



The University of the State of New York

The State Education Department

State Review Officer

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No. 23-076

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

Appearances:

Law Office of Philippe Gerschel, attorneys for petitioner, by Philippe Gerschel, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Brian J. Reimels, 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 daughter's privately obtained special education teacher support services (SETSS) and related services for the 12-month, 2022-23 school year. Respondent (the district) cross-appeals from the IHO's awarded relief. 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 IDEA (20 U.S.C. §§ 1400-1482), namely a local CSE that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414 [d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts related to IESPs, State law provides that "[r]eview of the recommendation of the committee on special education may be obtained by the parent or person in parental relation of the pupil pursuant to the provisions of [Education Law § 4404]," which effectuates the due process provisions called for by the IDEA (Educ. Law § 3602-c[2][b][1]). Incorporated among the procedural protections of the IDEA and the analogous State law provisions is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

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

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

A Committee on Preschool Special Education (CPSE) convened on August 3, 2020 and found the student eligible for special education as a preschool student with a disability (Parent Ex. B at p. 1). The August 2020 CPSE developed an IEP recommended the student receive eight hours per week of direct special education itinerant teacher (SEIT) services in a group up to a 2:1 ratio, two 30-minute sessions per week of individual speech-language therapy, one 30-minute session per week of speech-language therapy in a group up to a 2:1 ratio, and two 30-minute sessions per week of individual occupational therapy (OT) (id. at p. 6).

A CSE convened on March 17, 2021 and, finding the student eligible for special education as a student with a speech or language impairment, developed an IESP for the student for the 10-month 2021-22 school year; the IESP indicated the student would be parentally placed for the 2021-22 school year (Parent Ex. D at pp. 1, 14).¹ For the 10-month portion of the school year, the March 2021 CSE recommended five periods per week of direct, group SETSS in Yiddish, two 30-minute sessions per week of individual speech-language therapy in Yiddish, one 30-minute session per week of group speech-language therapy in Yiddish, and two 30-minute sessions per week of OT in English (id. at p. 12).²

For the 2021-22 school year, the student attended a different private school from the one identified in the IESP (compare Parent Ex. D at p. 1, with Parent Ex. K at p. 2).

On June 1, 2022, the parent signed a contract with Lead Remedial Services (Lead Remedial) pursuant to which, the parent authorized Lead Remedial to provide an unspecified amount of SETSS to the student for the duration of the 2022-23 school year at an unspecified hourly rate (Parent Ex. G).

A CSE convened on June 21, 2022 to develop an IEP for the summer portion of the 12-month 2022-23 school year (Parent Ex. K at pp. 1, 10, 14, 15). The June 2022 CSE continued to find the student eligible for special education as a student with a speech or language impairment (id. at p. 1). The June 2022 CSE recommended 12-month services consisting of five periods per week of direct, group SETSS in English language arts (ELA) and math to be delivered in Yiddish

¹ The student's eligibility for special education as a student with a speech or language impairment is not in dispute (see 34 CFR 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

² 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 Dept 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).

(id. at p. 10). The June 2022 IEP indicated the recommended services were to be implemented from July 5, 2022 through August 19, 2022 (id. at pp. 1, 10).

In a letter, dated August 26, 2022, the parent notified the district of her disagreement with the recommendations contained in the March 2021 IESP, specifically noting her rejection of "the most recent reduced recommendations" and of her intention to provide the student with "the prior recommended services" (Parent Ex. C at pp. 2, 3). The parent further notified the district of her intention to seek reimbursement or direct payment from the district "for this special education program and related services" (id. at p. 3).

A. September 2022 Due Process Complaint Notice

In a due process complaint notice dated September 13, 2022, the parent alleged that the district denied the student a free appropriate public education (FAPE) and asserted a right to pendency based on the August 2020 CPSE IEP (Parent Ex. A at p. 2). The parent alleged that the March 2021 IESP failed to recommend an appropriate placement for the student and reduced the recommendation for eight periods per week of individual SEIT services to five periods per week of group SETSS (id.). The parent further contended that the student required "a continuation of the broader SEIT program or an appropriate placement in a hybrid special education/general education program" that would address the student's special education needs in a mainstream environment (id. at p. 3). The parent alleged that SETSS was "a more limited service that d[id] not address the broader organizational, executive functioning, [and] social skills that [we]re needed for [the student] to meet [her] goals" (id.). The parent next alleged that, due to the district's failure to recommend a proper placement for the student, the parent was "left with no choice but to implement the SEIT program independently and seek reimbursement from the [district]" (id.). The parent also requested compensatory services, stating that, due to the difficulties in locating a SETSS and related services provider "from the [district] or even independently," the parent reserved the right to request compensatory SETSS and related services "for any periods not provided during the current 2022[-]23 school year" (id.).

As relief, the parent requested findings that the March 2021 IESP was "outdated, expired, and constitute[d] a denial of a FAPE"; that the district's failure to recommend "the continuation of SEIT program [wa]s a denial of a FAPE"; and that the failure by the district to recommend an appropriate placement for the student was a denial of a FAPE (Parent Ex. A at p. 3). "[A]bsent an up-to-date program," the parent also requested "an order that the recommendations on the IEP dated [August, 3, 2020] continue for the 2022-23 school year" (id.). The parent further requested, "in the event that [the p]arent w[as] . . . unable to locate services providers that [the student] [wa]s entitled to under pendency," that the IHO issue "an order that the [district] shall fund a bank of compensatory education equivalent to the missed services" (id.).

B. Impartial Hearing, Interim Decisions, and February 2023 Due Process Complaint Notice

A hearing date devoted to addressing the student's pendency placement was held on December 21, 2022, to which the district did not appear (Tr. pp. 6-12).³ The parent indicated that

³ A prehearing conference was held on November 29, 2022, at which the pendency hearing was scheduled (Tr.

an August 3, 2020 IEP was the student's last agreed upon program and that a more recent "IEP" was challenged by the parent (Tr. p. 9). The IHO indicated that he would accept all of the parent's proposed exhibits and "issue a pendency order for the services requested retroactive to the filing of the due process complaint" (Tr. p. 10). The IHO scheduled an additional hearing date (Tr. p. 11).

In an interim decision on pendency, dated December 23, 2022, the IHO determined that there was no dispute that the August 2020 CPSE IEP was the student's last-agreed upon program (Dec. 23, 2022 Interim IHO Decision at p. 2). The IHO ordered the district to "provide" the student with eight hours per week of "2:1 direct SEIT services, two 30-minute sessions per week of individual speech-language therapy, one 30-minute session per week of 2:1 speech-language therapy, and two 30-minute sessions per week of individual [OT]" as pendency retroactive to the filing of the parent's September 13, 2022 due process complaint notice (id. at p. 5).

The parent and IHO appeared for a hearing on January 18, 2023 (Tr. pp. 13-18). The district did not appear, and the parent's attorney indicated that the matter was unlikely to settle and requested an additional hearing date (Tr. pp. 15-16).

In a subsequent due process complaint notice, dated February 13, 2023, the parent alleged that the district had failed to implement the June 2022 IEP, which recommended five periods per week of direct, group SETSS in ELA and math provided in Yiddish for the summer 2022 (Parent Ex. J at p. 2). The parent alleged that she had been unable to locate SETSS providers and the district had failed to implement the June 2022 IEP (id.). The parent further alleged that "[w]ithout supports, the parental mainstream placement [wa]s untenable, and the failure to either implement the services or provide a placement [wa]s a denial of a FAPE" (id.). The parent alleged that she utilized the district's online resources to locate SETSS providers, "but the providers [she] contacted were unable to service [her] child, either due to the low standard rate offered by the [district], or due to the general dearth of providers in this neighborhood" (id.). The parent asserted that she had located appropriate service providers independently for the summer 2022 "at their prevailing rate" (id.). In addition, due to the difficulties in locating service providers "from the [district] or even independently," the parent reserved the right to request "compensatory SETSS for any periods not provided during the summer of 2022" (id.). As relief, the parent requested a finding that the failure of the district to implement its recommendations was a denial of a FAPE; an order requiring the district to fund the providers located by the parent at their prevailing rates; and an order that the district fund a bank of compensatory periods of SETSS "for the entire summer of 2022 - or the parts of which were not serviced" (id. at p. 3).

The impartial hearing reconvened on February 21, 2023; the district did not appear (Tr. pp. 19-28). The IHO indicated that a discussion had occurred off the record, wherein the parent's attorney stated that the parent had filed an additional due process complaint notice and had requested consolidation of the two matters (Tr. p. 20). The IHO agreed to consolidate the parent's due process complaint notices and scheduled an additional hearing date (Tr. pp. 20-21, 25).

pp. 1-5). The district did not appear for the prehearing conference.

By interim decision dated February 21, 2023, the IHO consolidated the parent's September 13, 2022 due process complaint notice and February 13, 2023 due process complaint notice (Feb. 21, 2023 Interim IHO Decision at p. 1).

The hearing continued on March 29, 2023 (Tr. pp. 29-42). The district did not appear and the IHO noted that the district had never appeared in this matter (Tr. p. 32). The parent gave an opening statement and the parent's documentary evidence was admitted (Tr. pp. 33-35, 37).

C. Impartial Hearing Officer Final Decision

By decision dated March 31, 2023, the IHO found that "the parent raised the undisputed claim that the [d]istrict did not implement its IEP and IESP[s] that were and [are] in effect for the 12-month 2022-2023 school year, and that it reduced the [s]tudent's SETSS without basis, SETSS that the [s]tudent still needs" (IHO Decision at p. 5). The IHO further found that the district submitted no documents and called no witnesses to defend against the parent's allegations and, therefore, did not provide any explanation, "let alone a cogent and responsive explanation, for the [d]istrict's actions and inaction" (*id.* at p. 6). The IHO determined that the district did not meet its burden to prove that it provided the student a FAPE or equitable services for the 12-month, 2022-23 school year (*id.*). In discussing the summer 2022 recommended services for the student, the IHO found that there was "no dispute about the [s]tudent's special education program, no dispute that the [d]istrict did not implement the June 21, 2022, IESP, in effect for the summer session of the 2022-2023 school year, and no dispute that the [p]arent was forced to locate a service provider to implement the IESP" (*id.* at p. 7). The IHO determined that the appropriate remedy was for the district to fund the services that it was supposed to provide and did not (*id.*). The IHO further found that the hearing record demonstrated that the parent entered into a contract with a qualified SETSS provider and that the services were provided to the student (*id.*).

With regard to the 10-month portion of the 2022-23 school year, the IHO found that the "undisputed record, which [wa]s devoid of any evidence whatsoever as to the basis of the [d]istrict's recommendation of five periods per week of SETSS, nonetheless lack[ed] sufficient evidence to establish that the [s]tudent needed eight hours of SETSS or related services for the 10-month 2022-2023 school year" (IHO Decision at p. 7).

The IHO then turned to discussion of his prior pendency order which was based on an August 2020 CPSE IEP (IHO Decision at pp. 7-8). The IHO determined that the parent was entitled to funding for the provision of any services under the pendency order the IHO issued on December 23, 2022 (*id.* at p. 8). The IHO then noted that after the pendency order was issued, the parent filed the February 2023 due process complaint notice "acknowledging that there was a later, June 21, 2022, IESP" and that "[t]he due process complaint express[ed] no disagreement with that IESP but complain[ed] only of lack of implementation" (*id.*). The IHO found that, contrary to the parent's assertion the June 2022 IESP was only for summer 2022; according to the IHO "the [June 2022] IESP clearly applied to the entire upcoming 2022-2023 school year, as the implementation date was July 5, 2022, the projected next date of annual review [wa]s June 21, 2023, and the IESP was for a 12-month program" (*id.*).

The IHO next found that, as the parent only challenged lack of implementation of the June 2022 IESP, the parent was required to demonstrate that "the [s]tudent actually need[ed] eight hours

of SETSS per week and continuing related services for the 2022-2023 school year once the pendency order expire[d] on the date of [his decision]" (IHO Decision at p. 8). The IHO determined that the parent did not meet her burden (id.). Next, the IHO found that the student received five hours of SETSS in summer 2022 "and that thus far eight hours of SETSS as well as related services have been provided pursuant to the pendency order" and that "the only evidence that the [s]tudent actually needed eight hours of SETSS or the related services for the 2022-2023 school year c[a]me[] from one sentence in the service provider's affidavit dated February 16, 2023, well into the school year" (id. at pp. 8-9). The IHO further found that the provider's statement in support of eight hours of SETSS and related services was "called into question" by the provider's March 15, 2023 affidavit related to the services provided during summer 2022, wherein the provider stated that the student required "[five] periods of SETSS . . . per week for the 2022-2023 school year to avoid regression" (id. at p. 9). The IHO determined that even in the absence of the second affidavit, "a single conclusory sentence by the provider in the [s]pring of 2023 [wa]s inadequate to establish that eight hours of SETSS were needed and that five hours of SETSS would not have been sufficient, or that the [s]tudent actually needed related services, for the 2022-2023 school year" (id.). The IHO further found that "[t]he [p]arent provided no evidence or analysis of how the additional three hours of SETSS per week, or how continuation of the related services, would benefit the [s]tudent" (id.). The IHO also noted that the pendency order, which was based on an August 2020 CPSE IEP, did not provide evidence of the student's then-current needs (id.).

In summarizing his findings, the IHO stated that (1) the district failed to provide equitable services or offer a FAPE to the student for the 2022-23 school year; (2) the parent established that the district failed to implement the June 2022 IESP for the 12-month 2022-23 school year and that the parent was compelled to obtain the services of a private qualified SETSS provider for the 2022-23 school year; (3) the district failed to provide the SETSS and related services ordered in the December 23, 2022 pendency decision, that the parent obtained private qualified providers to provide the student's pendency services, and that the district should be required to fund the student's pendency services; (4) the parent failed to establish that the student needed special education services for the 2022-23 school year in excess of those services recommended in the June 2022 IESP, with which the parent did not disagree; and (5) the district should immediately provide the services recommended in the June 2022 IESP or fund services obtained by the parent for the remainder of the 2022-23 school year (id. at pp. 9-10).

The IHO then ordered the district to fund the services obtained by the parent and actually provided to the student for summer 2022, as recommended in the June 2022 IESP consisting of five hours per week of SETSS in Yiddish and provided a method for computing a rate for those services (IHO Decision at p. 10). The IHO further ordered the district to fund the SETSS and related services obtained by the parent and actually provided to the student by qualified providers to the extent ordered in the December 23, 2022 pendency order from September 13, 2022 through the date of his decision (id. at pp. 10-11). In addition, the IHO ordered the district to immediately provide the SETSS recommended in the June 2022 IESP, or continue to fund the SETSS obtained by the parent and actually provided to the student by qualified providers to the extent recommended in the June 2022 IESP (id. at p. 11).

IV. Appeal for State-Level Review

The parent appeals and initially asserts that the IHO mistakenly found that the June 2022 IEP was for the entire 12-month 2022-23 school year instead of just for summer 2022. The parent alleges that the IHO incorrectly believed that, because the parent sought implementation of the June 2022 IEP, the parent was therefore barred from seeking an increase in services for the ten-month program. The parent argues that, for the 10-month portion of the 2022-23 school year, she challenged the reduction in SETSS recommended in the March 2021 IESP. The parent alleges that the evidence she presented supported an increase in the mandated services from five periods of SETSS per week to eight periods of SETSS per week. The parent also contends that the IHO's order that the student was only entitled to five periods of SETSS was based on the mistaken belief that the June 2022 IEP was applicable to the 10-month portion of the 2022-23 school year. As relief, the parent requests that the IHO's decision be modified to reflect the recommendations set forth in the August 2020 CPSE IEP, which she described as eight periods of SETSS per week, or in the alternative that the matter be remanded to the IHO to reconsider his decision in light of his mistaken belief that the June 2022 IEP included a recommendation for the 10-month portion of the 2022-23 school year.⁴

In an answer and cross-appeal, the district argues that the IHO correctly determined that the parent needed to demonstrate the student's need for eight hours per week of SETSS for the 10-month school year and cross-appeals from the IHO's award of funding. Initially, the district cross-appeals from the IHO's acceptance of witness affidavits into the hearing record because the witnesses were not available for cross-examination. Next, the district cross-appeals from the IHO's award of relief asserting that it was contrary to his finding that the parent failed to meet her burden of demonstrating the appropriateness of the unilaterally obtained services. The district also cross-appeals from the IHO's failure to find that the parent did not demonstrate a financial obligation to her private service providers. As relief, the district requests that all awarded relief be annulled, or at a minimum, the awards of OT and speech-language therapy be annulled and the SETSS award be limited to five hours per week.⁵

⁴ As noted above, the August 2020 CPSE IEP recommended eight periods per week of SEIT services; however, the parent appears to refer to SEIT services and SETSS interchangeably at times. In a case such as this where SEIT services or SETSS were the main form of relief sought by the parent, but by State law and regulation SEIT services are typically not allowed for school-aged students (see Educ. Law § 4410[1][k]; 8 NYCRR 200.16[i][3][ii]), whereas SETSS could be permissibly recommended for the student but is not defined in the State's continuum (see 8 NYCRR 2006), it is not helpful that the hearing record lacks more testimony or evidence that clearly defines the contours and features of SETSS (versus SEIT services) as understood by the parties. However, whether denominated as SEIT services or SETSS, the substance of the relief sought in the instant matter is the provision to the student of educational services by a special education teacher who assists the student in addition to the student's classroom program at the student's nonpublic school.

⁵ The district's request that the IHO's award of OT and speech-language therapy be annulled is not consistent with the IHO's decision. The IHO awarded the parent OT and speech-language therapy as part of the student's pendency services (IHO Decision at pp. 9, 10). The IHO did not award the parent the related services she requested as relief for the denial of equitable services and the district does not contest the IHO's pendency determination; therefore, the district was not aggrieved by this aspect of the IHO's decision and the district's claim will not be further considered.

In a reply and answer to the district's cross-appeal, the parent argues that the IHO did not err in accepting her witnesses' affidavits and, had the district appeared for the impartial hearing, the parent would have requested an adjournment to allow her witnesses to appear. The parent further argues that, because the district defaulted by failing to appear at any of the five hearing dates, the district is precluded from arguing that it was denied the right to cross-examine the parent's witnesses. Next, the parent contends that she met her burden of demonstrating the appropriateness of her unilaterally obtained services. The parent argues that the district failed to object to the appropriateness of the parent's SETSS provider at the impartial hearing, that the IHO determined Lead Remedial provided SETSS under a contract with the parent through a qualified provider, and that the district should not be allowed to question the sufficiency of the parent's evidence after failing to object or question it during the hearing. The parent also contends that, as determined by the IHO, the evidence established a financial obligation pursuant to the contract with the SETSS provider. The parent further reasserts her arguments and requested relief as set forth in the request for review.

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 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 public school 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]).⁶ "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

⁶ 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]).

"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.*).⁷ Thus, under State law an eligible New York State resident student may be voluntarily enrolled by a parent in a nonpublic school, but at the same time the student is also enrolled in the public school district, that is dually enrolled, for the purpose of receiving special education programming under Education Law § 3602-c, dual enrollment services for which a public school district may be held accountable through an impartial hearing.

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. v. New York City Dep't of Educ.*, 694 F.3d 167, 184-85 [2d Cir. 2012]; *T.P. v. Mamaroneck Union Free Sch. Dist.*, 554 F.3d 247, 252 [2d Cir. 2009]). In *Burlington*, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; *see Gagliardo v. Arlington Cent. Sch. Dist.*, 489 F.3d 105, 111 [2d Cir. 2007]; *Cerra v. Pawling Cent. Sch. Dist.*, 427 F.3d 186, 192 [2d Cir. 2005]). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (*Burlington*, 471 U.S. at 370-71; *see* 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

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).

VI. Discussion

A. Conduct of Impartial Hearing

I first turn to the district's allegations about the parent's witness affidavits. Initially, as noted above, the district did not appear at the March 29, 2023 hearing and did not appear for any

⁷ State guidance explains that providing services on an "equitable basis" means that "special education services are provided to parentally placed nonpublic school students with disabilities in the same manner as compared to other students with disabilities attending public or nonpublic schools located within the school district" ("Chapter 378 of the Laws of 2007—Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the Individuals with Disabilities Education Act (IDEA) 2004 and New York State (NYS) Education Law Section 3602-c," Attachment 1 at p. 11, VESID Mem. [Sept. 2007], [available at http://www.p12.nysed.gov/specialed/publications/policy/nonpublic907.pdf](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.*).

other scheduled hearing date. At the March 29, 2023 hearing date, the parent's attorney presented documentary evidence, which included two affidavits in lieu of direct testimony by the parent and two affidavits in lieu of direct testimony by the director of Lead Remedial, the agency that provided the student with SETSS and OT for the 2022-23 school year (Tr. pp. 36-37; Parent Exs. E; F; L; M). The parent's attorney advised the IHO that the parent and the director of Lead Remedial were not available for cross-examination on March 29, 2023 (Tr. p. 33). The parent's attorney further stated that, since the district was not present to cross-examine the witnesses, "[he] d[id not] believe that's going to be an issue" (*id.*). The IHO stated that if he had any questions of the parent's witnesses, he would "figure that out" (*id.*). The IHO further stated that the district was not present and was "in default on their burden that they provided a FAPE for the '22/'23 school year, 12-month '22/'23 school year" (*id.*). All of the parent's exhibits were admitted into the hearing record (Tr. p. 37).

The district asserts that, when the parent's attorney indicated that the parent's witnesses were not available for cross-examination, the IHO should have excluded the affidavits from the hearing record. The district concedes that it failed to appear at the impartial hearing; however, the district argues that "the regulations do not condition the availab[ility] of witnesses on the opposing party's presence at the hearing" (Answer and Cr.-Appeal ¶ 11). Rather, according to the district, the regulation states that an IHO may only take testimony by affidavit in lieu of in-person testimony provided the witness "shall be made available for cross-examination" (*id.* [emphasis omitted]). The district contends that the IHO erred in accepting the affidavits into evidence at the impartial hearing and that the IHO's determination should be annulled.

The IDEA requires State and local educational agencies "to ensure children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of a free appropriate public education (FAPE) by such agencies" (20 U.S.C. § 1415[a]), including the right of parents "to challenge in administrative and court proceedings a proposed IEP with which they disagree" (Burlington, 471 U.S. 359, 361 [1985]; *see* 20 U.S.C. § 1415[b], [f]). Federal and State regulations set forth the procedures for conducting an impartial hearing and address the minimum due process requirements that shall be afforded to both parties (34 CFR 300.512; 8 NYCRR 200.5[j]). Among other rights, each party "shall have an opportunity to present evidence, compel the attendance of witnesses, and to confront and question all witnesses" (8 NYCRR 200.5[j][3][xii]; *see* 34 CFR 300.512[a][2]). Furthermore, State regulation provides that each party "shall have up to one day to present its case unless the impartial hearing officer determines that additional time is necessary for a full, fair disclosure of the facts required to arrive at a decision" (8 NYCRR 200.5[j][3][xiii]).

Unless specifically prohibited by regulations, IHOs are provided with broad discretion, subject to administrative and judicial review procedures, with how they conduct an impartial hearing in order that they may "accord each party a meaningful opportunity" to exercise their rights during the impartial hearing (Letter to Anonymous, 23 IDELR 1073 [OSEP 1995]; *see* Impartial Due Process Hearing, 71 Fed. Reg. 46704 [Aug. 14, 2006] [indicating that IHOs should be granted discretion to conduct hearings in accordance with standard legal practice]). Additionally, while an IHO is required to exclude evidence and may limit the testimony of witnesses that he or she "determines to be irrelevant, immaterial, unreliable or unduly repetitious" (8 NYCRR 200.5[j][3][xii][c]-[e]), it is also an IHO's responsibility to ensure that there is an adequate and complete hearing record (*see* 8 NYCRR 200.5[j][3][vii]).

As noted by the district, State regulation provides that "[t]he [IHO] may take direct testimony by affidavit in lieu of in-hearing testimony, provided that the witness giving such testimony shall be made available for cross examination" (8 NYCRR 200.5[j][3][xii][f]).

A district may through its actions waive a procedural defense (Application of the Bd. of Educ., Appeal No. 18-088). The Second Circuit has held that a waiver will not be implied unless "it is clear that the parties were aware of their rights and made the conscious choice, for whatever reason, to waive them" and that "a clear and unmistakable waiver may be found . . . in the parties' course of conduct" (N.L.R.B. v. N.Y. Tele. Co., 930 F.2d 1009, 1011 [2d Cir. 1991]).

Here, the district chose not to appear at any of the five impartial hearing dates (Tr. pp. 1-42). The IHO further noted on the record that notice of the November 29, 2022 hearing date was sent to the parties by the Impartial Hearing Office on November 23, 2022, notice of the December 21, 2022 hearing date was sent on December 15, 2022, notice of the January 18, 2023 hearing date was sent on January 9, 2023, and notice of the March 29, 2023 hearing date was sent on March 22, 2023 (Tr. pp. 2, 8, 14, 32).⁸ As a general matter, the parties to an impartial hearing are obligated to comply with the reasonable directives of the IHO regarding the conduct of the impartial hearing (see Application of a Student with a Disability, Appeal No. 14-090; Application of a Child with a Disability, Appeal No. 05-026; Application of a Child with a Disability, Appeal No. 04-103; Application of a Child with a Disability, Appeal No. 04-061). Additionally, the district does not assert that the IHO erred in holding the district in default for its failure to appear at any of the hearing dates in this matter and does not request a remand in order to have the opportunity to cross-examine the parent's witnesses. Rather, the district's sole objection is to the IHO's admission of the affidavit testimony without the presence of the witnesses during the hearing.

As correctly noted by the parent, had the district appeared on March 29, 2023, the district could have objected to the admission of the parent's affidavits into the hearing record (see Tr. p. 33). Further, the IHO indicated his flexibility with regard to the appearance of the parent's witnesses by stating that if he needed to question the parent's witnesses, he would "figure it out" (Tr. p. 33). Under these circumstances, the district—by its course of conduct in failing to appear—waived its right to cross-examine the witnesses and, thus, it was within the IHO's discretion whether to limit the admission of the affidavit evidence based on the requirement that a witness giving testimony by affidavit be made available for cross-examination. In this matter, because the district did not raise the unavailability of the parent's witnesses for cross-examination at the impartial hearing, I find that the IHO properly exercised his discretion in admitting the parent's four affidavits in lieu of direct testimony.

B. Unilaterally Obtained Services

In its cross-appeal, the district does not appeal from the IHO's determination that it failed to offer the student a FAPE or equitable services for the 12-month, 2022-23 school year (IHO Decision at p. 9). The district also does not cross-appeal from the IHO's finding that it failed to implement the IHO's December 23, 2022 interim decision on pendency or the IHO's order to fund

⁸ At the February 21, 2023 impartial hearing date the IHO agreed to consolidate the parent's due process complaint notices but did not indicate on the record whether the Impartial Hearing Office had sent notice of the hearing date to the parties (Tr. p. 20).

the student's pendency services which were privately obtained by the parent from the date of the September 13, 2022 due process complaint notice through the date of the IHO's decision (*id.* at pp. 9, 10). In addition, the district does not cross-appeal from the IHO's finding that the district failed to implement the student's summer 2022 SETSS recommendation (*id.* at p. 10). Accordingly, these unappealed findings have become final and binding upon the parties (*see* 34 CFR 300.514[a]; 8 NYCRR200.5[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]).

As an initial matter, with regard to the IHO's finding that the June 2022 summer IEP was an IESP for the student's 12-month, 2022-23 school year, review of the document demonstrates that the parties are correct and that the IHO erred. The cover page indicated that it was an IEP, the IEP indicated an implementation date of July 5, 2022 through August 19, 2022, and the "other options considered" section of the IEP stated "[t]his IEP is for summer services 2022 only" (Parent Ex. K at pp. 1, 10, 14, 15).⁹ Further an IEP for only summer services is consistent with the district's obligations to parentally placed students. 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; as required, the district developed the June 2022 IEP for the summer portion of the 12-month school year.¹⁰

The IHO incorrectly found that the June 2022 summer IEP was an IESP for the entire 2022-23 school year. Additionally, although the IHO correctly articulated a Burlington/Carter standard to analyze the parent's claims, the IHO also appeared to compare the program the student received during the 10-month portion of the 2022-23 school to the program the student received during the summer portion of the school year. More specifically, the IHO's decision appears to have held the parent to a higher burden of proof—beyond demonstrating the appropriateness of her unilaterally obtained services—by requiring that "the [p]arent must show that the [s]tudent actually need[ed] eight hours of SETSS per week and continuing related services for the 2022-2023 school year" and concluding that the parent did not show that the student "needed" services "in excess of those services recommended in the June 21, 2022, IESP" (*see* IHO Decision at pp. 7-10). The correct standard, as set forth in more detail below, is whether the parent's unilaterally obtained services provided instruction specially designed to meet the unique needs of the student (20 U.S.C. §

⁹ The June 2022 IEP is slightly misleading as the section for 12-month service and/or program indicates the student "will receive the same recommended special education program/services as recommended above" rather than identifying the summer services in that section—giving the impression that summer services were in addition to the recommended services; however, as discussed above, review of the IEP as a whole shows that it was just for summer services (Parent Ex. K at p. 10).

¹⁰ In this matter, the parent challenged the March 2021 IESP, which was to be implemented on September 13, 2021 (Parent Ex. D at p. 1). During the hearing, counsel for the parent asserted that the district had not developed an IESP since the March 2021 IESP (Tr. p. 34).

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. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]). Putting the IHO decision to the side, I have conducted an independent review of the evidence in the hearing record and, as discussed below, find that the parent's unilaterally obtained services consisting of eight hours per week of SETSS for the 10-month portion of the 2022-23 school year were appropriate. However, the parent did not establish the appropriateness of the unilaterally obtained OT or speech-language therapy services.

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. For the 10-month portion of the 2022-23 school year, the parent sought continuation of the "SEIT program" recommended in the August 2020 CPSE IEP and testified that she "was left with no choice but to implement the special education program on [her] own" (Parent Ex. E ¶ 7). She further testified that she contacted Lead Remedial to provide the student with eight hours per week of SETSS and OT services (*id.* at ¶¶ 8-9). Accordingly, the issue in this matter is whether the parent is entitled to public funding of the costs of the private SETSS and related services. "Parents who are dissatisfied with their child's education can unilaterally change their child's placement . . . and can, for example, pay for private services, including private schooling. They do so, however, at their own financial risk. They can obtain retroactive reimbursement from the school district after the [IESP] dispute is resolved, if they satisfy a three-part test that has come to be known as the Burlington-Carter test" (Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 526 [2d Cir. 2020] [internal quotations and citations omitted]; *see Carter*, 510 U.S. at 14 [finding that the "Parents' failure to select a program known to be approved by the State in favor of an unapproved option is not itself a bar to reimbursement"]).

The parent's request for privately-obtained SETSS and related services 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 and related services obtained by the parent from Lead Remedial constituted appropriate unilaterally obtained services for the student such that the cost of the SETSS and related services are 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.

Turning to the standard to apply in assessing the appropriateness of the unilaterally-obtained services, the federal standard is instructive. 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., 459 F.3d at 364; see Rowley, 458 U.S. at 207). 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, 773 F.3d at 386; C.L., 744 F.3d at 836; 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

The parent contends that the student required eight hours per week of SETSS to receive educational benefit during the 10-month portion of the 2022-23 school year. The hearing record contains very little evaluative information about the student and current information about the student's performance is limited to a progress report and the information in the affidavits of the director of Lead Remedial, which is the agency that provided the student's SETSS.¹¹ Other than

¹¹ Although the parent has requested that the student continue to receive speech-language therapy and OT, as discussed below, there is no evidence in the hearing record that the parent unilaterally obtained speech-language therapy and insufficient evidence in the hearing record that the parent unilaterally obtained OT for the student during the 2022-23 school year.

the dispute as to the number of hours per week of SETSS the student required, the student's needs are not directly in dispute. Nevertheless, a discussion thereof provides context for the discussion of the remaining issue; namely, whether the SETSS the student received from Lead Remedial was appropriate to address the student's needs.

According to the parent, the last agreed upon program for the student was set forth on the August 2020 CPSE IEP (Parent Ex. B). The section of the August 2020 CPSE IEP, which should have indicated the student's then-present levels of performance were left blank and, therefore, provide no evaluative information or description of the student's academic achievement, social, or physical development (id. at p. 1). The August 2020 CPSE IEP included management needs that stated the student required support to remediate noted delays in language and fine motor skills (id. at p. 2). With regard to the effect of the student's needs on her participation in the general education curriculum and appropriate activities, the August 2020 CPSE IEP reflected that the student could participate in all activities when given appropriate visual and verbal support (id.). The August 2020 IEP did not include any annual goals or information relative to reporting progress to the parent (id. at pp. 3-5). The August 2020 CPSE IEP included recommendations of eight hours per week (for two hours per day, four day per week) of direct SEIT services in a group up to a 2:1 ratio, two 30-minute sessions per week of individual speech-language therapy, one 30-minute session per week of speech-language therapy in a group up to a 2:1 ratio, and two 30-minute sessions per week of individual OT (id. at p. 6).

The March 2021 IESP reflected that the student would be parentally placed for the 2021-22 school year and that, although the August 2020 CPSE IEP had recommended OT, the parent was unable to find a provider and the student had not received OT (Parent Ex. D at p. 1). The March 2021 IESP indicated that the March 2021 CSE had relied on a December 28, 2020 SEIT progress report, a January 4, 2021 speech-language progress report, and a parental report provided during the CSE meeting (id. at pp. 1-6).¹²

According to the March 2021 IESP, the December 2020 SEIT progress report indicated that the student was a bilingual Yiddish speaking 4.4 year old girl then-currently attending a prekindergarten class (Parent Ex. D at p. 1). As noted on the March 2021 IESP, the SEIT provider reported that the student presented with cognition deficits (id.). With regard to the student's progress, the SEIT provider stated that, in the area of cognitive skills, the student was able to identify and label basic body parts, colors, and shapes, and could put together a 25-piece interlocking puzzle with minimal assistance (id.). The student reportedly had demonstrated the ability to think of solutions to basic problems, place three pictures in sequence, sort items by category, and continue to work when encountering difficulty (id. at pp. 1, 2). In the area of attention span skills, the student was described as proficient with attending and completing a task with minimal supervision or reinforcement (id.). With regard to the student's math readiness skills, she was able to locate big and small objects, arrange objects in order of size, and, with some prompting, she was able to locate first, middle, and last (id.). The student reportedly could count orally to ten and with "1:1 correspondence t[o] 10" (id.). The SEIT provider further noted that the student was able to identify and label number symbols one through five (id. at pp. 1-2). The student

¹² The December 28, 2020 SEIT progress report and the January 4, 2021 speech-language progress report were not included as exhibits in the hearing record.

also was noted to appropriately follow teacher directions to complete classroom activities (id. at p. 2).

With regard to the student's cognitive delays, the March 2021 IESP reflected the SEIT provider's report that the student was unable to name the days of the week, unable to label categories, and exhibited weak problem-solving skills (Parent Ex. D at p. 2). The SEIT provider indicated that, to address this deficit, the provider practiced problem solving in imaginary and real-life situations (id.). The SEIT provider further noted concerns in the area of reading and decoding skills and reported that the student could identify her name in print; however, she was unable to identify the letters in her name (id.). The student was able to point to the letters of the Hebrew alphabet receptively but was unable to label them (id.). The student was reportedly starting to grasp the concept of beginning sounds but had difficulty generating them (id.). The student's reading readiness skills were described as deficient, which limited the student from being able to identify, name, and recite the Hebrew alphabet (id.). To address this deficit, the SEIT provider indicated that multi-sensory instruction was implemented with the student (id.).

Regarding communication skills, the March 2021 IESP reflected the SEIT provider's report that the student's "[r]eceptive [i]nstruction skills" were deficient, which limited the student's understanding of new concepts being taught in the classroom, and with following along with the class (Parent Ex. D at p. 2). The student was also described as "unsuccessful with understanding information that [wa]s not explicitly said," the student was unable to sequence a four-step "situation," and had difficulty understanding time concepts, like last week, or the day after tomorrow (id.). The student also exhibited delays in the area of auditory listening skills (id.). The student's ability to remember and repeat stories that the class was learning was impaired (id.). In addition, the SEIT provider reported that the student had shown poor classroom performance, such as losing patience when listening to a long story, due to her difficulty concentrating and following the story line (id.). The SEIT provider stated that strategies such as starting with simple stories to remember and repeat back and building up the length and complexity were implemented with the student (id.). The student also exhibited delays in the area of expressive language skills (id.). The SEIT provider reported that the student was unable to label learned letters and that this hindered the student's ability to be part of the class (id.). In addition, the student's classroom performance was impaired by the student's difficulty with finding the right word to say in a situation or coming up with an answer to the question (id.). To address the deficit, the SEIT provider reported use of a multisensory Hebrew alphabet program (id.).

According to the March 2021 IESP, the SEIT provider indicated that the student demonstrated moderate levels of performance and needed to develop age appropriate skills in the areas of showing awareness of time concepts; telling an ending to a story and applying knowledge or experience to a new context; following and comprehending stories read aloud; perceiving what other people say when information was not explicitly stated; and understanding abstract concepts (Parent Ex. D at p. 2). The SEIT provider also reported other weaknesses including describing things to people, using correct grammar when speaking and pronouncing complex words such as "electric" and "screwdriver," forming the correct size of letters, performing visual perception activities, and utilizing a mature pencil-grip (id. at pp. 2-3). The SEIT provider further indicated that the student demonstrated significant delays in the areas of identifying beginning letter sounds, recognizing rhyming words, reading community signs, tracing complex shapes, learning names of colors, people, and letters, and identifying consonant and vowel sounds (id. at p. 3).

According to a January 4, 2021 speech-language progress report reflected in the March 2021 IESP, the student presented with poor articulation skills, and with receptive and expressive language deficits (Parent Ex. D at p. 3). In the area of receptive language skills, the provider reported that the student was able to identify various objects and their functions, follow two-step simple directions, and maintain focus on a single task with clinician prompting for a few minutes at a time (id.). In the area of expressive language skills, the student was proficient with labeling picture items and their functions, and also answered simple "wh" questions (id.). The student reportedly demonstrated strengths with identifying familiar objects and people, identifying photographs of familiar objects, and answering questions (id.). The provider indicated that the student's limited progress in the area of receptive language skills prevented her from excelling in the classroom (id.). The student's articulation skills were deficient, which limited the student's success in the classroom (id.). The provider indicated that the student's teachers and peers had difficulty understanding her at times (id.). The student also demonstrated significant weaknesses in expressive language skills, which affected the student's ability to achieve academic success in the classroom (id.). The student demonstrated moderate levels of performance and needed to develop age-appropriate skills in the areas of making inferences, identifying an object that did not belong and identifying categories of objects, being intelligibly understood by others, discriminating between sounds and words, and self-correcting articulation errors (id.). The student demonstrated deficits with answering questions as quickly as other students, asking questions, and using a variety of vocabulary words when talking (id.). The provider indicated that the modes of intervention to be utilized with the student during therapeutic intervention included articulation drills, picture cards, games, books, manipulatives, worksheets and therapist-made materials; additionally, modeling prompts, tactile prompts, verbal cue prompts, visual cue prompts and facial cueing would be used to facilitate mastery of skills (id. at pp. 3-4).

The parent reported and the March 2021 IESP reflected that the student was making progress and that she knew about 11 letters, as well as shapes and colors (Parent Ex. D at p. 4). The parent also noted that the student could count to ten, knew numbers one through five, and understood 1:1 correspondence (id.). With regard to the student's strengths, preferences, and interests, the March 2021 IESP reflected that the student enjoyed imaginative play with dolls, playdough, and kinetic sand (id.). The student was further noted to be a visual learner (id.).

Regarding the academic, developmental, and functional needs of the student that were of concern to the parent, the March 2021 IESP reflected that the parent noted the student's cognitive, attention span, math readiness, reading and decoding, receptive instructions, auditory listening, social interaction, social/emotional/behavioral, expressive language, and reading readiness skills as areas of concern (id.). In the area of speech-language therapy, the parent indicated concerns with the student's articulation and expressive language skills (id.). The parent further noted that the student struggled with some concepts and was not learning at the same pace as her peers and that she believed the student's progress with letter recognition was attributable to repetition (id.). The parent indicated that she could understand the student but was unsure if other people would be able to (id.). The parent also reported that the student could relay information regarding something she witnessed but could not recount in detail any information received auditorily (id.).

With regard to the student's social development, the March 2021 IESP reflected the SEIT provider's report that the student's social interaction skills were deficient, which limited her from playing nicely with others and she was "unsuccessful with compromising with other children"

(Parent Ex. D at p. 5). The student was also described as having difficulty understanding other children's preferences (id.). To address this deficit, the SEIT provider practiced role playing with the student (id.). The SEIT provider also reported deficits in the student's ability to regulate her emotions, which impaired her ability to respond to situations that caused her to be upset or unhappy (id.). The SEIT provider further reported that the student's difficulty with compromise and emotional regulation could cause her to overreact and be unable to problem solve, which impaired her classroom performance (id.). The SEIT provider also indicated that the student had difficulty describing things to people and with word retrieval (id.). The student was also noted to be unsuccessful with pronouncing difficult words or words with the "s" sound (id.). The parent reported that the student loved people and was a "social butterfly" and that she did not have any concerns related to the student's social development (id.).

Concerning the student's physical development, the SEIT provider's report, as reflected in the March 2021 IESP, indicated that the student exhibited significant weaknesses in prewriting and handwriting skills, which affected the student's ability to trace and copy complex shapes, as well as simple shapes (Parent Ex. D at p. 6). The student reportedly demonstrated continuous challenges with grasping a pencil correctly and writing letters with the correct size and spacing (id.). To address this deficit, the SEIT provider implemented "a lot of practice and a safe place" where the student was allowed to make as many mistakes as she needed (id.). Concerns of the parent were noted to be that the student did not cut well, did not hold her pencil properly or apply proper pressure, was unable to write her name, and did not color in the lines (id.). The March 2021 IESP also reflected discussion that the student was healthy and participated in all expected physical activities (id.).

The March 2021 IESP indicated that the student was "being mandated to receive SETSS services, speech and language therapy and occupational therapy in kindergarten" and recommended management needs consisting of preferential seating, multisensory activities and lessons, visual supports, scaffolding and prompting to complete tasks and assignments, use of reinforcement, motivation charts, praise and encouragement, presenting skills in a hierarchical manner, requesting feedback on instructions given, modeling, demonstration and guided practice, repetition and rephrasing as needed, structuring and breaking down work into manageable units with rewards for small gains, use of visual checklists for task initiation, planning and completion, use of alphabet and vowel charts, use of vocabulary cards and visuals, graded level reading material, oral motor activities, articulation drills, and collaboration amongst disciplines (Parent Ex. D at p. 7).

With regard to the effect of the student's needs on involvement and progress in the general education curriculum, the student's learning differences were noted to be best addressed in a general education setting, with part time special education intervention and related services (Parent Ex. D at p. 7). The March 2021 IESP further indicated that a general education classroom with no supports would not allow the student to meet grade level expectancy (id.).

The June 2022 IEP indicated that, on June 21, 2020, the student was administered the Kaufman Survey of Early Academic and Language Skills and the Developmental Assessment of Young Children-Second Edition (Parent Ex. K at p. 1). The June 2022 IEP does not include any results from the assessments and stated that the student presented with cognitive deficits (id.). The June 2022 IEP further indicated that teachers reported the student had a hard time retaining

information and needed a minimum of eight weeks to recapture the skills and information lost by a sustained interruption of class time (id.). The June 2022 IEP also stated that both the parent and the school had indicated that, without services for the summer months of July and August, the student would suffer significant academic regression (id. at p. 4). The student's management needs indicated that the student required multisensory activities and lessons, including visual supports, scaffolding and prompting to complete tasks and assignments, use of reinforcement, motivation charts, praise, and encouragement (id. at pp. 4-5). With regard to the effect of the student's needs on involvement and progress in the general education curriculum, the June 2022 IEP stated that summer services should help deter substantial academic regression for the student (id. at p. 5). The remaining content of the June 2022 IEP's present levels of performance were taken verbatim from the March 2021 IESP (compare Parent Ex. K at pp. 1-4, with Parent Ex. D at pp. 2-6).

2. Appropriateness of SETSS, OT and Speech-Language Therapy

Turning to the appropriateness of the parent's unilaterally obtained services, the parent argues that the IHO erred in awarding the parent only five periods per week of SETSS as a result of his finding that the June 2022 summer IEP was an IESP for the entire 12-month 2022-23 school year. As noted above, the IHO was mistaken in his finding that the June 2022 IEP was an IESP; however, notwithstanding the IHO's error, the parent has the burden of demonstrating the appropriateness of the unilaterally obtained services. 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 or, as in this case, the parent's unilaterally obtained services must offer an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129).

The district argues that the IHO erred in awarding the parent any funding for unilaterally obtained services. As an initial matter, the district asserts that the parent failed to establish that the services provided to the student for the summer portion of the 2022-23 school year were appropriate. However, the district does not, and cannot reasonably argue, that the base program consisting of five hours per week of SETSS was not appropriate for the student, as it is a substantially similar to the program recommended by the district in the June 2022 IEP (Parent Ex. K at p. 9).¹³ Further, as per the parent's affidavit testimony, she contacted Lead Remedial to provide the student with five hours per week of SETSS over the summer because she could not locate a district provider and the district did not make a provider available (Parent Ex. L at ¶¶ 3-6). The director of Lead Remedial also provided affidavit testimony as to the provision of five hours per week of SETSS to the student during the summer portion of the 2022-23 school year (Parent Ex. M at ¶¶ 10-16). Accordingly, there is no reason to depart from the IHO's finding that the five hours of SETSS delivered to the student during the 2022-23 school year was an appropriate program.

Additionally, for the 10-month portion of the school year, the district asserts that the IHO should have denied any funding for SETSS after finding the parent did not demonstrate that the eight hours of SETSS per week provided by Lead Remedial during the 10-month, 2022-23 school

¹³ The program recommended in the June 2022 IEP was for five periods per week of SETSS; however, there was no evidence included in the hearing record describing how long one period of SETSS over the summer months would have been (see Parent Ex. K at p. 10).

year was appropriate. In the alternative, the district asserts that the parent did not demonstrate the appropriateness of her request for funding for speech-language therapy and OT and that the parent is entitled to no more than five periods per week of SETSS.

With regard to speech-language therapy and OT, the IHO correctly denied the parent's requested relief. The parent has requested that the student's educational program should reflect the program offered in the August 2020 CPSE IEP and that, as for related services, the student receive two 30-minute sessions of individual speech-language therapy, one 30-minute session of group speech-language therapy, and two 30-minute sessions of individual OT (Req. for Rev. at p. 5). However, there is no evidence in the hearing record that the parent unilaterally obtained any speech-language therapy services for the student during the 2022-23 school year (see Parent Exs. E; F; G; I; L; M). Turning to OT, the only evidence in the hearing record to support the parent's assertion that the student received OT during the 2022-23 school year are generic statements in the affidavits of the director of Lead Redial and the parent (Parent Exs. E at ¶¶ 8-9; F at ¶¶ 6, 10, 12-13). Additionally, the contract with Lead Remedial does not mention OT or speech-language therapy as a service provided by the agency, much less as a service the parent contracted with the agency to provide (Parent Ex. G). The hearing record includes the certification of an occupational therapist who was identified by the Lead Remedial director as the person who provided the student with OT services during the 2022-23 school year; however, that individual did not provide any documentary or testimonial evidence to support a finding that the parent obtained appropriate OT services for the student (Parent Exs. F at ¶¶ 12, 13; I at p. 6). Finally, the recommendation set forth in the December 2022 SETSS progress report stated that the student "should continue to receive her SETSS services as well as OT and speech therapy services" (Parent Ex. H at p. 3). However, this statement without corroborating documentary and/or testimonial evidence is insufficient to establish that these services were provided to the student. Therefore, considering the above, the parent has not met her burden with regard to unilaterally obtained speech-language therapy and OT services.¹⁴

The hearing record shows that by contract with Lead Remedial dated June 1, 2022, the parent arranged for the student to receive SETSS for the 2022-2023 school year and authorized Lead Remedial to provide services "during the 2022-2023 school year, up until and including the date" the parent notified Lead Remedial that she no longer wanted services provided (Parent Ex. G).

The director of Lead Remedial (director) provided two affidavits in lieu of direct testimony, one related to summer 2022 and the other related to the 10-month portion of the 2022-23 school year (Parent Exs. F; M). The director testified that the student received eight hours per week of SETSS from two providers employed by Lead Remedial and two 30-minute sessions per week of

¹⁴ Although the parent has not met her burden to show that the student received appropriate speech-language therapy or OT services, the district was still responsible for providing the student with two 30-minute sessions of individual speech-language therapy, one 30-minute session of speech-language therapy in a group of two, and two 30-minute sessions of individual OT during the pendency of this proceeding, which commenced September 13, 2022 and continued past the conclusion of the 2022-23 school year (Dec. 23, 2022 Interim IHO Decision at p. 5). Additionally, as part of his final decision, the IHO directed the district to fund the student's related services of speech-language therapy and OT actually provided to the student during the pendency of the proceeding (IHO Decision at pp. 10-11).

OT from an occupational therapist during the 10-month, 2022-23 school year (Parent Ex. F ¶¶ 10-12). The director further testified that in addition to providing 1:1 instruction to the student at her school on a pull-out basis, the SETSS providers also prepared for sessions, created goals, wrote progress reports, and met with teachers and parents (id. ¶¶ 13-14, 17). The student's goals were reviewed quarterly and according to the director, the December 1, 2022 progress report was an accurate representation of what the SETSS providers had been working on with the student, including goals, over the course of the 2022-23 school year (id. ¶¶ 15-16). The director also testified that the student's progress was measured through quarterly assessments, consistent meetings with the provider and support staff, observation of the student in the classroom, and daily session notes (id. ¶ 18). The director testified that the student had already shown signs of progress with her SETSS instruction and OT sessions; however, the student's academic and social delays warranted the need for continued services (id. ¶ 19). The director testified that the student required the continuation of eight periods of 1:1 SETSS per week and two 30-minute sessions per week of OT for the 2022-23 school year (id. ¶ 20).

The two SETSS providers identified by the director did not testify; however, a December 1, 2022 progress report prepared by the providers was admitted into evidence at the impartial hearing (compare Parent Ex. H at p. 1, with Parent Ex. F ¶ 11). According to the December 2022 SETSS progress report, in math, the student was able to rote count from one to 30 with some errors and could count from one to 20 "with 1:1 correspondence" (Parent Ex. H at p. 1). The student reportedly had difficulty adding and subtracting numbers and solving word problems, although she was able to complete basic addition within numbers one through 10 when using manipulatives (id.). The student also forgot many basic facts and needed a lot of prompting and assistance with both addition and subtraction and "often confused addition with subtraction and vice versa" (id.). The SETSS providers further indicated that the student's reading skills were then-currently significantly below grade level, and she could not read any word problems (id.). The SETSS providers also reported that, even when math word problems were read to the student, she struggled to identify the correct strategy to use (addition or subtraction) and therefore needed continuous cueing when completing math examples (id.).

In reading, the SETSS providers reported that the student was then-currently reading at level B according to a Fountas and Pinnell assessment (Parent Ex. H at p. 1). The student reportedly needed constant practice and modeling with the phonics rules and had trouble mastering basic sight words (id.). The student had a good vocabulary and comprehension skills; however, she did not apply these skills while reading (id.). The SETSS providers indicated that the student could respond to simple "Wh" questions and could make accurate predictions; however, she had trouble retelling stories (id.). The student had reportedly made some progress in her reading skills; however, she was still significantly below grade level (id.).

In writing, the student's handwriting was described as slightly below grade level and several of her letters were not formulated properly (Parent Ex. H at p. 2). The SETSS providers further indicated that the student had difficulty applying phonics rules while writing and had trouble expressing her thoughts on paper (id.). In language, the student's expressive and receptive language skills were reportedly at grade level, and she could follow one and two step directions but sometimes required prompting to continue with the task (id.). The student could express her needs and share personal experiences in a grade appropriate manner (id.).

With regard to the student's social/emotional functioning, the student reportedly had "very weak emotional stamina" (Parent Ex. H at p. 2). The student had a strong need to do things her way and to be in control (id.). The SETSS providers noted that the student got frustrated with tasks that challenged her and would simply shut down and refuse to comply instead of accepting assistance (id.). When the student was feeling good about herself, she was relaxed and happy and she was a pleasure to be around; however, the slightest disturbance could "make her quite difficult to teach" (id.). In the area of interpersonal relationships, the SETSS providers stated that the student was a sociable girl who played nicely with her peers for the most part, although she was often unable to express her needs or wants in a socially appropriate way (id.). The student was learning to use words when requesting something from a peer and turn-taking skills during a conversation (id.). The SETSS providers indicated that, when something did not go the student's way, she could become angry and distant with her peers or teachers very abruptly; however, she was learning to express her feelings and come up with coping strategies (id.). The student required constant encouragement when working on a seemingly difficult task (id.). The SETSS providers also stated that the student enjoyed spending time with her friends, enjoyed drawing and was learning to play board games with her peers (id.).

According to the SETSS providers, it was imperative that the student continue to receive the support she was then-currently receiving to address her many academic and social deficits (Parent Ex. H at p. 2). The student was then-currently receiving eight hours of SETSS and also received support services during the summer as she easily regressed and forgot the material she learned (id. at pp. 2-3). The SETSS providers recommended that the student continue to receive SETSS services, as well as OT and speech-language therapy to address those concerns (id. at p. 3). The SETSS providers also stated that hands-on instruction with various strategies and techniques were used to help the student attain skills (id.).

Based on the foregoing, a comparison of the student's present levels of performance as shown in the March 2021 IESP and June 2022 IEP (which were primarily based on reports from December 2020 and January 2021), with the December 2022 SETSS progress report shows that, in the course of approximately two years, the student made some, although limited, gains with respect to counting in math, reading, writing and social/emotional functioning (compare Parent Ex. D at pp. 1-3, and Parent Ex. K at pp. 1-4, with Parent Ex. H at pp. 1-3). Although the student's progress might not be solely attributable to the services provided by Lead Remedial during the 2022-23 school year, as the student was only receiving those services for approximately three months at the time of the report, the student's progress is somewhat indicative that the eight hours per week of special education support that the student was receiving was appropriately addressing the student's needs.

As noted above, the IHO found that the parent failed to establish the appropriateness of eight periods per week of SETSS and instead awarded five periods per week of SETSS, based in part on the recommendations set forth in the June 2022 summer IEP, which he incorrectly believed to be an IESP for the 12-month, 2022-23 school year, and in part on what he viewed as inconsistencies in the two affidavits prepared by the director of Lead Remedial (IHO Decision at pp. 7, 8-9). According to the parent and undisputed by the district, an IESP was not developed for the student for the 2022-23 school year and the purpose of the June 2022 IEP was to "help deter substantial academic regression" over the summer for the student (Parent Ex. K at pp. 5, 15). Contrary to the IHO's view, the provision of five periods per week of SETSS to prevent substantial

regression during the summer would not necessarily be inconsistent with the need for a program consisting of eight periods of SETSS and related services during the 10-month portion of the school year, as the recommended programs would serve different purposes for the student (see 8 NYCRR 200.1[eee]; 200.4[d][2][i]-[iii]; 200.6[k][1]).

Similarly, the lack of a recommendation for OT and speech-language therapy in the June 2022 summer IEP does not demonstrate that those services were not necessary for the student to receive educational benefit during the 10-month portion of the 2022-23 school year. However, while there is insufficient evidence that the student actually received OT and speech-language therapy during the 2022-23 school year, 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 eight hours per week of SETSS delivered to the student during the 2022-23 school year provided the student with specially designed instruction to meet her special education needs. Thus, based on the totality of the circumstances, the evidence in the hearing record demonstrates that the eight hours per week of SETSS reasonably served the student's individual needs, and the IHO's findings to the contrary are reversed.

3. Parent's Contractual Obligation

As a final matter, the district alleges that the parent did not establish a financial obligation to Lead Remedial. Specifically, the district argues that the contract admitted into evidence lacks the information required to demonstrate that the parent incurred a financial obligation in that it only describes the provision of SETSS and does not include an hourly rate, or the rate and frequency of services.

The Second Circuit has held that some blanks that the parties did not fill in in a written agreement would not render an entire contract void and indicated that in the case before it that "the contract's essential terms—namely, the educational services to be provided and the amount of tuition—were plainly set out in the written agreement, and we cannot agree that the contract, read as a whole, is so vague or indefinite as to make it unenforceable as a matter of law" (E.M. v. New York City Dep't of Educ., 758 F.3d 442, 458 [2d Cir. 2014]).

The hearing record includes a contract for the provision of SETSS to the student for the 2022-23 school year, which was signed by the parent on June 1, 2022 (Parent Ex. G).¹⁵ The contract stated that Lead Remedial was "contracted to provide special education services for [the student] for the entire duration of the 2022-2023 school year" (id.). The contract terms further indicated that the parent could request a change in providers and authorized Lead Remedial to provide services to the student during the 2022-23 school year, "up until and including the date [the parent] notif[ied] Lead Remedial Services that [she] no longer want[ed] Lead Remedial Services to provide such services" (id.). The contract also provided that "[i]n order for our agency

¹⁵ Although the district objects to the contract because it does not include the provision of related services, as discussed above, related services are not being awarded to the parent in this matter and, therefore, it is not relevant to the present discussion whether the contract could be read to cover related services.

to effectively work with you, and you're understanding that you are ultimately responsible for any unpaid balance on services we provide that are not covered by the [district], we ask that you agree to these terms which we call Parent Responsibilities" (*id.*). The parent responsibilities included attending CSE meetings, cooperating with the district's evaluation process, and complying with district requests for tax information, attendance at district meetings, and "[a]ny other reasonable request by the [district] in connection with [the student]'s services" (*id.*). Lastly, the contract required the parent to inform Lead Remedial if the district contacted the parent for an IESP meeting or sent the parent a new IESP (*id.*).

The affidavits prepared by the director of Lead Remedial specified the hourly rate and frequency of the SETSS provided to the student during the summer 2022 and during the 10-month, 2022-23 school year (Parent Exs. F at ¶¶ 6, 10, 20; M at ¶¶ 6, 10, 17). For the summer portion of the 2022-23 school year, the parent testified that she contracted with Lead Remedial to provide the student with five hours per week of SETSS (Parent Ex. L at ¶¶ 5-7). Additionally, consistent with the August 2022 letter she sent the district, the parent testified by affidavit that she signed a contract with Lead Remedial to deliver eight hours per week of SETSS to the student during the 2022-23 school year, indicating her intent was to implement the special education program recommended for the student in the August 2020 CPSE IEP (Parent Ex. E at ¶¶ 3, 6-10).

In New York, a party may agree to be bound to a contract even where a material term is left open but "there must be sufficient evidence that both parties intended that arrangement" and an objective means for supplying the missing terms (Express Indus. & Terminal Corp. v. N.Y. State Dep't of Transp., 93 N.Y.2d 584, 590 [1999]; 166 Mamaroneck Ave. Corp. v. 151 E. Post Rd. Corp., 78 N.Y.2d 88, 91 [1991]). Here, the foregoing presents sufficient evidence of the parent's and the agency's intentions and objective means for supply the terms regarding frequency and rate including evidence of the agency's performance under the contract.

Under these circumstances, the appropriate equitable relief consists of direct funding of the SETSS delivered to the student during the 10-month, 2022-23 school year subject to proof of delivery of services (see Mr. and Mrs. A. v. New York City Dep't of Educ., 769 F. Supp. 2d 403, 406 [S.D.N.Y. 2011]; 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 up to eight hours per week of SETSS provided to the student by Lead Remedial during the 2022-23 school year as set forth in the agreement between the parent and Lead Remedial.

VII. Conclusion

As discussed above, the district conceded that it failed to meet its burden to prove that it offered the student a FAPE for summer portion of the 2022-23 school year or that it 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 Lead Remedial were appropriate to address the student's educational needs for the 2022-23 school year, and equitable considerations do not warrant a reduction in the relief awarded.

THE APPEAL IS SUSTAINED TO THE EXTEND INDICATED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's decision, dated March 31, 2023, is modified by reversing that portion which found that the eight hours per week of SETSS provided by Lead Remedial during the 10-month portion of the 2022-23 school year 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 Lead Remedial the cost of up to eight hours per week of SETSS delivered to the student over the 10-month, 2022-23 school year, at the hourly rate of \$195 per hour.

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

SARAH L. HARRINGTON
STATE REVIEW OFFICER