The University of the State of New York

The State Education Department
State Review Officer
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No. 23-078

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:
Liz Vladeck, General Counsel, attorneys for respondent, by Cynthia Sheps, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request to be reimbursed for, or for the district to directly fund, the costs of the student's special education teacher support services (SETSS) and related services for the 2022-23 school year. The appeal must be dismissed.

II. Overview—Administrative Procedures

When a student who resides in New York is eligible for special education services and attends a nonpublic school, Article 73 of the New York State Education Law allows for the creation of an individualized education services program (IESP) under the State's so-called "dual enrollment" statute (see Educ. Law §3602-c). The task of creating an IESP is assigned to the same committee that designs educational programing for students with disabilities under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482), namely a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law §§ 3602-c; 4402; see 20 U.S.C.

§ 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]).[1] 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[a]). 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

[1] Similarly, when a preschool student in New York is eligible for special education services, the IDEA calls for the creation of an IEP, which is delegated to a local Committee on Preschool Special Education (CPSE) that includes, but is not limited to, parents, teachers, an individual who can interpret the instructional implications of evaluation results, and a chairperson that falls within statutory criteria (Educ. Law § 4410; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.1[mm], 200.3, 200.4[d][2], 200.16; see also 34 CFR 300.804).

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

Given the limited scope of this appeal, a full recitation of the student's educational history is unnecessary. Briefly, a CSE convened on March 23, 2022 to conduct the student's annual review and to develop an IESP for the 2022-23 school year (kindergarten) (see Parent Ex. B at pp. 1-2, 12). At that time, the student attended preschool and received three 60-minute sessions per week of special education itinerant teacher (SEIT) services, and she was expected to transition from receiving CPSE (preschool) services to receiving CSE (school-age) services (id. at pp. 1-2).[2, 3] Finding the student eligible to receive special education as a student with a speech or language impairment, the March 2022 CSE recommended that the student receive four periods per week of SETSS as a group service (Yiddish), two 30-minute sessions per week of individual speech-language therapy (Yiddish), one 30-minute session per week of speech-language therapy in a group (Yiddish), and two 30-minute sessions per week of occupational therapy (OT) (English) (id. at pp. 1, 9).[4]

In a letter dated August 29, 2022, the parent informed the district that she had consented to all of the services recommended in the March 2022 IESP but had been unable to locate and secure

[2] State law defines SEIT services (or, as referenced in State regulation, "Special Education Itinerant Services" [SEIS]) as "an approved program provided by a certified special education teacher . . . , at a site . . . , including but not limited to an approved or licensed prekindergarten or head start program; the child's home; . . . or a child care location" (Educ. Law § 4410[1][k]; 8 NYCRR 200.16[i][3][ii]; see "[SEIS] for Preschool Children with Disabilities," Office of Special Educ. Field Advisory [Oct. 2015], available at http://www.p12.nysed.gov/specialed/publications/2015-memos/documents/SpecialEducationItinerantServicesforPreschoolChildrenwithDisabilities.pdf; "Approved Preschool Special Education Programs Providing [SEIT] Services," Office of Special Educ. [June 2011], available at http://www.p12.nysed.gov/specialed/publications/SEITjointmemo.pdf). In addition, SEIT services are "for the purpose of providing specialized individual or group instruction and/or indirect services to preschool students with disabilities" (8 NYCRR 200.16[i][3][ii] [emphasis added]; see Educ. Law § 4410[1][k]). Thus, to the extent that the parent or her attorney refer to the individual special education teacher services the student continued to receive as a school-aged student during the 2022-23 school year at the religious, nonpublic school or thereafter as SEIT services, it is inconsistent with State regulation and policy for a school district to deliver a service designed exclusively for preschool students to a school-aged student. Additionally, SETSS are not defined by State regulations, the special education program identified in State regulation that the student received at the religious, nonpublic school most closely resembles is direct consultant teacher services, which similar to SEIT services, is programming delivered by a certified special education teacher (see 8 NYCRR 200.1[m][1]; 200.6[d]).

[3] According to the March 2022 IEP, although the student was mandated to receive related services of speech-language therapy and occupational therapy (OT), she was not receiving either related service at the time of the meeting (see Parent Ex. B at p. 1).

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

providers at the district's standard rate to deliver the student's SETSS and related services recommended in the March 2022 IESP (see Parent Ex. C at p. 2). The parent also informed the district that, as a result, she had "no choice but to implement the IESP on [her] own and seek reimbursement or direct payment" for the services (id.).

A. Due Process Complaint Notice

By due process complaint notice dated September 6, 2022, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2022-23 school year due to the district's failure to implement the student's March 2022 IESP (see Parent Ex. A at pp. 1-2). The parent indicated that the student was currently attending a religious, nonpublic school for the 2022-23 school year (id. at p. 1). As relief, the parent requested a pendency order directing the district to implement the services recommended in the March 2022 IESP as pendency services, and due to the difficulty in locating service providers, the parent reserved her right to seek compensatory educational services for any SETSS and related services not delivered to the student during the 2022-23 school year (id. at pp. 2-3). In addition, the parent requested an order directing the district to fund the parent's selected providers at "their prevailing rate" and to fund a bank of compensatory educational services consisting of SETSS and related services not delivered during the 2022-23 school year (id. at p. 3).

B. Impartial Hearing Officer Decision

On October 13, 2022, the parties proceeded to an impartial hearing, which concluded on March 16, 2023, after seven total days of proceedings (see Tr. pp. 1-164). On December 11, 2022, the IHO issued an interim decision on pendency, which ordered the district to provide the following as the student's pendency services, effective as of the date of the due process complaint notice, September 6, 2022: four periods per week of SETSS as a group service (Yiddish), two 30-minute sessions per week of individual speech-language therapy (Yiddish), one 30-minute session per week of speech-language therapy in a group (Yiddish), and two 30-minute sessions per week of OT in a group (English) (see Interim IHO Decision at p. 8).

In a decision dated April 13, 2023, the IHO determined that the district failed to offer the student a FAPE for the 2022-23 school year (see IHO Decision at pp. 9, 11). With respect to the parent's unilaterally obtained SETSS and related services, the IHO initially questioned whether the services had been delivered to the student (id. at p. 11). The IHO noted that, while "[a]ffidavits [we]re self-serving by design," the affidavits presented at the impartial hearing by the parent were "cursory, general, and not [s]tudent-centric" and were "not supported by documentary evidence, such as attendance records, logs, sessions notes, or other records establishing the dates, times, and location [the s]tudent received the special education services" (id.). The IHO also noted that, although the SETSS provider testified in her affidavit that the student received "services outside of her classroom in her mainstream school," the hearing record lacked any evidence concerning the "curriculum" the student received at the religious, nonpublic school or how the school

accommodated the student's "special education service sessions during the school day or in an after-school setting" (id. at pp. 11-12).[5]

In addition, the IHO found the hearing record similarly lacking in evidence with respect to progress reports and evidence of the student's overall progress toward her annual goals (see IHO Decision at p. 12). The IHO described the witness's "testimony pertaining to progress reports" as "hesitative, halting, evasive, and stilted" when "discuss[ing] whether progress reports were received or even whether they had been prepared" (id.). As noted by the IHO, although the "[a]gency attested in the affidavit that [the s]tudent's progress was measured through quarterly assessments, meetings, classroom observation, and daily session notes," the IHO found that this "assertion was not adopted during testimony" (id.). For example, the IHO indicated that while the witness testified that "at least one progress report had been generated" for the 2022-23 school year, the parent, herself, testified that "she received progress reports either weekly, biweekly, monthly or whenever transmitted to her"; therefore, the IHO concluded that the hearing record lacked any "concrete evidence" demonstrating the student's progress toward her annual goals (id.).

Next, the IHO opined, based on the evidence in the hearing record, that the student received SEIT services, rather than SETSS (see IHO Decision at p. 12). Initially, the IHO pointed to the agency provider's testimony, which indicated that she was "licensed as a SEIT provider" and that the hearing record failed to contain evidence that she provided the student with SETSS (id.). Additionally, the IHO pointed to the parent's testimony, which indicated that the student received "SEIT services" (id.). Based on the regulatory definition of SEIT services, the IHO concluded that SEIT services were "not appropriate for a school-aged child," such as this student, and opined that, as a result, the student "may not have received the necessary educational services to permit her to reach her annual goals" (id.).

Finally, the IHO indicated that, although the "agency witness attested in the affidavit that she communicate[d] and me[t] with parents," the parent was "not aware that the witness herself was reportedly providing SEIT services to [the s]tudent four times a week" (IHO Decision at p. 12). According to the IHO, the parent also had "considerable difficulty pronouncing the name of the SEIT/SETSS provider who was also the owner of Beyond Limits [Services]," (Beyond Limits) and the parent's testimony of "being present—at least on one occasion—when educational services were being provided to [the s]tudent [wa]s not credible" (id. at pp. 12-13). As a result, the IHO concluded that the evidence in the hearing record did not support a finding that the student received the special education services, and further noted that, "[i]f [the s]tudent received SEIT services, they were not appropriate for a school-aged child" (id. at p. 13).

Having found that the parent did not sustain her burden to establish the appropriateness of the unilaterally-obtained services, the IHO turned next to address the question of equitable considerations (see IHO Decision at p. 13). Here, the IHO found that the "provider's bare recitation of agency rates and avowal that they [we]re 'less than or equal to the current market rate for service providers in the neighborhood' d[id] not suffice to establish the market rate for providers in the

[5] According to the SETSS provider's affidavit, she was also the "owner and educational director at Beyond Limits Services," the agency the parent selected to deliver the student's SETSS, speech-language therapy, and OT (Parent Ex. E ¶¶ 2-4, 12-17).

IDEA community" (id.). The IHO noted that the hearing record lacked evidence of "[f]actors" that may support "the enhanced rate for SEIT/SETSS services," such as "salaries, overhead, the costs of support personnel, and incidental[s]"; however, the IHO acknowledged that the witness's cross-examination concerning the agency's operation was "forestalled by objection[s]" by the parent's attorney (id.). Based on prior administrative proceedings, the IHO took judicial notice of the "range of enhanced hourly rates for SETSS," which the IHO found to be from $125.00 to $150.00 per hour (id.). The IHO also noted, however, that the agency's practice of not withholding a portion of the related services' providers "full hourly rate" was "contrary to standard business practices and [wa]s given no weight" (id.). As a result, the IHO summarized that, even if the parent "had secured appropriate equitable services" for the student, her request for an "enhanced rate was not supported by objective data to allow the [IHO] to award an hourly rate of $175 for SEIT/SETSS services and $195 for related service providers" (id.).

As a final point, the IHO indicated that the hearing record lacked evidence to support a finding that the parent timely requested special education services from the district, to wit, by June 1, 2022 (see IHO Decision at p. 13).[6] More specifically, the IHO noted that the parent's 10-day notice was dated August 29, 2022, long after the June 1st deadline (id.). In addition, the IHO found that, although the parent "avowed she incurred an obligation to pay for the educational services [the s]tudent received, no evidence was presented to support a finding that a parent of modest means agreed to pay hourly rates of $175 for SEIT/SETSS services and $195 for related service providers" (id.).[7]

In light of the foregoing analysis and conclusions, the IHO denied the parent's request for an enhanced rate for educational services (see IHO Decision at p. 14).

IV. Appeal for State-Level Review

The parent appeals, arguing that the IHO erred by denying her request to be reimbursed for, or for the district to directly fund, the costs of the student's SETSS and related services for the 2022-23 school year. The parent asserts that the IHO found that she and the agency provider were not credible for reasons that remain unclear. Contrary to the IHO's finding, however, the parent contends that the following facts are true: the student was mandated to receive services; the district failed to make any efforts to locate and secure providers to deliver those services; she, herself, could not locate or secure providers and the student received privately obtained services; the student requires these services to make progress; and the agency "informed [her] that they will

[6] In the proceedings prior to receiving testimonial evidence, the IHO asked the parent's attorney whether the parent's 10-day notice letter satisfied the "requirement of requesting services by June 1st, 2022," and in response, the parent's attorney asserted that such a "timing defense" needed to be "raised at the initial administrative hearing" or it was otherwise waived (Tr. pp. 61-63). The parent's attorney provided the IHO with caselaw in support of his arguments, and he further noted that the district had "many different opportunities" to raise the June 1st deadline prior to the impartial hearing and therefore, this affirmative defense should be deemed to be waived by the district as it was "only coming up now at the [impartial] hearing" (Tr. pp. 63-69).

[7] In her direct testimony provided via affidavit, the parent attested that "[p]aying for these services up front would pose extreme financial hardship for [her]" and that she "would not be able to pay for these services without outside financial support from friends and family" (Parent Ex. D ¶ 9).

enforce our agreement and require [the parent] to pay for these services," which the parent cannot afford to pay without "disastrous consequences for [her] family." In addition, the parent argues that the impartial hearing was "invasive and adversarial," and the questions asked of her at the impartial hearing were designed to "set traps and stumbling blocks." While acknowledging that her attorney had informed her that the IHO would "need to hear intimate details of [her] family finances including [their] financial struggles," the parent notes that she remains "puzzled as to why this would be necessary in order to provide [the student] with the services she need[ed]." The parent also questioned why the agency owner was asked about the agency's finances and whether agency providers were "employees or contractors."

Next, the parent contends that, while she may not have had perfect recall concerning when the student received "particular services," the district was equally confused about facts, such as whether the student was a male or female and the name of the student's provider. In addition, the parent admits that, at times during the impartial hearing, she mistakenly referred to the student's services as SEIT services, rather than SETSS, but now clarifies that the student received SETSS.

Finally, with respect to the hourly rates of the agency providers, the parent contends that she was never asked to provide "statistics from the US Bureau of Labor to support [her] request for a reasonable market rate." The parent argues that, if the district objected to her requests, then the district should have provided evidence of the rates typically paid for such services. According to the parent, SETSS and SEIT services within her specific community were "typically funded between $175 and $200 dollars per hour." Moreover, the parent indicates that she was "never informed of any June 1st deadline" prior to the IHO finding that she was required to provide notice to the district prior to that date. The parent also notes that the district did not raise the June 1st issue prior to closing remarks and, thus, it would be unfair to her to now hold her to a "deadline that [she] was never informed of and contradicts the [district's] promise to provide [the student] with services." As relief, the parent seeks funding for the costs of the student's services as mandated in her March 2022 IESP and she submits additional documentary evidence for consideration on appeal in support of her requests.

In an answer, the district responds to the parent's allegations and generally argues to uphold the IHO's decision in its entirety. Additionally, the district asserts that the student has been receiving pendency services consistent with the IHO's interim decision on pendency throughout the administrative proceedings. The district affirmatively asserts that it does not challenge the IHO's finding that the district failed to provide the student with equitable services for the 2022-23 school year.[8] In support of upholding the IHO's findings, the district argues that the IHO properly concluded that the hearing record lacked sufficient evidence of any contractual relationship between the parent and the agency, Beyond Limits, to provide the student with SETSS and related services of OT and speech-language therapy. In addition, the district contends that the hearing record lacked evidence—such as invoices or logs—to establish that the parent was "ever billed for related services" or to otherwise provide evidence of when the student actually received services.

[8] Since the district asserts that it does not appeal from the IHO's finding that the district failed to implement the student's March 2022 IESP, this determination has become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

The district further contends that, as the impartial hearing took place in February and March 2023, "invoices through that time period could have been introduced into the [hearing] record at that time." Next, the district asserts that, although the hearing record included testimonial evidence that Beyond Limits delivered SETSS, OT, and speech-language therapy to the student, such evidence was insufficient to establish that the parent was legally obligated to pay for such services. Thus, the district argues that the IHO properly concluded that the hearing record was devoid of evidence—such as "attendance records, logs, sessions notes or other records that established the dates, time and location when these services were allegedly provided to the [s]tudent"—notwithstanding the parent's testimony that she was legally obligated to pay for such services. Finally, the district argues that consistent with the IHO's findings, the hearing record failed to contain sufficient evidence of the student's progress and that the attestations in the parent's and the agency owner's affidavits were "vague and overbroad" regarding whether the student received a benefit from these services. Overall, the district seeks to uphold the IHO's decision and to dismiss the parent's appeal.

In a reply to the district's answer, the parent argues that she did not turn any invoices over at the impartial hearing because she had not received any invoices. The parent maintains, however, that she is contractually obligated to pay for the services even if she has not received any invoices. Next, the parent indicates that she is "not even aware of what the outstanding balance would be since [p]endency may or may not have covered a portion of the invoices." The parent also asserts that, contrary to the district's allegations, the testimony at the impartial hearing indicated that the student made progress, and specific references were made by the agency witness as to assessments reflecting the student's progress, such as the "Brigance Assessment as well as the CELF-4 and CELF-5." Finally, the parent asserts that the hearing record includes "numerous references" to the contract between the agency and the parent and she was never asked at the impartial hearing to produce the contract. The parent notes that she may be contacted should a review of the contract be desired. The parent continues to seek funding for the costs of the student's services, at a reasonable market rate, as relief.[9]

V. Applicable Standards

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

[9] The parent prepared, served, and filed a reply to the district's answer in this case. However, State regulation limits the scope of the parent's reply to "any claims raised for review by the answer . . . that were not addressed in the request for review, to any procedural defenses interposed in an answer . . . or to any additional documentary evidence served with the answer" (8 NYCRR 279.6[a]). In this instance, the district's answer does not include any of the necessary conditions precedent triggering the parent's right to compose a reply. As such, the parent's reply fails to comply with the practice regulations and will not be considered.

the IDEA to receive some or all of the special education and related services they would receive if enrolled in a public school (see 34 CFR 300.134, 300.137[a], [c], 300.138[b]).

However, under State law, parents of a student with a disability who have privately enrolled their child in a nonpublic school may seek to obtain educational "services" for their child by filing a request for such services in the district of location where the nonpublic school is located on or before the first day of June preceding the school year for which the request for services is made (Educ. Law § 3602-c[2]).[10] "Boards of education of all school districts of the state shall furnish services to students who are residents of this state and who attend nonpublic schools located in such school districts, upon the written request of the parent" (Educ. Law § 3602-c[2][a]). In such circumstances, the district of location's CSE must review the request for services and "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an [IEP]" (Educ. Law § 3602-c[2][b][1]). The CSE must "assure that special education programs and services are made available to students with disabilities attending nonpublic schools located within the school district on an equitable basis, as compared to special education programs and services provided to other students with disabilities attending public or nonpublic schools located within the school district (id.).[11]

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. Preliminary Matters—Additional Documentary Evidence

As noted, the parent submitted additional documentary evidence for consideration in support of her appeal (see generally Req. for Rev. Exs. 1-3).[12] Generally, documentary evidence not presented at an impartial hearing is considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the

[10] 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]).

[11] State guidance explains that providing services on an "equitable basis" means that "special education services are provided to parentally placed nonpublic school students with disabilities in the same manner as compared to other students with disabilities attending public or nonpublic schools located within the school district" ("Chapter 378 of the Laws of 2007–Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the Individuals with Disabilities Education Act (IDEA) 2004 and New York State (NYS) Education Law Section 3602-c," Attachment 1 at p. 11, VESID Mem. [Sept. 2007], available at http://www.p12.nysed.gov/specialed/publications/policy/nonpublic907.pdf). The guidance document further provides that "parentally placed nonpublic students must be provided services based on need and the same range of services provided by the district of location to its public school students must be made available to nonpublic students, taking into account the student's placement in the nonpublic school program" (id.).

[12] The district took no position in its answer with respect to the parent's submission of additional documentary evidence, but avers that the invoices dated through March 2023 "could have been introduced into the [hearing] record at that time" (Answer ¶ 7).

evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]).

A review of the parent's additional evidence reveals that most of the documents existed at the time of the impartial hearing—which took place from October 13, 2022 through March 16, 2023—since the additional evidence reflects dates that range from as early as October 25, 2022 (date of initial OT consultation and evaluation) to as late as April 4, 2023 (one invoice reflecting dates in March 2023 when SETSS was allegedly delivered to the student) (see Req. for Rev. Exs. 1 at p. 1; 2 at p. 1; 3 at p. 7). While the invoice dated April 4, 2023 may not have existed prior to the record close date of the impartial hearing (March 16, 2023), the remaining invoices produced by the parent range in dates from February 8, 2023 through March 8, 2023, and were available at the time of the impartial hearing (compare IHO Decision at p. 1, with Req. for Rev. Ex. 3 at pp. 1-6). Moreover, the invoices demonstrate that Beyond Limits directly billed the district for SETSS purportedly delivered to the student from September 6, 2022 through March 30, 2023 at a rate within the range of rates requested by the parent, which weighs against a finding that the parent was financially obligated to pay for the agency's services (see Req. for Rev. Ex. 3 at pp. 1-6). However, in the request for review, the parent does not explain why the additional evidence was not proffered at the impartial hearing, other than indicating she now provides the evidence to establish that the "services testified to were in fact delivered" (Req. for Rev. at p. 4). Given that the proffered evidence was available at the time of the impartial hearing, and it is not now necessary in order to reach a decision in this case, I will exercise my discretion and decline to accept the parent's additional documentary evidence.

In addition, even assuming for the sake of argument that the additional evidence was now accepted into the hearing record, the parent would not prevail in her appeal, as the additional evidence would not alter the IHO's finding that the hearing record failed to include sufficient evidence that the services were appropriate or that the parent was obligated to pay for the SETSS and related services delivered to the student.

B. Credibility Determinations and Conduct of the Impartial Hearing

The parent alleges that, for reasons unclear to her, the IHO "found [the parent] and the provider unbelievable." The parent also alleges that the impartial hearing was "invasive and adversarial," with certain questions asked to "set traps and stumbling blocks." The parent expressed further concern about questions asked with respect to her family's finances, as well as the agency's finances, and whether questions about the agency providers' employment status was relevant to the student's receipt of services.

Turning first to the parent's concerns regarding the IHO's alleged credibility findings, generally, an SRO gives due deference to the credibility findings of an IHO unless non-testimonial evidence in the hearing record justifies a contrary conclusion or the hearing record, read in its entirety, compels a contrary conclusion (see Carlisle Area Sch. v. Scott P., 62 F.3d 520, 524, 528-29 [3d Cir. 1995]; P.G. v City Sch. Dist. of New York, 2015 WL 787008, at *16 [S.D.N.Y. Feb.

25, 2015]; M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 330 [E.D.N.Y. 2012], aff'd, 725 F.3d 131 [2d Cir. 2013]; Bd. of Educ. of Hicksville Union Free Sch. Dist. v. Schaefer, 84 A.D.3d 795, 796 [2d Dep't 2011]). However, in addressing credibility determinations made in other administrative settings, the Second Circuit Court of Appeals has pointed out that an assessment of a witness' credibility should provide specific reasons for the adverse credibility determination (see Zhang v. U.S. I.N.S., 386 F.3d 66, 74 [2d Cir. 2004] [2d Cir. 2007] [noting that court looks to see if the trial judge "provided 'specific, cogent' reasons for the adverse credibility finding and whether those reasons bear a 'legitimate nexus' to the finding"]; Williams v. Bowen, 859 F.2d 255, 260–61 [2d Cir. 1988] ["A finding that the witness is not credible must nevertheless be set forth with sufficient specificity to permit intelligible plenary review of the record"]).

Overall, a review of the IHO's decision does not support the parent's concerns because it does not appear that the IHO made credibility findings, but rather, drew attention to conflicting and confusing testimonial evidence elicited at the impartial hearing with respect to whether the agency issued progress reports for the student and whether and when the parent may have received those progress reports (see IHO Decision at pp. 11-12). Within this portion of the decision, the IHO was analyzing the appropriateness of the unilaterally-obtained services, and in that vein, considered any and all evidence relevant to that inquiry, including whether the evidence in the hearing record demonstrated that the services were actually delivered to the student (id.). As noted by the IHO, the hearing record was devoid of any progress reports, and given the inconsistent nature of the testimonial evidence, the IHO was unable to discern whether or when such progress reports would have been issued by the agency or received by the parent (id.). Therefore, rather than finding that the agency owner and parent were not credible, the IHO appears to have given little, if any, weight to their respective testimony with regard to the progress reports, and then, after further consideration and review of the evidence, concluded that the hearing record failed to contain sufficient evidence to establish that the unilaterally-obtained services were appropriate to meet the student's needs (id. at pp. 11-13). As a result, the parent's assertions must be dismissed.

In addition, assuming for the sake of argument that the IHO, in fact, made credibility determinations as asserted by the parent, the parent does not point to any non-testimonial evidence in the hearing record—or otherwise argue that the hearing record, when read in its entirety—compels a contrary conclusion (see generally Req. for Rev.). Therefore, as above, the parent's argument must be dismissed.

With regard to the conduct of the impartial hearing, and more specifically, the "invasive" questions asked regarding her family's finances or the agency's finances and the perceived adversarial nature of the proceedings, an independent review of the entire hearing record does not support the parent's contentions. For example, the parent's attorney initially questioned her about her family's finances by inquiring about the size of her family and the yearly household income, as well as any other sources of assistance the family received (see Tr. pp. 100-01). However, during cross-examination, the district's attorney inquired about whether the parent signed a contract with Beyond Limits and if she had received any invoices for services rendered to the student (see Tr. pp. 103-04). Otherwise, the district's attorney did not ask the parent any other questions about her family's finances (see Tr. pp. 104-06). In addition, although the IHO posed questions to the parent at the impartial hearing, the IHO did not delve any further into the area of the family's finances (see Tr. pp. 106-11). Other questions posed by the IHO dealt generally with

the issuance and receipt of progress reports, the names of the student's providers, the name of the agency owner and whether that individual provided services to the student, and whether the parent signed the contract in person or online (see Tr. pp. 106-11). And while it appears from the transcript that the parent may have become confused, at times, with respect to what was being asked of her or with regard to her recall of certain information, the transcript does not reflect a lack of patience by the attorneys or the IHO with the parent or otherwise reflect that the proceedings became more adversarial during questioning of the parent (see Tr. pp. 95-111). A review of the transcript of the agency owner's testimony reveals that the attorneys and the IHO extended the same levels of patience and courtesy to her as well (see Tr. pp. 78-94).

C. Unilaterally-Obtained Services and Relief

As noted above, the parent appeals the IHO's findings that the unilaterally-obtained services for the student were not appropriate and she continues to seek reimbursement or direct funding of those services as relief. However, assuming without deciding that the unilaterally-obtained services were appropriate to meet the student's needs, the parent would not be entitled to the requested relief because the parent failed to provide sufficient evidence establishing that she was financially obligated to pay for such services.

One form of relief available to the parent for the district's failure to offer a FAPE is tuition reimbursement, or as sought here, direct funding of SETSS. Generally, a board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 252 [2d Cir. 2009]). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

In other words, districts can be made to pay for special education services privately obtained for which a parent paid for or has become legally obligated to pay for, a process that is essentially the same as the federal process under IDEA. "Parents who are dissatisfied with their child's education can unilaterally change their child's placement . . . and can, for example, pay for 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 "[p]arents' failure to select a program known to be approved by the State in favor of an unapproved option is not itself a bar to reimbursement"]).

Accordingly, the parent's request for four hours (or periods) per week of SETSS must be assessed under this framework; namely, having found that the district failed to provide appropriate equitable services, the issue is whether the four hours of individual SETSS constituted an appropriate unilateral placement of the student such that the cost of the SETSS are reimbursable to the parent or, alternatively, should be directly paid by the district to the provider upon proof that the parent has paid for the services or is legally obligated to pay but does not have adequate funds to do so (see Parent Ex. B at pp. 1-2).[13] As a result, the cost of the SETSS, under the Burlington-Carter test, must be fully reimbursed or directly funded by the district unless, as a matter of equitable considerations, the costs sought to be reimbursed are excessive or otherwise should be reduced or, in the case of direct funding, the parent has not demonstrated a legal obligation to pay the costs and an inability to do so.

Here, the hearing record conclusively establishes through the parent's own testimony that she has not paid Beyond Limits for providing services to the student for the 2022-23 school year (see Tr. pp. 103-04). Thus, because there is no evidence that the parent has actually paid any money for which she must be reimbursed, this matter is in a subset of more complicated cases in which the financial injury to the parent and the appropriate remedy are less clear.[14]

Here, although the parent testified that she signed a contract with Beyond Limits to provide the student's services, the parent did not submit that contract into the hearing record as evidence—or as additional evidence for consideration on appeal—and she further testified that she had not

[13] Pursuant to the IHO's interim decision on pendency, the district was ordered to provide the student with the following as pendency services: four periods per week of SETSS as a group service in Yiddish; two 30-minute sessions per week of individual speech-language therapy services in Yiddish; one 30-minute session per week of speech-language therapy in a group in Yiddish; and two 30-minute sessions per week of OT in a group in English (see Interim IHO Decision at p. 8). The IHO also ordered that the pendency services were retroactive to the date of the due process complaint notice, September 6, 2022, and remain in effect throughout the duration of the administrative hearing process (id.). Although the IHO did not order the district to use specific providers—i.e., Beyond Limits agency—or otherwise describe how the district was to implement the student's pendency services in the decision, the parent does not now assert on appeal that the student did not fully receive the pendency placement services or that the district has not paid for the pendency placement services (see generally Req. for Rev.; Answer). Consequently, there does not appear to be any dispute as to the provision of, or payment for, the four hours (or periods) per week of individual SETSS and related services that may have already been provided to the student under pendency during the 2022-23 school year. However, the parties are reminded that the student may be entitled to some relief for any lapse in pendency. The Second Circuit has held that where a district fails to implement a student's pendency placement, students should receive the pendency services to which they were entitled as a compensatory remedy (Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 446 [2d Cir. 2015] [directing full reimbursement for unimplemented pendency services awarded because less than complete reimbursement for missed pendency services "would undermine the stay-put provision by giving the agency an incentive to ignore the stay-put obligation"]; see Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *25, *26 [E.D.N.Y. Oct. 30, 2008] [ordering services that the district failed to implement under pendency awarded as compensatory education services where district "disregarded the 'automatic injunction' and 'absolute rule in favor of the status quo' mandated by the [IDEA] and wrongfully terminated [the student's] at-home services"] [internal citations omitted]).

[14] At the impartial hearing, the agency owner testified that,"[u]sually most of [her] providers have to have the [progress] reports written by mid-schoolyear," or by "January" (Tr. pp. 85-86). The parent testified that she received progress reports from the student's providers, but could not specify when she had received them or how often she received progress reports (Tr. pp. 106-07).

received any invoices for services (see Parent Ex. D ¶ 8; Tr. pp. 103-04). In addition, the parent testified that she signed a contract with Beyond Limits in person, but she received all of the paperwork online through her email; additionally, when asked if she filled out a written application for the student's services, she simply responded that she "filled out paperwork" (see Tr. pp. 110, 112). The Second Circuit Court of Appeals has held that a direct payment remedy is an appropriate form of relief in some circumstances, and that "[i]ndeed, where the equities call for it, direct payment fits comfortably within the Burlington–Carter framework" (E.M. v. New York City Dep't of Educ., 758 F.3d 442, 453 [2d Cir. 2014]; see also Mr. and Mrs. A. v. New York City Dep't of Educ., 769 F. Supp. 2d 403, 430 [S.D.N.Y. 2011] [finding it appropriate to order a school district to make retroactive tuition payment directly to a private school where equitable considerations favor an award of the costs of private school tuition but the parents, although legally obligated to make tuition payments, have not done so due to a lack of financial resources]). However, unlike the E.M. case, the hearing record in this matter is devoid of any evidence that the parent is legally obligated to pay the agency or the provider for the SETSS or the related services allegedly delivered to the student (see generally Tr. pp. 1-164; Parent Exs. A-F). As noted by the IHO in her decision, and the district in its answer, no contract between the parent and the Beyond Limits agency was included in the hearing record for the 2022-23 school year (see IHO Decision at p. 13). Therefore, and consistent with the IHO's decision to deny the parent's request to fund SETSS and related services for the 2022-23 school year, as there is no evidence in the hearing record—such as a written contract between the parent and the agency or an invoice directed to the parent revealing a legal obligation to pay—it is not possible to find that the parent incurred a financial obligation for the SETSS or related services delivered to the student that would support an award of reimbursement relief for the 2022-23 school year.

As there is inadequate proof that the parent has expended any funds to pay for SETSS or the related services for the 2022-23 school year or that she has taken on a legal obligation to do so—other than her testimony which was not clear—it is not appropriate equitable relief in this due process proceeding to require the district to either reimburse the parent for the costs of SETSS and related services or to directly fund SETSS and related services under the relevant legal standards discussed above.[15]

Going forward, if they have not done so already, both parties should also return to using the appropriate CSE planning process called for by State law, and the parent should ensure that she adheres to the June 1 deadline for requesting section 3602-c services if she intends to place the student in a nonpublic school and seek dual enrollment services. Should the parent continue to find that the district is not engaging in the special education planning process or that the district is not sending a teacher to the private school to provide the requisite special education services, the procedure for obtaining private services is to send a timely notice of unilateral placement and then obtain reliable proof of an agreement between the parent and the private entity that details the

[15] To be clear, the equitable determinations made herein—that is, that the parent is not entitled to the relief sought because the hearing record is devoid of evidence to support an award of either tuition reimbursement for, or direct funding of, the SETSS delivered to the student during the 2022-23 school year—would be the same regardless of whether a determination was made finding that the SETSS allegedly provided to the student were appropriate.

essential terms under which the special education services are provided and who is legally responsible for the costs.

VII. Conclusion

In summary, the hearing record fails to include evidence sufficient to reverse the IHO's finding that the parent was not entitled to either reimbursement or direct funding of the student's SETSS and related services for the 2022-23 school year.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
August 10, 2023

CAROL H. HAUGE
STATE REVIEW OFFICER