The University of the State of New York

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

No. 24-282

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

Appearances:
Liz Vladeck, General Counsel, attorneys for respondent, by Sarah M. Pourhosseini, 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 that respondent (the district) fund the costs of her son's unilaterally-obtained special education teacher support services (SETSS) delivered by Learning Learners, LLC (Learning Learners) for the 2023-24 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 IDEA (20 U.S.C. §§ 1400-1482), namely a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, 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 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 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

In this matter, the evidence in the hearing record reflects that a CSE convened in November 2017 for the student's annual review and developed an IESP that included recommendations for the student—who was eligible to receive special education as a student with a speech or language impairment—to receive three periods per week of SETSS in a group (English, separate location)

and three 30-minute sessions per week of speech-language therapy in a group (English, separate location) (see Parent Ex. B at pp. 1, 6). According to the November 2017 IESP, the student was then-currently enrolled in second grade at a religious, nonpublic school, which "d[id] not have direct instruction in English reading or writing skills, and math skills" (id. at pp. 1-2). As noted in the November 2017 IESP, the student had been evaluated in October 2017, and although the student's testing results revealed that his overall intelligence fell within the average range, an administration of the "WIAT-III" to assess the student's academic achievement did not yield a "Total Achievement score" because he was "unable to earn scores on most reading and writing related subtests" (id. at p. 1).[1] The student did, however, earn scores within the average range on the oral language and mathematics composites, but he scored in the low range on basic reading composite and within the very low range on the written composite (id.). The November 2017 IESP indicated that the student's "overall performance suggest[ed] significantly below grade level achievement in the areas related to reading and writing skills, and close to grade level achievement related to math skills" (id.). It was further noted, however, that because the student's "school d[id] not teach [English Language arts (ELA)] and math skills," the student's "evaluations should be interpreted with caution" (id.). Additionally, it was noted that the student "reportedly d[id] struggle in related areas at school" (id.).

With respect to the student's speech-language needs, the November 2017 IESP indicated that he presented with "articulation, expressive language and voice deficits" (Parent Ex. B at p. 2). The IESP further indicated that the student's "[d]elays in the above listed areas must be addressed in order to participate in educational type activities and function age appropriately in a school and/or other social settings" (id.). In addition, the IESP noted that the student needed to "develop age appropriate skills in the following areas []: using complete sentences when speaking, providing details and controlling rapid speech" (id.). The IESP also noted that the student performed the following activities "with difficulty": "[r]eciting information clearly, controlling unusually loud voice or shouting in the classroom and dealing with a voice quality making it difficult to understand the content of spoken words" (id.). The student demonstrated strengths, however, with respect to "segmenting words, pronouncing words and using a variety of vocabulary words when talking," as well as using the "correct grammar when speaking" (id.).

Evidence in the hearing record reveals that, in December 2021, a CSE convened to conduct the student's annual review and develop an IESP that included a recommendation for the student—who remained eligible to receive special education as a student with a speech or language impairment—to receive three periods per week of individual SETSS in a separate location (see Dist. Ex. 1 at pp. 1, 5).[2] According to the IESP, the CSE relied on a teacher report, parent report, and a SETSS report to develop the student's program (id. at p. 1). At that time, the student was parentally placed at a religious, nonpublic school (id. at p. 1). According to the December 2021 IESP, the student was then-currently attending sixth grade at a "private school that d[id] not provide formal instruction for secular subjects" and further reflected that it was "important to note

[1] While not described in the hearing record, WIAT-III typically refers to the Wechsler Individual Achievement Test, Third Edition.

[2] The student's eligibility to receive special education and related services 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]).

that [the student's] school curriculum concentrate[d] on Judaic studies, and secular studies [we]re not addressed" (id.). As reported by the student's "classroom teacher, the student was "managing in class," he participated, and was "pass[ing] all of his class[es]" (id.). The December 2021 IESP reflected that, per the classroom teacher, the student was "on grade level" and "perform[ed] well academically"; however, he needed to "focus more and concentrate," which improved his overall performance (id.). The IESP also noted that the student had a "very good memory," he "[r]etained information well," and he needed "instruction repeated and clarified" (id.).

As noted in the December 2021 IESP, the SETSS provider reported that the student was "below grade level" (Dist. Ex. 1 at p 1). In addition, the SETSS provider indicated that the student could "count up to 1000 and c[ould] do addition and subtraction," but he needed "help with multiplication and division" (id.). In reading, the SETSS provider reported that the student was also "below grade level"; however, the student "underst[ood] a simple paragraph" and needed help with "reading text" (id. at pp. 1-2). In writing, the SETSS provider noted that the student was "below class level," but demonstrated "creative writing ideas" (id. at p. 2). According to the SETSS provider, the student needed to improve "in writing the abcs" (id.). Additionally, it was noted that the student could "comprehend the English language" (id.). The IESP reflected that a SETSS progress report had been reviewed with the parent and that, according to the progress report, the student was "below grade level in reading and mathematics"; thus, the CSE recommended continuing SETSS (id.).

The December 2021 IESP reported the parent's concerns, which included, among other things, that she wanted the student to "begin to learn English" (Dist. Ex. 1 at p. 2). The parent also reported, at that time, that the student had not received speech-language therapy services, but she believed he did not require speech-language therapy services (id.).[3]

Neither party provided any information or evidence regarding what occurred during the remainder of the 2021-22 school year or for the entire 2022-23 school year (see generally Tr. pp. 1-55; Parent Exs. A-H; Dist. Exs. 1-2). Approximately 1.5 years after the December 2021 CSE meeting, on May 31, 2023, the parent—via an email sent by Learning Learners—informed the district that she had parentally placed the student in a nonpublic religious school at her own expense, but wanted the district to continue to provide special education to the student for the next school year (see Parent Ex. C at pp. 1-2). The parent signed the letter to the district on May 23, 2023 (id. at p. 2).

On August 9, 2023, the parent signed a "Parent Service Contract" with Learning Learners to provide SETSS to the student for the 2023-24 school year at a rate of $215.00 per hour (Parent Ex. E at pp. 1-2).[4]

[3] According to the December 2021 IESP, the parent reported no concerns with regard to the student's social or physical development (see Dist. Ex. 1 at p. 2).

[4] The document indicated that Learning Learners would "make every effort to implement" three periods per week of group SETSS and three 30-minute sessions per week of group speech-language therapy; however, the contract also indicated that Learning Learners "intend[ed] to provide" "SETSS/SEITS at a rate of $215 per hour" with no reference to speech-language therapy services in that portion of the document (Parent Ex. E).

In a letter to the district dated August 26, 2023, this time sent and signed by an attorney "on behalf of" the parent, notified the district of her intentions to unilaterally-obtain services to implement the student's November 2017 IESP and to seek reimbursement or direct payment of those services from the district (see Parent Ex. D at p. 2).

A. Due Process Complaint Notice

In a due process complaint notice dated February 13, 2024, the parent, through her attorney, alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2023-24 school year by failing to convene the CSE for the 2023-24 school year (Parent Ex. A at pp. 1-2). According to the parent, the student's last-agreed upon program in his November 2017 IESP was "outdated and expired"; in addition, she could not locate a provider and the district had failed to implement the student's program in the November 2017 IESP for the 2023-24 school year (id. at p. 2). The parent also indicated that the student's November 2017 IESP, which included recommendations for three periods per week of SETSS in a group (English) and three 30-minute sessions per week of speech-language therapy services in a group (English), formed the basis for the student's pendency services (id.). As relief, the parent sought an order directing the district to fund the costs of the student's program set forth in the November 2017 IESP for the 2023-24 school year at the "provider's contracted rate" and to fund a bank of compensatory educational services for any pendency services not provided to the student (id. at p. 3).

B. Impartial Hearing Officer Decision

On April 3, 2024, the parties proceeded to an impartial hearing before an IHO with the Office of Administrative Trials and Hearings (OATH) (see Tr. pp. 1-8).[5] On May 8, 2024, the parties resumed and concluded the impartial hearing (see Tr. pp. 9-55). The parent did not appear at the impartial hearing. In a decision dated May 28, 2024, the IHO found that the district failed to offer the student a FAPE for the 2023-24 school year, that the parent's unilaterally-obtained SETSS delivered by Learning Learners was appropriate, but that equitable considerations warranted a reduction in the hourly rate awarded for the SETSS Learning Learners delivered from the contracted rate of $215.00 per hour to $125.00 per hour (see IHO Decision at pp. 8-14).[6]

In reaching the decision to reduce the SETSS hourly rate awarded to the parent, the IHO primarily rested this conclusion on the agency director of special education's (director) testimony, which the IHO described as "internally inconsistent" and which "seemed tailored to justify numerous expenses that, in fact, ha[d] nothing to do with expenses incurred by servicing this [s]tudent" (IHO Decision at p. 14).[7] For example, in the findings of fact, the IHO noted that the director "attempted to explain the various factors that [went] into the 'overhead' that [Learning Learners] collect[ed] per hour of service, but [she] gave largely contradictory, confusing, and incoherent answers" (id. at p. 6, citing Tr. pp. 28-35). In addition, the IHO indicated that although

[5] The parent remained represented by an attorney throughout the impartial hearing (see Tr. pp. 1, 9).

[6] At the impartial hearing, the parent withdrew her request that the district fund the costs of the student's speech-language therapy services for the 2023-24 school year (see Tr. p. 17).

[7] During cross-examination, the witness testified that her job title was "Director of Agency" (Tr. p. 20).

the director testified that "'educational resources' made up part of the overhead expenses charged by [Learning Learners], on cross-examination, [she] could not explain what [she] meant when using that term" (IHO Decision at p. 6, citing Tr. pp. 31-33). Next, when asked to explain what was "meant by one-on-one supervision," the director testified that it was "'the supervisor consulting with the provider in an educational . . . way'" and failed to provide any "further details" (IHO Decision at p. 6, citing Tr. p. 32). The IHO further noted that when asked to identify the SETSS provider's supervisor, the director "could not name" the individual notwithstanding the director's claim that the "supervisor's one-on-one work with [the SETSS provider] was a substantial part of the reason why the hourly rate charged by the agency was more than double the amount paid to [the SETSS provider]" (id.). Finally, the IHO pointed to the director's testimony concerning "overhead expenses," which, based on her testimony, included "spending on 'materials'" (IHO Decision at p. 6, citing Parent Ex. H). According to the testimony, the IHO found that the agency gave the SETSS provider "$100 . . . at the beginning of the school year to spend on [the s]tudent and how, at the time of the due process hearing, [the SETSS provider] had still not even spent that money on resources" for the student (IHO Decision at p. 6, citing Tr. p. 34). Based on these findings, the IHO indicated that while he "credit[ed] [the d]irector's testimony regarding the quality" of the SETSS delivered to the student, he "c[ould not] credit, in any way, [the d]irector's testimony about the justification for the rate charged" by Learning Learners (IHO Decision at pp. 6-7).

When analyzing equitable considerations, the IHO explained that, based on the director's testimony, the agency paid the SETSS provider $85.00 per hour; however, the IHO concluded that, while "some of [the d]irector's testimony explained legitimate overhead expenses," "[w]ithout more guidance, [he was] ordering funding to be capped at $125 per hour" on a 10-month school year basis (i.e., 36 weeks) (IHO Decision at p. 14). Therefore, as relief, the IHO ordered the district to fund 108 hours of individual SETSS to the student for the 2023-24 school year by the Learning Learners agency at a rate not to exceed $125.00 per hour upon the receipt of invoices for services rendered, sessions notes for each service, and a "sworn affidavit from each provider that the services described in the invoices were actually rendered" (id. at pp. 14-15). The IHO also ordered that the SETSS award, if not fully used, would expire on September 8, 2025 (id. at p. 15).

IV. Appeal for State-Level Review

The parent appeals pro se, alleging that the IHO erred by reducing the hourly rate awarded to fund the unilaterally-obtained SETSS delivered by Learning Learners for the 2023-24 school year.

In an answer, the district responds to the parent's allegations and generally argues to uphold the IHO's decision in its entirety. The district also asserts that the parent's request for review should be dismissed for the failure to comply with practice regulations. With respect to the IHO's determination regarding equitable considerations, the district contends that the parent failed to appeal the specific findings that the director's testimony lacked credibility. Additionally, the district asserts that due deference must be given to the IHO's credibility determination, which was based on detailed findings. Alternatively, the district contends that the excessiveness of cost remained a relevant factor in equitable considerations. In this matter, the district calculates that

approximately 39 percent of the total hourly rate was paid to the SETSS provider and the hearing record failed to support an award of $215.00 per hour.[8]

V. Applicable Standards

A board of education must offer a FAPE to each student with a disability residing in the school district who requires special education services or programs (20 U.S.C. § 1412[a][1][A]; Educ. Law § 4402[2][a], [b][2]). However, the IDEA confers no individual entitlement to special education or related services upon students who are enrolled by their parents in nonpublic schools (see 34 CFR 300.137[a]). Although districts are required by the IDEA to participate in a consultation process for making special education services available to students who are enrolled privately by their parents in nonpublic schools, such students are not individually entitled under the IDEA to receive some or all of the special education and related services they would receive if enrolled in a public school (see 34 CFR 300.134, 300.137[a], [c], 300.138[b]).

However, under State law, parents of a student with a disability who have privately enrolled their child in a nonpublic school may seek to obtain educational "services" for their child by filing a request for such services in the 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]).[9] "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

[8] The district attaches additional documentary evidence to its answer for consideration on appeal (see Answer SRO Ex. 1). Generally, documentary evidence not presented at an impartial hearing is considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]). Here, the district submits an email as evidence of the parent filing the notice of intention to seek review on the district (see Answer SRO Ex. 1). However, the parent, consistent with State regulations, filed an affidavit of electronic service with the Office of State Review, which reflects service of the notice of intention to seek review on the district on July 3, 2024 (Parent Aff. of Service). Therefore, because the administrative hearing record on appeal already includes proof of service of the notice of intention to seek review, I will exercise my discretion and decline to enter and consider the district's document into the hearing record as evidence.

[9] 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]).

nonpublic schools located within the school district (id.).[10] 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.

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E. v. New York City Dep't of Educ., 694 F.3d 167, 184-85 [2d Cir. 2012]).

VI. Discussion

A. Preliminary Matters—Compliance with Practice Regulations

As noted, the district seeks dismissal of the parent's request for review, alleging that the parent did not timely serve the notice of intention to seek review.

An appeal from an IHO's decision to an SRO—whether the appeal is by a district or a parent—must be initiated by timely personal service of a verified request for review and other supporting documents, if any, upon respondent (8 NYCRR 279.4[b], [c]). Personal service on a school district is made "by delivering a copy thereof to the district clerk, to a trustee or member of the board of education of such school district, to the superintendent of schools, or to a person who has been designated by the board of education to accept service" (8 NYCRR 279.4[b]). The petitioner must personally serve the opposing party with the notice of intention to seek review no later than 25 days after the date of the IHO's decision and thereafter, must serve the opposing party with the request for review no later than 40 days after the date of the IHO's decision (8 NYCRR 279.2[b]). The petitioner must also file the "notice of intention to seek review, notice of request for review, request for review, and proof of service with the Office of State Review . . . within two days after service of the request for review is complete" (8 NYCRR 279.4[e]).

The practice regulations envision an efficient process by which a notice of intention to seek review is served upon the respondent approximately 10 days before a request for review is served

[10] 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 (Questions and Answers), VESID Mem. [Sept. 2007], available at https://www.nysed.gov/special-education/guidance-parentally-placed-nonpublic-elementary-and-secondary-school-students). The guidance document further provides that "parentally placed nonpublic students must be provided services based on need and the same range of services provided by the district of location to its public school students must be made available to nonpublic students, taking into account the student's placement in the nonpublic school program" (id.). The guidance has recently been reorganized on the State's web site and the paginated pdf versions of the documents previously available do not currently appear there, having been updated with web based versions.

(but not later than 25 days after the date of the IHO decision).[11] Among other things, the "service of a notice of intention to seek review upon a school district serves the purpose of facilitating the timely filing of the hearing record by the district with the Office of State Review (see Application of a Student with a Disability, Appeal No. 24-083; Application of a Student with a Disability, Appeal No. 21-054; Application of a Student with a Disability, Appeal No. 16-040; Application of a Student Suspected of Having a Disability, Appeal No. 12-014). The district must file the completed and certified record with the Office of State Review within 10 days after service of the notice of intention to seek review (see 8 NYCRR 279.9[b]).

Here, consistent with the district's assertion, the parent served the notice of intention to seek review and case information statement on the district on July 3, 2024, and then two days later, served the notice of request for review and request for review on the district on July 5, 2024. Based on the date of the IHO's decision, May 28, 2024, and the timelines set forth in State regulations, the parent was required to serve the district with the notice of intention to seek review no later than June 24, 2024.[12] Therefore, it is undisputed that the parent untimely served the notice of intention to seek review. However, an SRO "may, in his or her discretion . . . review the determination of an impartial hearing officer notwithstanding a party's failure to timely serve a notice of intention to seek review" (8 NCYRR 279.2[f]).

Based on the parent's noncompliance with State regulation, together with what the district characterizes as a developing pattern of untimely filing of notices of intention to seek review by parents or their attorneys, the district asks the undersigned to take judicial notice of this alleged pattern and to consider the inherent prejudice to the district arising from its receipt of the parent's notice of intention to seek review approximately one week after its own deadline for filing a notice of intention to cross-appeal would have passed, as a basis upon which to dismiss the parent's appeal.

However, despite attributing a pattern of late filings to the parent's attorney, the district fails to point to any specific evidence to support this claim, other than the filing in this appeal. Ordinarily the type of pattern of noncompliance as the district describes is attributed to a specific individual or a specified small group of individuals who engages in these matters consistently. But in this case the district is attributing it merely to parents in general, which is too broad. I note that the parent, who is not listed on the roll of attorneys in this State, did not appear to participate in the preparation of letters sent by Learning Learners or her attorney or, for that matter, in the impartial hearing itself; yet she suddenly demonstrated a stunning level of legal acumen and familiarity with prior SRO decisions and special education case law in her pro se request for review

[11] If the respondent in an appeal is a school district, this provides school district personnel ample time to examine, prepare and certify the complete administrative record. On the other hand, if the respondent is a parent, the parent who has been timely provide a notice of intention to seek review has ample notice before the parent's responsive pleading is due to facilitate engagement (or reengagement) of legal representation and/or to begin to consider possible defenses to favorable outcomes obtained in the hearing process or cross-appeal any unfavorable aspects of the IHO's decision.

[12] Although the district asserts that the parents had until June 22, 2024 to serve the notice of intention to seek review, June 22nd fell on a Saturday; as a result, State regulations permitted the parents to timely serve the notice of intention to seek review on Monday, June 24, 2024 (see 8 NYCRR 279.11[b]).

filed in this proceeding and this suggests she may have had undisclosed legal assistance. Thus the district's attribution of the conduct to an attorney may not be far from the mark. On the other hand, the district's assertion that it was precluded from filing a cross-appeal in this matter as a result of the passage of the deadline for filing a notice of intention to cross-appeal is not true. In addition, the district has not convincingly identified any prejudice in responding to the parent's request for review or its ability to timely file a certified hearing record with the Office of State Review. Therefore, at this juncture, as the district has not demonstrated any prejudice, I will exercise my discretion and decline to dismiss the parent's request for review for the failure to timely file the notice of intention to seek review (see 8 NCYRR 279.2[f]).

B. Legal Standard

The IHO in this matter expressed reluctance to apply a Burlington/Carter analysis to the private services that the parent unilaterally obtained for which she sought direct funding from the district. In this matter, the student has been parentally placed in a religious nonpublic school and the parent does not seek tuition reimbursement from the district for the cost of the nonpublic school. Instead, the parent alleged that the district failed to implement the student's mandated public special education services under the State's dual enrollment statute for the 2023-24 school year and, as a self-help remedy, she unilaterally obtained private services from Learning Learners for the student without the consent of the school district officials, and then commenced due process to obtain remuneration for the costs thereof. Generally, districts that fail to comply with their statutory mandates to provide special education can be made to pay for special education services privately obtained for which a parent paid or became legally obligated to pay, a process that is essentially the same as the federal process under IDEA. Accordingly, the issue in this matter is whether the parent is entitled to public funding of the costs of the private 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 Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 14 [1993] [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 district funding of privately-obtained services must be assessed under this framework. Thus, a board of education may be required to reimburse parents for their expenditures for private educational services they obtained for a student 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 (Carter, 510 U.S. 7; 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]).[13] 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.

[13] State law provides that the parent has the obligation to establish that a unilateral placement is appropriate, which in this case is the special education that the parent obtained from Learning Learners (Educ. Law § 4404[1][c]).

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).

Here, the IHO applied the correct legal standard and, the IHO then factually found that the SETSS Learning Learners delivered to the student during the 2023-24 school year was appropriate. Since neither party appealed the IHO's finding regarding the appropriateness of the SETSS, 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]).[14]

C. Equitable Considerations

The crux of the parties' dispute focuses on the hourly rate the IHO awarded to fund the student's unilaterally-obtained SETSS.

The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]; L.K. v. New York City Dep't of Educ., 674 Fed. App'x 100, 101 [2d Cir. Jan. 19, 2017]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014] [identifying factors relevant to equitable considerations, including whether the withdrawal of the student from public school was justified, whether the parent provided adequate notice, whether the amount of the private school tuition was reasonable, possible scholarships or other financial aid from the private school, and any fraud or collusion on the part of the parent or private school]; C.L., 744 F.3d at 840 [noting that "[i]mportant to the equitable consideration is whether the parents obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA"]).

Reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to their removal of the student from public school, or by written notice 10 business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C.

[14] Again, the district's argument that it was foreclosed from cross-appealing this determination is without merit. Furthermore, nothing precluded the district from timely serving and filing its own notice of intention to seek review and a request for review in this matter.

§ 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger v. Medina City Sch. Dist., 348 F.3d 513, 523-24 [6th Cir. 2003]; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G., 459 F.3d at 376; Voluntown, 226 F.3d at 68).

Among the factors that may warrant a reduction in tuition under equitable considerations is whether the frequency of the services or the rate for the services were excessive (see E.M., 758 F.3d at 461 [noting that whether the amount of the private school tuition was reasonable is one factor relevant to equitable considerations]). An IHO may consider evidence regarding whether the rate charged by the private agency was unreasonable or regarding any segregable costs charged by the private agency that exceed the level that the student required to receive a FAPE (see L.K. v. New York City Dep't of Educ., 2016 WL 899321, at *7 [S.D.N.Y. Mar. 1, 2016], aff'd in part, 674 Fed. App'x 100). More specifically, while parents are entitled to reimbursement for the cost of an appropriate private placement when a district has failed to offer their child a FAPE, it does not follow that they may take advantage of deficiencies in the district's offered placement to obtain all those services they might wish to provide for their child at the expense of the public fisc, as such results do not achieve the purpose of the IDEA. To the contrary, "[r]eimbursement 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 [emphasis added]; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148). Accordingly, while a parent should not be denied reimbursement for an appropriate program due to the fact that the program provides benefits in addition to those required for the student to receive educational benefits, a reduction from full reimbursement may be considered where a unilateral placement provides services beyond those required to address a student's educational needs (L.K., 674 Fed. App'x at 101; see C.B. v. Garden Grove Unified Sch. Dist., 635 F. 3d 1155, 1160 [9th Cir. 2011] [indicating that "[e]quity surely would permit a reduction from full reimbursement if [a unilateral private placement] provides too much (services beyond required educational needs), or if it provides some things that do not meet educational needs at all (such as purely recreational options), or if it is overpriced"]; Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ., 790 F.2d 1153, 1161 [5th Cir. 1986] ["The Burlington rule is not so narrow as to permit reimbursement only when the [unilateral] placement chosen by the parent is found to be the exact proper placement required under the Act. Conversely, when [the student] was at the [unilateral placement], he may have received more 'benefit' than the EAHCA [the predecessor statute to the IDEA] requires"]).

In reaching the decision to reduce the SETSS hourly rate award from the contracted rate of $215.00 per hour to a cap of $125.00 per hour based on equitable considerations, the IHO did not credit the director's testimony when she attempted to explain the basis for the hourly rate the agency charged for SETSS (see IHO Decision at pp. 13-14). On appeal, the parent contends that the hearing record fails to include any evidence to support a rate reduction, such as other evidence of market rates or that the rate charged by Learning Learners was excessive.

The district initially asserts that the parent failed to appeal the IHO's specific ruling that the director's testimony lacked credibility. On this basis, the district argues that the IHO's finding is final and binding. In addition, the district asserts that the IHO made detailed findings with respect to the director's credibility and the parent does not refute these determinations and does not point to evidence to overturn the credibility determination.

Turning first to 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"]).

Here, the evidence in the hearing record reveals that, at the impartial hearing, the parent presented the director's affidavit in lieu of direct testimony as evidence (see generally Parent Ex. H). Within the affidavit, the director testified that the agency charged $215.00 per hour for SETSS and that the rate was "necessary to cover all of the Agency's costs related to providing services" for the 2023-24 school year (id. ¶¶ 7-8). According to her testimony, the agency's SETSS rate included "one-on-one supervision, educational resources and support, professional development and materials, employment taxes, administrative costs and overhead costs" (id. ¶ 8). In addition, the director testified that the agency's SETSS rate covered the "costs necessary to run the agency," and was "applied towards paying for materials and supplies for our teachers, paying our rent, and paying support staff" (id.).

On cross-examination, the director testified that the SETSS provider assigned to the student had been working with him for three years, and for the 2023-24 school year, the SETSS provider began working with him at the "beginning" of the school year (Tr. p. 23). According to the director, the agency tracked the SETSS provider's sessions through an "app," and if a student was absent, the student could receive make-up services (see Tr. p. 24). She also testified that the agency's billing practices only allowed the SETSS provider to "bill from when they start[ed]" the session, but a student could access a "certain bank of hours" if the provider was late (Tr. pp. 24-25).

With respect to the agency's rate for SETSS, the director testified that, out of the total rate of $215.00 per hour, the SETSS provider in this matter was paid $85.00 per hour and the remaining $130.00 per hour covered the items she had listed in her affidavit (see Tr. pp. 25-26, 28; Parent Ex. H ¶ 8). Upon further examination, the director explained that "one-on-one supervision" referred to when a provider "ha[d] any questions or anything concerning the student," the agency

was "there to provide support" and the supervisor was an individual from the agency (Tr. p. 26). When asked how often the SETSS provider in this matter connected with her supervisor for this student, the director testified that the SETSS provider could "call when she ha[d] any concern or any questions," but did not specify how often that occurred (Tr. pp. 26-27). She also could not provide an "exact calculation" or a "percentage" for how much of the remaining $130.00 per hour had been allotted to the supervisor's services for the student's SETSS provider (Tr. p. 28).

When asked to explain the "educational resources and support" portion of the agency's rate charged for SETSS, the director testified that this referred to "loans," "office staff," and activities associated with "running the agency," such as a "bookkeeper, accountant, rent, supplies, and stuff like that" (Tr. p. 28; see Parent Ex. H ¶ 8). She also testified that the educational resources and support were also paid from the remaining $130.00 per hour of the total amount charged for SETSS (id.). To clarify the witness's testimony, the district's attorney confirmed the director's testimony that the "educational resources and support" included the "office support, rent, supplies, [and] loans" (Tr. p. 29). The district's attorney then noted, however, that the director's affidavit separately listed "rent, support, and things of that nature," and questioned whether those had been "included twice in . . . [her] affidavit" (id.). In response, the director testified that materials a provider needed for a student was a "separate cost," as well as "supervision," "office staff," and "loans," which had been used to pay providers in light of delayed payments and delayed authorizations for payment to the agency (Tr. pp. 29-30). In another attempt to clarify the witness's testimony, the district's attorney reframed the question about the "educational resources and support" and the director explained that "if there's classes or support, then that's what it [wa]s," such as "classes given to providers or support" and monies paid "out of pocket" for a "counseling provider" to "make sure that . . . [the students were] being helped out in the best way possible" (Tr. pp. 31-32). The director could not provide the name of the individual providing counseling services (see Tr. p. 32). She then identified herself as the SETSS provider's supervisor in this case (see Tr. pp. 32-33). The director could not, however, provide an "exact calculation" for what amount or percentage of the remaining $130.00 per hour of the agency's total rate charged for SETSS was allotted to pay for the "educational resources and support" (Tr. p. 33).

Next, the cross-examination turned to the "professional development and materials" listed in the director's affidavit as a component of the hourly rate charged for SETSS (Tr. p. 34; Parent Ex. H ¶ 8). The director confirmed that "professional development" referred to "classes for the provider," and described "materials" as monies spent by the SETSS provider for "anything" the student may need (Tr. p. 34). However, she noted that the agency "usually" gave the providers "like $100 or something per student" for the school year; the director further testified that the SETSS provider in this case had not yet "utilized $100 worth of materials" for this student to date (Tr. pp. 34-35). With respect to "professional development," the director could not provide "any calculations" with regard to how much of the remaining $130.00 per hour had been allotted for this component of the agency's hourly rate charged for SETSS (Tr. p. 35). She also could not provide an "exact calculation" or a "percentage" for how much of the remaining $130.00 per hour had been allotted to pay towards "employment taxes" (id.).

Next, the cross-examination turned to the "administrative costs" listed in the director's affidavit as a component of the hourly rate charge for SETSS (Tr. p. 36). The director described these costs as including "overhead," "office staff, a "bookkeeper," and an "accountant," along with "everything that c[ame] along with running an agency," including "stuff that need[ed] to be paid"

(id.). When pressed on the distinction between "administrative costs" and "overhead costs," the director admitted that "overhead costs" and " administrative costs" were "[p]retty much" the same things (Tr. pp. 36-37). She also admitted that the "administrative costs and overhead costs [we]re basically everything that [wa]s being listed in paragraph 8 of [her] affidavit" (Tr. p. 37).

With respect to the actual rate charged for SETSS, the director testified that the agency arrived at the $215.00 per hour because it was the "market rate" or the "standard rate that [wa]s being charged right now" (Tr. p. 37).[15] She further testified that it was the "rate that[wa]s needed to cover" (Tr. pp. 37-38). The director also testified that she, herself, had contacted two other agencies—"ALL SETSS" and "Lead Remedial"—to determine the market rate for SETSS (Tr. p. 38).

Overall, a review of the director's testimony and the IHO's decision reveals that the IHO drew attention to conflicting and confusing testimonial evidence elicited at the impartial hearing with respect to how Learning Learners justified the total hourly rate of $215.00 and how the agency apportioned the remaining $130.00 per hour charged for SETSS (see IHO Decision at pp. 6-7, 13-14). Within the findings of fact, the IHO accurately recited the director's testimony, and when examining equitable considerations, the IHO gave no weight to the director's testimonial evidence when it came to awarding relief (id. at pp. 13-14).

Turning to the parent's contentions on appeal, a review of the evidence above supports the IHO's characterization of the director's testimony as confusing, and at times, contradictory. This is true where, as here, the evidence regarding the agency's hourly rate for SETSS appears suspect, particularly when over half of the rate charged by the agency goes towards various expenses that were shown at times to be duplicative. However, as the parent argues, a reduction of the rate awarded based on reasonableness or excessiveness must include evidence of what a reasonable rate would be, or at least a factual basis for finding a rate unreasonable, and a review of the hearing record does not include any offer of evidence by the district at all as to what a reasonable rate for SETSS would be.[16] Thus, the IHO's proposed reduction, without evidence of what a reasonable hourly rate should be, was error.

Notwithstanding the foregoing, the inconsistencies in the director's testimony, as well as inconsistencies between the other evidence included in the hearing record, tends to indicate that the student was receiving primary instruction through SETSS rather than receiving the services as a special education support for instruction provided at a nonpublic school.

In particular, in reviewing the student's November 2017 IESP when the student was in second grade, as well as the December 2021 IESP when the student was in sixth grade, it was

[15] In her request for review, the parent alleges for the first time that she had spoken with "other [p]arents," and based on those conversations, she understood that the "going rate for SETSS [wa]s between $200 and $225 dollars per hour" (Req. for Rev. at p. 5).

[16] To be clear, although the district's attorney indicated at the impartial hearing that the district challenged both the appropriateness of the unilaterally-obtained SETSS and the hourly rate for SETSS, the district did not present any evidence of reasonable rates or market rates but instead, noted in its closing statement that the parent failed to present sufficient evidence to justify the rate charged by the agency (see Tr. pp. 16-17, 46-47; Dist. Exs. 1-2).

reported in both IESPs that the student had not been receiving direct or formal instruction in secular subjects, such as "English reading or writing skills, and math" (Parent Ex. B at pp. 1-2; Dist. Ex. 1 at p. 1). As noted in the November 2017 IESP, by second grade, the absence of such instruction interfered with the student's ability to "earn scores on most reading and writing related subtests" and, as a result, a "Total Achievement score" on the WIAT-III could not be obtained (Parent Ex. B at p. 1). In the December 2021 IESP, the student's classroom teacher reported that he was doing "well academically," which was in stark contrast to the SETSS provider's report of the student's academic performance as "below grade level" in reading, writing, and mathematics (Dist. Ex. 1 at pp. 1-2).

The hearing record in this matter includes a progress report, dated January 9, 2024 (January 2024 progress report), which appears to have been prepared by the student's SETSS provider from Learning Learners (see Parent Ex. G at p. 1; see generally Parent Ex. F). Initially, the progress report reflects that the student was then-currently attending eighth grade and was receiving three hours per week of SETSS (see Parent Ex. G at p. 1). The progress report describes the student as presenting with "significant delays in reading, math, language, writing, and social[/]emotional skills," as requiring "specialized instruction," and as "struggl[ing] with academics" (id.). The progress report further indicates that the student "cannot function properly in a classroom setting" without support (id.).

In the area of reading, the January 2024 progress report indicates that the student's "reading skills [we]re poor" and he "require[d] support to read words containing split digraphs, consonant blends and digraphs, and vowel digraphs and diphthongs" (Parent Ex. G at p. 1). It was also noted that the student had difficulty reading "'r' controlled vowels and need[ed] prompting to read sight words and multisyllabic words" (id.). The progress report further indicates that the student could not "read fluently as his reading lack[ed] accuracy, speed, and proper expression when reading" (id.). To address the student's needs in reading, the progress report indicates that the SETSS provider modeled and demonstrated "proper pronunciation, rhythm, and decoding strategies" (id.). In addition, the SETSS provider used "[p]honological awareness intervention methods, charts, and frequent reading exercises" to assist the student (id.).

Notably, as part of the student's November 2017 IESP, when the student was in second grade, the CSE developed an annual goal targeting the student's "knowledge of phonics (e.g. digraphs, blends, vowels, word families consonants) to blend sounds for grade level words" (Parent Ex. B at p. 5).[17] Another annual goal targeted the student's ability to "read a story" and "retell the story in his own words" (id.). In the December 2021 IESP, when the student was in sixth grade, the CSE developed annual goals targeting the student's ability to "decode and comprehend a variety of grade level literature, including stories and poetry" and to improve his ability to read "a list of (50) regular and irregular unfamiliar multisyllabic words . . . in a manner that sound[ed] like normal speech and count the number of syllables" (Dist. Ex. 1 at pp. 3-4). The December 2021 IESP also included an annual goal to improve his ability to read a "grade-level text with peers, then discuss[] the main ideas and key details and write a summary of the text" (id. at p. 4).

[17] Three of the five annual goals in the November 2017 IESP targeted the student's speech-language skills (see Parent Ex. B at pp. 4-5).

With respect to reading comprehension skills, the January 2024 progress report notes that the student's "poor fluency and cognitive delays d[id] not support grade level comprehension of text" (Parent Ex. G at p. 1). The student could, however, "summarize a story, make predictions, and discuss characters, with support" (id.). At that time, the student "struggle[d] to respond to 'wh' questions and ha[d] trouble with problem solving more difficult questions that involve[d] critical thinking and higher order thinking" (id.). The student also struggled with "comparing and contrasting, cause and effect and inferencing" (id.). To address his reading comprehension needs, the SETSS provider "guided [the student] through the text and provided [him] with graphic organizers and story maps" to assist with organizing ideas in text; limited distractions; and used "[c]lose readings" and "metacognitive strategies" to improve his comprehension skills (id. at pp. 1-2).

In addition to describing the student's reading skills, the January 2024 progress report included annual goals (see Parent Ex. G at p. 2). Many of the annual goals addressed the student's reading comprehension skills, such as responding to "'wh' questions," making predictions, discussing characters "feelings and actions," "compar[ing] and contrast[ing] stories," reading and comprehending "literature," and "compar[ing] and contrast[ing] the adventures and experiences of characters" (id.).

Turning to the student's needs in the area of mathematics, the November 2017 IESP reported that he was "close to grade level achievement related to math" based on his "overall performance" when evaluated; the IESP did not reflect any specific information regarding deficits in the student's mathematics skills due to a disability and the IESP did not include any annual goals targeting mathematics skills (Parent Ex. B at pp. 1, 4-5). In the December 2021 IESP, the SETSS provider reported that the student's mathematics skills were "below grade level," but he could "count up to 1000 and c[ould] do addition and subtraction" (Dist. Ex. 1 at p. 1). The SETSS provider also reported that, at that time, the student needed "help with multiplication and division" and the IESP included one annual goal targeting his need to "improve in learning multiplication times table[s] up to five" and his ability to "learn simple division" (id.).

As reflected in the January 2024 progress report, the SETSS provider noted that the student "continue[d] to present with delays in math" (Parent Ex. G at p. 2). Although the student could "add and subtract double digits with support, he struggle[d] with regrouping and [wa]s unable to add and subtract when borrowing and carrying over [wa]s required" (id.). The student could not "multiply or divide digits," tell time, or pay with money and provide change (id.). According to the SETSS provider, the student also could not "comprehend the concept of fractions" or "complete math work involving fractions and decimals" (id.). The student demonstrated difficulty with completing "word problems" independently and needed "support to analyze and comprehend a word problem and set up an equation to solve the problem" (id.). The SETSS provider used "flashcards, worksheets, place value charts, visual supports, step-by-step checklists, and manipulatives" to address the student's needs with his "overall number skills, computational skills, and [to] solve word problems effectively" (id.). The annual goals in the progress report targeted the student's computational skills (addition, subtraction, multiplication, division), ability to tell time and solve word problems with money, memorization of multiplication facts of "two one-digit numbers," understanding fractions, solve computations involving fractions and whole numbers, understand decimal notations, and his ability to solve "real-world problems involving" mathematics (id. at pp. 2-3).

Turning to the student's needs in the area of writing, although the November 2017 IESP reported that his "overall performance" was "significantly below grade level achievement" in writing skills when evaluated, the IESP did not reflect any specific information regarding the student's deficits in writing skills due to a disability and the IESP did not include any annual goals targeting writing skills (Parent Ex. B at pp. 1, 4-5). In the December 2021 IESP, the SETSS provider reported that the student's writing skills were "below class level," but he had "creative writing ideas" and had shown improvement in his ability to write the alphabet (Dist. Ex. 1 at pp. 1-2). However, the December 2021 IESP did not include any annual goals to address the student's needs in writing (id. at pp. 3-4).

In the January 2024 progress report, the SETSS provider indicated that the student could "write words and sentences independently," but his "spelling and grammar skills [we]re not at grade level" (Parent Ex. G at p. 3). At that time, the student required "support to express himself in writing," which often contained "spelling mistakes, grammar issues" and lacked organization (id.). According to the SETSS provider, the student could not independently "write a structured paragraph" with a "main idea" or "supporting details" (id.). To address the student's needs, the SETSS provider worked with him to improve his "handwriting, spelling, grammar skills, and written expression with practice worksheets and writing assignments" (id.). Annual goals for writing targeted the student's "command of the conventions of standard English capitalization,, punctuation, and spelling when writing"; spelling; producing well-organized writing; and completing short-term and long-term writing assignments (id.).[18]

Turning to the SETSS provider delivering services to the student, the director testified that she had been working with the student since sixth grade, and the same provider continued to deliver services to the student because "it was a good match for [him]" (Tr. p. 39). Noting that the student was currently in eighth grade, the district's attorney inquired whether the SETSS provider was actually a "good match" for the student when the SETSS provider was "only certified to teach special education students up to the [six]th grade" (id.). The director testified that the SETSS provider was "working on getting her all-grade certificate," but she primarily continued working with the student since it was a "good match" (id.).

When inquiring about the delivery of SETSS to the student, the director testified that the student was receiving services "at home," so that the parent "could see what services [we]re being provided and she c[ould] get a better understanding about . . . what's happening during the services" (Tr. p. 40). This testimony conflicted with the information in her direct testimony by affidavit, which indicated that the student received SETSS at "his/her mainstream school" (compare Tr. p. 40, with Parent Ex. H ¶ 14). The hearing record lacks any evidence concerning whether the SETSS provider delivered home-based SETSS to the student for the entire school year or just a portion thereof (see generally Tr. pp. 1-55; Parent Exs. A-H; Dist. Exs. 1-2). Overall, the January 2024 progress report suggests that the student was receiving SETSS at school in light of the references to his ability to perform within the classroom and his interactions with peers and teachers (see Parent Ex. G at pp. 1, 3).

[18] As reflected in the January 2024 progress report, the SETSS provider also addressed the student's language needs and social/emotional functioning, and the progress report included annual goals in both areas (see Parent Ex. G at pp. 3-4).

The Second Circuit Court of Appeals recently reasoned that "once parents pass the first two prongs of the Burlington-Carter test, the Supreme Court's language in Forest Grove, stating that the court retains discretion to 'reduce the amount of a reimbursement award if the equities so warrant,' suggests a presumption of a full reimbursement award" (A.P. v. New York City Dep't of Educ., 2024 WL 763386 at *2 [2d Cir. Feb. 26, 2024], quoting Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 246-47 [2009]). Accordingly, in deciding equitable considerations, the appropriateness of the unilaterally obtained services is not being weighed.

However, the use of a special education service to replace primary general academic instruction that should have been delivered by the nonpublic school the student was attending, as well as inconsistencies in the evidence presented by the parent as to the description of how services were provided to the student and the costs of services, cannot be ignored (see J.L., v. New York City Dep't of Educ., 2024 WL 3605970, at *5 [S.D.N.Y. July 31, 2024] [the court weighed parent's actions during the administrative and court proceedings, with respect to the submission or withholding of evidence, as a part of equitable considerations). The director of Learning Learners was evasive regarding her oversight of the teacher assigned to the student's case, likely because he has so few if any special education needs. The available evidence leans heavily toward the conclusion that student is one who has not been provided instruction in the general education curriculum in the first place.

On the other hand, inexplicably there is no evidence that the CSE is addressing that point, and the district is not defending itself with respect to the student's need for special education services (or lack thereof) or whether Learning Learners provides services that constitute special education in the form of SETSS. This proceeding has been more of a cat and mouse game between litigants and participants in the student's education, exhibiting a lack of candor, and unfortunately, there is a student at the center of that dispute who may not be receiving needed instruction in the general education curriculum, something that is not correctible through the application of services using the dual enrollment statute. I can do little to correct that problem in the administrative due process forum for special education disputes, as it is not designed to address issues related to a student's sound basic education in a nonpublic school, and mere remediation of limited English proficiency that appears to be an issue in the student's primary instruction is not itself the purpose of special education services. Even the parent was lamenting that she wanted the student to "begin to learn English" (District Ex. 1 at p. 2). The purpose of the equitable relief in a special education case is to redress special education deficits of the student, not remediate a lack of instruction by the nonpublic school, and the examination of the witness from Learning Learners convincingly elicited damaging testimony that showed that the objective was merely to extract as much money from the public fisc as possible regardless of the purpose.[19] While that does not support a finding of more relief than has already been awarded by the IHO, the district's lack of a cross-appeal otherwise requires me to leave the IHO's decision intact as is. Neither party's approach to this

[19] Although it has rarely occurred in the last several years, at least in a case that has reached State-level review, if a parent is not forthcoming regarding with information regarding the nonpublic school instruction the student is receiving, it is perfectly permissible for IHO's and school districts to admit or seek evidence regarding the general education environment in which the special education services are being sought or disputed. The special education services under the dual enrollment statute are supposed to support the student in those regular education activities, and it is not appropriate to purposefully limit the evidence in a due process proceeding and distort or hide the context in which privately obtained services have been obtained by the parent and used by the student.

proceeding has been satisfies the requirement of reasonable conduct with respect to the student's education. Thus, in these circumstances I find no reason to disturb the decision of the IHO.

VII. Conclusion

As neither party appealed from the IHO's determinations that the district failed to offer the student a FAPE for the 2023-24 school year and that the unilaterally-obtained SETSS were appropriate, those findings are final and binding on the parties. However, the district exposed considerable contradictions in the parent's evidence and elicited damaging concessions from the parent's witnesses regarding the services provided to ostensibly support the student, services that the hearing record shows were largely designed to support a lack of instruction by the nonpublic school. Accordingly, there is no reason to depart from the determination of the IHO.

I have considered the parties' remaining contentions and find them to be without merit or unnecessary to address in light of the determinations made herein.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
August 2, 2024

JUSTYN P. BATES
STATE REVIEW OFFICER