¶ 9). Additionally, the SETSS provider stated she used "the reading dots program" prior to reading to assist with eye movement to increase the student's reading fluency (*id.* ¶ 10). For organization and planning skills the SETSS provider used "Sara Ward's, Cognitive Connections" method, "Dr. Ross Greene's" approach for developing problem solving techniques, and "Winner's" and "Shays's" approach to awareness for development of social/emotional and cognitive skills (*id.* ¶ 15). She also indicated that specific charts were created for the student in the areas where it was felt he needed incentives



(*id.*). She indicated that All Kidz invested in The Learning Breakthrough Program, which was used simultaneously with the sessions as it was specifically developed for students that struggled with processing, reading, memory, and higher order thinking (*id.* ¶ 10).

Turning to the parent's appeal of the IHO's finding that the SETSS was not appropriate, in part because the student did not make progress, progress with unilaterally obtained services is not dispositive; however, it is a relevant factor to be considered (*Gagliardo*, 489 F.3d at 115, citing *Berger*, 348 F.3d at 522, and *Rafferty v. Cranston Pub. Sch. Comm.*, 315 F.3d 21, 26-27 [1st Cir. 2002]). In this instance, the IHO's assessment of the student's progress while receiving SETSS from All Kidz focused on a comparison of the student's academic functioning, as reported in the June 2019 IESP with the student's grade-level scores reported by the SETSS provider (IHO Decision at p. 16). In particular, the IHO found that the student was "almost fifteen and in [h]igh [s]chool" and was reading at a first-grade level, which was lower than in June 2019 (*id.*). With respect to writing, the IHO found that the student maintained a second-grade level from fourth grade to the 2022-23 school year (*id.*). Additionally, for math, the IHO found that the student only progressed from a second-grade level to a fourth-grade level (*id.*). Overall, the IHO found that the student was functioning "below the level of an eight-year-old in 9<sup>th</sup> grade," which caused her to question the effectiveness of the SETSS provided to the student over the prior five years (*id.*).

The parent appeals from the IHO's findings asserting that the IHO made factual errors in discussing the student's progress while he received SETSS from All Kidz. In particular, the parent asserts that only three years elapsed between the June 2019 IESP and the September 2022 assessment of the student, that the IHO erred in calculating the student's age and current grade in that as of the September 2022 assessment the student had just turned 14 and was in eighth grade, and that the IHO erred in reviewing the student's grade level scores in that most of the student's reading scores equated to a third-grade level based on age equivalent scores, noting the student's scores in reading, basic reading skills, letter-word identification, spelling, passage comprehension, and spelling sounds.

Considering the IHO's analysis and the parent's appeal, in an attempt to measure the student's progress from June 2019 up to the 2022-23 school year, a review will be made of the student's academic functioning as reported in the June 2019 IESP compared to the student's academic functioning as of the 2022-23 school year based on the limited information available, including the June 2022 teacher letter, the September 2022 W-J IV assessment conducted by the student's SETSS provider, and the testimony of the student's SETSS provider.

The SETSS provider testified that All Kidz began providing SETSS to the student during the 2018-19 school year, which continued in subsequent school years (Tr. pp. 74-75).

The June 2019 IESP indicated that in September 2018 the student "was unable to encode and decode CVC's, [and] he was struggling with fact finding skills needed for basic comprehension" (Dist. Ex. 3 at p. 2). Further, the IESP noted that that student "struggle[d] with comprehension due to his lack of reading fluency, conceptualizing, fluid reasoning, memory issues, processing skills and organization" (*id.*). According to the IESP, the student "was unable to write a simple sentence" and he "continue[d] to struggle spelling words with long vowel sounds, vowel digraphs and consonant digraphs" (*id.*). Further, the IESP indicated that the student's "math skills were limited to double digit addition and single digit subtraction" (*id.*). Additionally, the

IESP indicated that according to "informal classroom assessments" the student was performing at the second-grade level in reading, writing, and mathematics and indicated that there was "a considerable gap" in the student's reading, spelling, comprehension, writing, and math skills (*id.* at pp. 1, 2).

The June 2022 teacher letter identified similar academic difficulties as the June 2019 IESP (*compare* Parent Ex. F, *with* Dist. Ex. 3 at p. 2). In fact, a comparison of the June 2022 teacher's letter with the June 2019 IESP shows that much of the language regarding the student's abilities remained consistent over the three year gap (*compare* Parent Ex. F, *with* Dist. Ex. 3 at p. 2). For example, both reports indicate that the student was unable to write simple sentences, he struggled spelling words with long vowel sounds, vowel digraphs, and consonant digraphs, he struggled with fact finding skills needed for basic comprehension, he struggled with comprehension due to his lack of reading fluency, conceptualizing, fluid reasoning, memory issues, processing skills, and organization (*compare* Parent Ex. F, *with* Dist. Ex. 3 at p. 2).<sup>18</sup> However, while the June 2019 IESP indicated the student's math skills were limited to double digit addition and single digit subtraction, the June 2022 teacher letter indicated his math skills were limited to multiplication and division, showing some improvement (*compare* Parent Ex. F at p. 1, *with* Dist. Ex. 3 at p. 2). The teacher letter also stated that, as of June 2022, there was a "considerable gap in [the student's] reading skills, spelling skills, comprehension skills, writing skills and math skills compared to his peers" (Parent Ex. F at p. 1).

As asserted by the parent, the September 2022 assessment reported the student's age equivalent score for reading as "comparable to that of the average individual at age 8-9" with a standard score of 73 falling in the low range (Parent Ex. C at pp. 3, 5). Additionally, with respect to reading skills, as noted above, the September 2022 assessment report also indicated that the student scored in the low average range in the phoneme-grapheme knowledge cluster and in a test for spelling of sounds, in the low range on the reading and basic reading skills clusters and on tests of letter-word identification and passage comprehension, but in the very low range on the broad reading, reading comprehension, reading comprehension-extended, reading rate clusters and on tests of spelling, sentence reading fluency, reading recall, word reading fluency, reading vocabulary (*id.* at p. 2). The reported age equivalencies for these clusters ranged from "5-7" for reading rate to "8-11" for basic reading skills (*id.* at p. 3). As noted by the parent, a typical student at the age of 8 would be in third grade; however, the September 2022 assessment report also indicated that the student "may gain the most from reading instruction presented within the middle to late first grade range," (*id.* at p. 2). The report also indicated that writing instruction presented within the late second grade to late third grade level "may be appropriate," and that "[m]ath instruction presented within the middle fourth grade to middle fifth grade range may produce the greatest gains" (*id.*). Additionally, the SETSS provider's testimony indicated that in November 2022 the student was reading at a third grade level, and he was performing at a fifth grade level for mathematics (Parent Ex. G at ¶ 6).

Based on the above, a comparison of the student's present levels of performance as shown in the June 2019 IESP with the more current reports of student's performance shows that, in the

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<sup>18</sup> While the June 2022 teacher letter indicted that the student had difficulty reading words with long vowel sounds, vowel digraphs, and consonant digraphs, the June 2019 IESP only indicated difficult spelling such words (*compare* Parent Ex. F, *with* Dist. Ex. 3 at p. 2).

course of approximately three years, the student made some, although limited, gains with respect to reading and writing (compare Dist. Ex. 3 at p. 2, with Parent Exs. C at pp. 2, 3; F; G at ¶ 6). Additionally, the student made more tangible progress in mathematics moving from working on double digit addition and single digit subtraction to multiplication and division (compare Dist. Ex. 3 at p. 2, with Parent Ex. F). Accordingly, while the student's progress, as reported, definitely leaves areas where the IHO's questioning of the effectiveness of the services provided to the student was reasonable, it also shows some incremental gains. Moreover, while it is conceivable that the student would have made more progress had he received additional special education support, that is not the standard to be applied in assessing the appropriateness of the unilaterally-obtained SETSS as it was not the parent's burden to show that the services obtained provided every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). Rather, the question posed is whether the SETSS delivered to the student provided instruction specially designed to meet the unique needs of the student. For the reasons set forth above, the parent met her burden to prove that the SETSS provided specially designed instruction particularly given the district's concession that the student was entitled to seven period of SETSS per week (Tr. p. 60).

In addition to the IHO's finding regarding the student's prior progress while receiving SETSS, the IHO raised concerns about the testimony of the SETSS provider (IHO Decision at pp. 16, 18). In particular, the IHO determined that there were inconsistencies in the SETSS provider's testimony, such that the IHO found "it was not fully credible and it [wa]s unclear what [wa]s true or not in this matter" (id. at p. 18). In reviewing the IHO's decision, the IHO questioned two portions of the SETSS provider's testimony (id. at pp. 16-17). First, the IHO found that the SETSS provider blamed the student for refusing summer services, and, second, the IHO found that the SETSS provider "did not see the benefit in knowing what [the] [s]tudent's underlying disabilities [we]re, even though they appear[ed] extreme by the laundry list in her affidavit" (id. at pp. 16-17). The parent appeals from these findings asserting that the IHO misconstrued the SETSS provider's testimony.

Generally, an SRO gives due deference to the credibility findings of an IHO unless non-testimonial evidence in the hearing record justifies a contrary conclusion or the hearing record, read in its entirety, compels a contrary conclusion (see Carlisle Area Sch. v. Scott P., 62 F.3d 520, 524, 528-29 [3d Cir. 1995]; P.G. v City Sch. Dist. of New York, 2015 WL 787008, at \*16 [S.D.N.Y. Feb. 25, 2015]; M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 330 [E.D.N.Y. 2012], aff'd, 725 F.3d 131 [2d Cir. 2013]; Bd. of Educ. of Hicksville Union Free Sch. Dist. v. Schaefer, 84 A.D.3d 795, 796 [2d Dep't 2011]). However, in addressing credibility determinations made in other administrative settings, the Second Circuit Court of Appeals has pointed out that an assessment of a witness' credibility should provide specific reasons for the adverse credibility determination (see Zhang v. U.S. I.N.S., 386 F.3d 66, 74 [2d Cir. 2004] [2d Cir. 2007] [noting that court looks to see if the trial judge "provided 'specific, cogent' reasons for the adverse credibility finding and whether those reasons bear a 'legitimate nexus' to the finding"]; Williams v. Bowen, 859 F.2d 255, 260-61 [2d Cir. 1988] ["A finding that the witness is not credible must nevertheless be set forth with sufficient specificity to permit intelligible plenary review of the record"]).

Turning to the IHO's findings supporting the credibility determination, initially, the IHO accurately reviewed the evidence in the hearing record, including the SETSS provider's testimony

(IHO Decision at pp. 6-10). On the issue of summer services, the IHO noted that the SETSS provider testified that the student did not want to get summer services, that the student fought with the parent over it until the nonpublic school got involved, that the student's nonpublic school "put their foot down," and that the student had to go along with it (*id.* at pp. 6-7). Later, in her analysis, the IHO determined that the SETSS provider blamed the student for refusing summer services, that the "[p]arents [we]re not mentioned as actors in this, which makes no sense" and that the student "is a child and not responsible for the determination of whether he should receive [s]ummer [s]ervices" (*id.*). Reviewing the hearing record, when asked about the parent's request for 12-month services and whether she agreed that it was required, the SETSS provider testified "[v]ery much so" and that she and the student's school had mentioned concerns in the past (Tr. pp. 76-77). She continued that the student "refused" the summer services, "[h]e did not want to have anything related to this," and there was "always a fight" over it (Tr. p. 77). Continuing, the provider testified that for summer 2022 "the school put their foot down more" and "demanded that the [student] ha[d] to have the summer services" such that the student "knew he had no choice . . . [h]e had to go along with it" (*id.*). Review of this testimony shows that the SETSS provider was attempting to explain what happened in response to a question rather than assigning blame to the student or the parents.

Additionally, the parent asserts that the IHO misconstrued the SETSS provider's testimony by concluding that she "did not know what [the] [s]tudent's short-term memory and slow processing stemmed from" and further that "what it stemmed from was 'irrelevant'" (IHO Decision pp. 8-9). The IHO found this was "a surprising moment in her testimony when she testified [the student's] underlying disabilities did not matter" (*id.* at p. 17). However, review of the hearing transcript supports the parent's position that the IHO was misconstruing the witness's testimony.

At the impartial hearing, the parent's attorney questioned the SETSS provider asking "who prompted a request for [the student] to receive summer services in 2022?" to which the SETSS provider responded:

Well, the Parent contacted me. The school contacted the Parent that he is really lagging terribly behind because it comes in every year. And . . . he has an immense . . . severe short-term memory, very slow processing. I don't know if it stems from APD or ADD or any of those things but irrelevant. So it takes him really long to maintain information. And then when summer comes, he just loses it.

(Tr. p. 76).<sup>19</sup>

Further, as discussed in more detail above, the SETSS provider testified regarding the student's deficits and needs (Parent Ex. G at ¶¶ 8, 10-12). The SETSS provider also testified as to the issues pointed out by the IHO, that the student had severe short-term memory issues and very slow processing deficits, which were well documented in the hearing record (Tr. p. 76; Parent Exs. F at p. 1; G ¶ 8; Dist. Ex. 3 at p. 1). While use of the term "irrelevant" may have been inartful, it appears from the testimony that the term was used in reference to the relevance to the request for

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<sup>19</sup> The parent asserts that "APD" and "ADD" represent auditory processing delays and attention deficit disorder, respectively (*see* Req. for Rev. ¶ 14).

12-month services (i.e., that he took a long time to maintain information, which was then lost over the summer, and therefore required 12-month services irrespective of the underlying diagnosis that gave rise to these needs)<sup>20</sup> or to the question posed (i.e., who prompted the request for 12-month services) rather than the relevance as to how or what to provide for the student for special education as it was taken by the IHO. However, the testimony does not support the IHO's broad interpretation that the provider was not knowledgeable about or was dismissive of the student's needs.

In addition to the above, the IHO stated, without identifying anything specific, that "[t]here were inconsistencies" in the SETSS providers testimony (IHO Decision at p. 18). Other than the above identified issues that the IHO had with the SETSS provider's testimony—including the student's grade level functioning as reported in the September 2022 assessment and the testimony regarding the summer services and the student's underlying disabilities—review of the IHO's decision shows that the only other issue that she identified with the SETSS provider's testimony was as to whether the student received SETSS at his nonpublic school or at the provider's agency (see IHO Decision at pp. 6-10).

Thus, based on the totality of the circumstances, the evidence in the hearing record demonstrates that unilaterally-obtained SETSS reasonably served the student's individual needs, and the IHO's findings to the contrary are reversed.

### **C. Equitable Considerations**

Having found that the district failed to provide a FAPE and equitable services to the student for the 2022-23 school year and that All Kidz provided the student with services that were appropriate to address the student's needs, the inquiry now turns to whether equitable considerations support the parent's request for relief.

The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]; L.K.

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<sup>20</sup> This view would be consistent with authority whereby courts have given considerably less weight to identifying the underlying theory or root causes of a student's educational deficits and have instead focused on ensuring the parent's equal participation in the process of identifying the academic skill deficits to be addressed through special education and through the formulation of the student's IEP (see Fort Osage R-1 Sch. Dist. v. Sims, 641 F.3d 996, 1004 [8th Cir. 2011] [noting the IDEA's strong preference for identifying the student's specific needs and addressing those needs and that a student's "particular disability diagnosis" in an IEP "will, in many cases, be immaterial" because the IEP is tailored to the student's individual needs]; Draper v. Atlanta Indep. Sch. Sys., 480 F. Supp. 2d 1331, 1342 [N.D. Ga. 2007]; see also Application of a Student with a Disability, Appeal No. 21-056; Application of the Dep't of Educ., Appeal No. 12-013; Application of a Student with a Disability, Appeal No. 09-126 [noting that "a student's special education programming, services and placement must be based upon a student's unique special education needs and not upon the student's disability classification"]. "Indeed, [t]he IDEA concerns itself not with labels, but with whether a student is receiving a free and appropriate education" (Heather S. v. State of Wisconsin, 125 F.3d 1045, 1055 [7th Cir.1997]).

v. New York City Dep't of Educ., 674 Fed. App'x 100, 101 [2d Cir. Jan. 19, 2017]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014] [identifying factors relevant to equitable considerations, including whether the withdrawal of the student from public school was justified, whether the parent provided adequate notice, whether the amount of the private school tuition was reasonable, possible scholarships or other financial aid from the private school, and any fraud or collusion on the part of the parent or private school]; 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"]).

Reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to their removal of the student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger v. Medina City Sch. Dist., 348 F.3d 513, 523-24 [6th Cir. 2003]; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G., 459 F.3d at 376; Voluntown, 226 F.3d at 68).

As indicated by the IHO, there is no evidence in the hearing record that the parent provided the district with notice of her intention to obtain private services and request public funding, a finding that the IHO indicated was a factor in determining relief, particularly for the 12-month services (see IHO Decision at p. 18). Initially, the parent did not address the IHO's finding as to the required ten business day notice in her request for review. However, the district addressed the issue in its answer, noting that the IHO found that the parent did not provide the district with notice that she was obtaining services for the student unilaterally and arguing that the failure to provide the notice warrants a denial of relief (Answer ¶¶ 13, 22). In an answer to the district's cross-appeal, the parent addresses equitable considerations and asserts, for the first time, that the notice requirement does not apply as the parent was seeking services pursuant to the State's dual-enrollment statute, that the notice requirement only applies where a parent is "removing" a student from a public school setting and no publicly funded services were offered to the student, and that even if the notice was required it is not applicable because there is no evidence in the hearing record that the parent received the required procedural safeguards notice.

Initially, the parent has not properly appealed from the IHO's determination that the parent failed to provide the district with 10 business day notice of her intent to obtain services unilaterally

and that the failure to provide such notice is a factor in limiting relief based on equitable considerations. State regulations provide that a request for review "shall clearly specify the reasons for challenging the [IHO's] decision, identify the findings, conclusions, and orders to which exceptions are taken, or the failure or refusal to make a finding, and shall indicate what relief should be granted by the [SRO] to the petitioner" (8 NYCRR 279.4[a]). As the parent did not properly appeal from the IHO's finding on this issue, that finding is final and binding on the parties (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]).

However, it remains to be determined whether the relief awarded in this matter should be reduced or denied given the lack of 10-day notice. In this instance, the reason for a finding of a denial of FAPE is that the district did not develop an educational program for the student for the 2022-23 school year. As indicated above, the purpose of the 10 business day notice is to give the district an opportunity to determine if it can provide a suitable education to the student (see Greenland, 358 F.3d at 160). Thus, this appears to be the situation in which a notice could have been beneficial for both parties. Accordingly, in review of the events leading up to the district's denial of a FAPE to the student for the 2022-23 school year, a 10 percent reduction in the relief awarded for the SETSS delivered to the student is warranted.

#### **D. Relief—Financial Obligation**

The IHO was unconvinced that the parent was financially responsible for the SETSS she obtained for the 2022-23 school year due to the parent's failure to appear and testify at the impartial hearing. The parent appeals asserting that the hearing record includes evidence of her financial obligation without her testimony and the district presented no argument in the alternative or related to the reasonableness or appropriateness of the hourly rate charged by All Kidz for its services (Req. for Review ¶ 16).

The Second Circuit Court of Appeals has held that a direct payment remedy is an appropriate form of relief in some circumstances, and that "[i]ndeed, where the equities call for it, direct payment fits comfortably within the Burlington–Carter framework" (E.M. v. New York City Dep't of Educ., 758 F.3d 442, 453 [2d Cir. 2014]; see also Mr. and Mrs. A. v. New York City Dep't of Educ., 769 F. Supp. 2d 403, 430 [S.D.N.Y. 2011] [finding it appropriate to order a school district to make retroactive tuition payment directly to a private school where equitable considerations favor an award of the costs of private school tuition but the parents, although legally obligated to make tuition payments, have not done so due to a lack of financial resources]).

The parent entered a contract with All Kidz to provide the student with seven periods per week of SETSS from July 1, 2022 to June 30, 2023 at a specified hourly rate (Parent Ex. H). Per the contract, because the parent commenced an impartial hearing, All Kidz agreed to wait until the conclusion of this proceeding before issuing any invoices for the SETSS provided to the student during the 2022-23 school year and further agreed that, if the parent succeed in obtaining direct funding in full for all SETSS provided at the agency's rate, All Kidz would wait for payment to come directly from the district (id.). Regarding summer services, the SETSS provider testified that "the parent knew that there was no choice" that the student needed summer services and All Kidz "drew up a contract that if the [district] will not fund it, [the parent] will privately fund it" (Tr. p. 79). Further, she testified that there was no invoice sent to the parent for summer services

because she is "waiting to see what the decision is going to be" (Tr. p. 87). In addition, the parent submitted her 2021 income tax return to show that she was unable to front the cost of the student's SETSS for the 12-month 2022-23 school year (Parent Ex. M).

Under these circumstances, the appropriate equitable relief consists of direct funding of the student's SETSS for the 12-month 2022-23 school year subject to the adjustment described above based upon the parent's failure to provide the district with adequate notice (see Mr. and Mrs. A., 769 F Supp. 2d at 406; A.R. v. New York City Dep't of Educ., 2013 WL 5312537, at \*11 [S.D.N.Y. Sept. 23, 2013]). Accordingly, I find that the parent is entitled to direct funding of the SETSS provided to the student by All Kidz for the 2022-23 school year as set forth in the agreement between the parent and All Kidz, less the equitable reduction discussed above.

### **E. Independent Education Evaluation**

The parent alleges that the IHO erred in denying her request for funding of the September 2022 assessment. According to the parent, the IHO erred in finding that she did not identify the district evaluation that she disagreed with, asserting that she disagreed with the evaluations and assessments used to create the June 2019 IESP because they were "no longer timely or relevant" (Req. for Review ¶ 15). The district argues to uphold the IHO's determination and further alleges that it is unclear that the September 2022 administration of the W-J IV was an actual evaluation. The district also cross-appeals from the IHO's order directing it to conduct a full evaluation of the student, arguing that neither party requested an order directing the district to evaluate the student.

In her decision, the IHO found the parent made a vague statement and did not "state with any clarity what evaluations [she] disagreed with when requesting . . . to obtain independent evaluations" (IHO Decision at p. 18). Further, the IHO held that the W-J IV assessment was part of All Kidz's process and should have been billed as part of the SETSS (id.). In addition, although the IHO denied funding for the September 2022 assessment, the IHO found that the student's levels of academic functioning were unknown at the end of the 2021-22 school year as there was no "empirical or quantitative information about his academic levels or performance provided in the record" (id. at p. 8). Accordingly, the IHO ordered the district to conduct a "full evaluation" of the student including "all evaluations and assessments necessary for an initial or triennial evaluation" (id. at p. 17).

The IDEA and State and federal regulations guarantee parents the right to obtain an IEE (see 20 U.S.C. § 1415[b][1]; 34 CFR 300.502; 8 NYCRR 200.5[g]), which is defined by State regulation as "an individual evaluation of a student with a disability or a student thought to have a disability, conducted by a qualified examiner who is not employed by the public agency responsible for the education of the student" (8 NYCRR 200.1[z]; see 34 CFR 300.502[a][3][i]). Parents have the right to have an IEE conducted at public expense if the parent expresses disagreement with an evaluation conducted by the district and requests that an IEE be conducted at public expense (34 CFR 300.502[b]; 8 NYCRR 200.5[g][1]; see K.B. v Pearl Riv. Union Free Sch. Dist., 2012 WL 234392, at \*5 [S.D.N.Y. Jan. 13, 2012] [noting that "a prerequisite for an IEE is a disagreement with a specific evaluation conducted by the district"]; R.L. v Plainville Bd. of



Educ., 363 F. Supp. 2d. 222, 234-35 [D. Conn. 2005] [finding parental failure to disagree with an evaluation obtained by a public agency defeated a parent's claim for an IEE at public expense]).<sup>21</sup>

If a parent requests an IEE at public expense, the school district must, without unnecessary delay, either (1) ensure that an IEE is provided at public expense; or (2) initiate an impartial hearing to establish that its evaluation is appropriate or that the evaluation obtained by the parent does not meet the school district criteria (34 CFR 300.502[b][2][i]-[ii]; 8 NYCRR 200.5[g][1][iv]). If a school district's evaluation is determined to be appropriate by an IHO, the parent may still obtain an IEE, although not at public expense (34 CFR 300.502[b][3]; 8 NYCRR 200.5[g][1][v]). Additionally, both federal and State regulations provide that "[a] parent is entitled to only one [IEE] at public expense each time the public agency conducts an evaluation with which the parent disagrees" (34 CFR 300.502[b][5]; 8 NYCRR 200.5[g][1]). The Second Circuit Court of Appeals has recently found that, if a district and a parent agree that a student should be evaluated before the required triennial evaluation "the parent must disagree with any given evaluation before the child's next regularly scheduled evaluation occurs" or "[o]therwise, the parent's disagreement will be rendered irrelevant by the subsequent evaluation" (D.S. v. Trumbull Bd. of Educ., 975 F.3d 152, 170 [2d Cir. 2020]).

Initially, in past decisions, SROs have held that a parent may request a district funded IEE in a due process complaint notice in the first instance (see Application of a Student with a Disability, Appeal No. 19-094). However, this is not exactly the process contemplated by the IDEA and its implementing regulations (34 CFR 300.502[b]; 8 NYCRR 200.5[g][1]), and, in most instances it is likely that a parent would be in a better position to elicit an agreement from the district to fund an IEE if the IEE was requested outside of the more formal context of an impartial hearing.

In either case, in this instance, the IHO correctly found that the parent did not express disagreement with a district evaluation. A full review of the parent's due process complaint notice shows that the parent "disagree[d] with the results of the [district's] most recent evaluations and disagree[d] that they remain timely and relevant" (Parent Ex. A at p. 3). Although the parent disagreed with a district evaluation, it appears that her disagreement was based on the evaluation no longer containing relevant information regarding the student's current functioning. The parent's request for review makes this point clear, as she clarified that she alleged the district's last evaluations "were no longer timely or relevant" (Req. for Rev. ¶ 15). The Second Circuit has made it clear that a parent must disagree with a district evaluation as of the time it was conducted, and that subsequent changes in circumstances do not support a disagreement with an evaluation (Trumbull, 975 F.3d at 171 [2d Cir. 2020] citing N.D.S. by and Through de Campos Salles v. Acad. for Sci. and Agric. Charter Sch., 2018 WL 6201725, at \*2 [D. Minn. Nov. 28, 2018] ["Informing a school that, subsequent to an evaluation, a child's condition has changed is not the same thing as disagreeing with the evaluation"]). Under those circumstances, the appropriate course of action "would be more frequent evaluations—and the parents are entitled to request one

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<sup>21</sup> Guidance from the United States Department of Education's Office of Special Education Programs (OSEP) indicates that if a parent disagrees with an evaluation because a child was not assessed in a particular area, "the parent has the right to request an IEE to assess the child in that area to determine whether the child has a disability and the nature and extent of the special education and related services that child needs" (Letter to Baus, 65 IDELR 81 [OSEP 2015]; see Letter to Carroll, 68 IDELR 279 [OSEP 2016]).

per year—not an IEE at public expense. If the parent disagrees with those evaluations, then they would be free to request an IEE at public expense with which to counter" (Trumbull, 975 F.3d at 171). Based on the above, the parent's disagreement with the district's evaluations does not support her request for an IEE.

Turning to the IHO's determination that the student's level of functioning was unknown and order directing the district to conduct a "full evaluation" of the student (IHO Decision at pp. 8, 17), according to the district's September 2022 due process response, the CSE relied on the following information when creating the student's June 2019 IESP: a social history update; a psychoeducational evaluation; a classroom observation; related service progress reports/evaluations; teacher progress reports; and a SETSS progress report (Dist. Ex. 1 at pp. 2-3).<sup>22</sup> As noted above, the parent disagreed with the evaluative information available to the June 2019 CSE as it was no longer relevant (see Parent Ex. A at p. 3). Accordingly, there is no evidence in the hearing record to indicate that the district has reevaluated the student since those evaluations considered in 2019 or that the parent agreed in writing that such a reevaluation was unnecessary (see generally, Parent Exs. A-M; Dist. Exs. 1-3; Tr pp. 1-94). Under the IDEA, a district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). As the IHO appears to have weighed the lack of evaluative information in finding that the district failed to offer the student a FAPE, the IHO's order directing the district to conduct an evaluation of the student appears to have been a reasonable exercise of his equitable powers (see, e.g., Mr. and Mrs. A v. New York City Dep't of Educ., 769 F. Supp. 2d 403, 422-23, 427-30 [S.D.N.Y. 2011]; see Forest Grove v. T.A., 129 S.Ct. 2484 [2009]).

## **VII. Conclusion**

As discussed above, the district failed to meet its burden to prove that it offered the student a FAPE for summer 2022 and provided the student with appropriate services on an equitable basis for the 10-month portion of the 2022-23 school year. In addition, the hearing record supports a finding that the parent's unilaterally obtained SETSS from All Kidz were appropriate to address the student's educational needs for the 2022-23 school year, and equitable considerations warrant a 10 percent reduction in the relief awarded.

**THE APPEAL IS SUSTAINED TO THE EXTEND INDICATED.**

**THE CROSS-APPEAL IS DISMISSED.**

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<sup>22</sup> The district's due process response fails to specify the dates of any report, assessment or evaluation used to create the June 2019 IESP and, as noted above, the district failed to submit additional evidence to support its position in this matter.

**IT IS ORDERED** that the IHO's decision, dated December 17, 2022, is modified by reversing those portions which found that the parent's unilaterally obtained SETSS for the 12-month 2022-23 school year provided by All Kidz were inappropriate; and

**IT IS FURTHER ORDERED** that upon presentation of proof of delivery of services to the student, the district shall directly fund to All Kidz of the cost of up to 7 hours per week of SETSS delivered to the student over the 2022-23 school year, including summer 2022, at the hourly rate set forth in the contract, reduced by 10 percent based on equitable considerations.

**Dated:**           **Albany, New York**  
                          **March 17, 2023**

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**SARAH L. HARRINGTON**  
**STATE REVIEW OFFICER**