The University of the State of New York

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

No. 24-296

**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 Nate Munk, 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 EdZone, LLC (EdZone) for the 2023-24 school year. The district cross-appeals from that portion of the IHO's decision which awarded the parent with related services authorizations (RSAs). The appeal must be sustained in part. The cross-appeal must be dismissed.

## II. Overview—Administrative Procedures

When a student who resides in New York is eligible for special education services and attends a nonpublic school, Article 73 of the New York State Education Law allows for the creation of an individualized education services program (IESP) under the State's so-called "dual enrollment" statute (see Educ. Law § 3602-c). The task of creating an IESP is assigned to the same committee that designs educational programing for students with disabilities under the IDEA (20 U.S.C. §§ 1400-1482), namely a local 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

The evidence in the hearing record regarding the student's educational history is sparse. Briefly, a CSE convened on March 30, 2022, and finding that the student remained eligible to

receive special education as a student with a speech or language impairment, developed an IESP for the student with a projected implementation date of March 30, 2022 and a projected annual review date of March 20, 2023 (see Parent Ex. B at p. 1).[1] The March 2022 CSE recommended that the student receive four periods per week of SETSS in a group, one 30-minute session per week of speech-language therapy in a group, one 30-minute session per week of individual occupational therapy (OT), one 30-minute session per week of OT in a group, and one 30-minute session per week of counseling services in a group (id. at pp. 8-9).[2]

In a letter dated May 17, 2023, the parent informed the district that she would be placing the student in a nonpublic school for the 2023-24 school year and requested that the district provide educational services to the student under the State's dual enrollment statute (see Parent Ex. E).

On August 17, 2023, the parent electronically signed a "Payment Agreement" with EdZone, which confirmed that EdZone would provide the student with the services in "accordance with the last agreed upon [individualized education program (IEP)]/IESP[]" on a 10-month school year basis during the 2023-24 school year (Parent Ex. C at pp. 1, 3).[3] The agreement included an attached addendum reflecting the rates charged by EdZone (i.e., $198.00 per 60-minute individual session; $148.00 per 60-minute group session) for special education or related services, but neither the agreement nor the addendum listed the specific services to be provided to the student (id.).

In a letter dated August 23, 2023, the parent, through "Prime Advocacy, LLC, duly Authorized o/b/o Parent," (Prime Advocacy) notified the district that it had failed to assign the student any providers to deliver the student's mandated services for the 2023-24 school year (Parent Ex. D). Additionally, the parent requested that the district "fulfill the mandate" or she would be "compelled to unilaterally obtain the mandated services through a private agency at an enhanced market rate" (id.).

**A. Due Process Complaint Notice**

By due process complaint notice dated April 9, 2024, the parent, through an advocate with Prime Advocacy, alleged that the district failed to develop and implement a program for the student for the 2023-24 school year, thereby denying the student a free appropriate public education (FAPE) (see Parent Ex. A at p. 1). According to the parent, the district impermissibly shifted its responsibilities to the parent when it failed to "supply providers for the services it recommended for the [s]tudent and failed to inform the [p]arent how the services would be implemented" (id. at p. 2). The parent was unable to find providers willing to accept the district's standard rates but found providers willing to provide the student with his mandated services for the 2023-24 school

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

[2] SETSS is not defined in the State continuum of special education services (see 8 NYCRR 200.6). As has been laid out in prior administrative proceedings, the term is not used anywhere other than within this school district and a static and reliable definition of "SETSS" does not exist among parents, practitioners, and the district.

[3] EdZone is a limited liability company and has not been approved by the Commissioner of Education as a school or company with which districts may contract to instruct students with disabilities (see NYCRR 200.1[d], 200.7).

year at enhanced rates (id.). Among other relief, the parent sought pendency, an order directing the district to fund the costs of the student's SETSS and related services at enhanced rates, and an award of compensatory educational services for any mandated services not provided by the district (id. at p. 3).

### B. Impartial Hearing Officer Decision

On May 10, 2024, the parties proceeded to an impartial hearing before an IHO with the Office of Administrative Trials and Hearings (OATH) (see Tr. p. 1). The IHO conducted a prehearing conference, however, the district did not appear through a representative at that time (see Tr. pp. 1-3). When the impartial hearing resumed on May 22, 2024, the district failed to appear again (see Tr. pp. 7, 10). The IHO described the efforts made to contact the district, however, those efforts were not successful and the IHO then proceeded with the impartial hearing but without a district representative (see Tr. pp. 10-45).[4]

In a decision dated May 30, 2024, the IHO found that, pursuant to a Burlington/Carter legal analysis, the district failed to provide the student with a FAPE or equitable services for the 2023-24 school year (see IHO Decision at pp. 5, 11). Turning to the appropriateness of the parent's unilaterally-obtained services, the IHO determined that the parent failed to sustain her burden to establish that the SETSS were specially designed to meet the student's needs (id. at pp. 5-9). Next, the IHO addressed equitable considerations, initially finding that the hearing record failed to contain any evidence that the parent provided the district with the requisite 10-day notice (id. at pp. 9-10). The IHO also found that the hearing record lacked evidence establishing that the parent had incurred any financial obligation for the SETSS, and contrary to the parent's arguments, the contract, alone, was not sufficient to establish the parent's financial obligation (id. at p. 10). In light of these findings, the IHO denied the parent's request for direct funding of the student's SETSS, and ordered the district to issue RSAs for the parent to obtain the student's related services and to implement the student's SETSS for the remainder of the 2023-24 school year (id. at p. 11).

## IV. Appeal for State-Level Review

The parent appeals with the assistance of a lay advocate from Prime Advocacy, and initially alleges that the IHO erred by finding that the SETSS delivered by EdZone was not appropriate. The parent also alleges that the IHO erred by finding that her contract with EdZone was not valid and that she failed to provide the district with a 10-day notice of unilateral placement. As relief, the parent seeks an order directing the district to fund the costs of the unilaterally-obtained SETSS at the contract rate of $144.00 per hour.[5]

[4] At the impartial hearing, the parent's advocate clarified that the parent sought the following as relief: district funding of the costs of the student's unilaterally-obtained SETSS at a rate of $148.00 per hour (four hours per week) and for the district to issue the parent RSAs to obtain related services not provided by EdZone (see Tr. p. 40).

[5] The parent's request for review is not paginated; for the purposes of this decision, the pages will be cited by reference to their consecutive pagination with the first page (i.e., Notice of Request for Review) as page one (see Req. for Rev. at pp. 1-13).

In an answer and cross-appeal, the district initially responds to the parent's allegations in the request for review and generally argues to uphold the IHO's decision in its entirety. As a cross-appeal, the district asserts that the IHO's award of RSAs was overly broad, and seeks a modification to reflect a "deduction for any services already provided for by the [district] during the school year at issue."

The parent did not file a reply to the district's answer or an answer to the district's cross-appeal.[6]

## 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]).[7] "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.).[8] Thus, under State law an eligible New

[6] In this case, the parent's advocate requested, and received, an extension from the Office of State Review to file a responsive pleading to the district's answer and cross-appeal. The parent's advocate did not do so, and then ignored a request from the Office of State Review to provide this office with an update on the status of her request to file a responsive pleading.

[7] 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]).

[8] 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

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. Unilateral Placement

In this matter, the student has been parentally placed in a nonpublic school and the parent does not seek tuition reimbursement from the district for the cost of the parental placement. 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 EdZone 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

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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.

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]).[9] 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 this matter, the IHO relied on the appropriate legal standard in reaching his conclusions of law, and neither party challenges this aspect of the IHO's decision (see generally Req. for Rev.; Answer & Cr. App.). As a result, 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]).

Turning to a review of the appropriateness of the unilaterally-obtained services, the federal standard for adjudicating these types of disputes is instructive.

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129). Citing the Rowley standard, the Supreme Court has explained that "when a public school system has defaulted on its obligations under the Act, a private school placement is 'proper under the Act' if the education provided by the private school is 'reasonably calculated to enable the child to receive educational benefits'" (Carter, 510 U.S. at 11; see Rowley, 458 U.S. at 203-04; Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see also Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] ["evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (id. at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G., 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential

[9] 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 EdZone (Educ. Law § 4404[1][c]).

(Frank G., 459 F.3d at 364-65). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

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

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

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

**1. The Student's Needs**

Although the student's needs are not in dispute, a discussion thereof provides context for the issue to be resolved on appeal, namely, whether the parent's unilaterally-obtained SETSS provided the student with specially designed instruction to address his unique needs.

Based on the limited evidence in the hearing record, the student's March 2022 IESP provides the most recent description of the student's needs prior to the parent unilaterally obtaining services for the student for the 2023-24 school year at issue (see generally Parent Ex. B). In developing the March 2022 IESP, the CSE reportedly relied on teacher estimates and documented the student's reading level as "2.5" and his mathematics level as "2.0" within the evaluation section of the IESP (id. at p. 1). At the time of the March 2022 CSE meeting, the student was attending second grade in a religious, nonpublic school (id. at p. 2). A review of the March 2022 IESP reflects information reported to the CSE by the parent, the student's then-current SETSS provider, his then-current speech-language therapy provider, and through an OT progress report (id. at pp. 2-4).[10] According to the IESP, the student presented with "age level decoding skills," and when

[10] The student's then-current SETSS provider attended the March 2022 CSE meeting via telephone (see Parent Ex. B at p. 12). Based upon a comparison of evidence in the hearing record, it appears that the same individual delivered SETSS to the student during the 2023-24 school year (compare Parent Ex. B at p. 12, with Parent Ex. F ¶¶ 7-8, and Parent Ex. G at p. 3).

focused, he could "respond to comprehension questions posed" (id. at p. 2). Additionally, the student "attempt[ed] all writing tasks; however, he struggle[d] to properly organize his thoughts on paper," and had "difficulty following capitalization and punctuation rules" (id.). With regard to mathematics, the IESP reflected that the student could "compute two and three digit addition problems," he "need[ed] assistance to accurately compute two and three digit subtraction problems," and he "solve[d] age level math word problems but need[ed] assistance" with those requiring "higher level thinking" (id.). At that time, the IESP noted that the SETSS provider's "primary focus" with the student was in the area of mathematics (id.). The SETSS provider indicated that the student had "difficulty with word problems and determining correct computation" but "performed well" when focused (id.).

Regarding language skills, the March 2022 IESP reflected reports that the student received twice weekly speech-language therapy to improve receptive and expressive language skills, and noted that he had "made progress in his ability to respond to comprehension and recall questions based on auditorily presented information and information read aloud" and had also made progress in his ability to "determine the meanings of unfamiliar vocabulary words using context clues" (Parent Ex. B at p. 2). It was further noted in the IESP that, at times, the student "require[d] prompts to retell a story in a clear and cohesive manner, with adequate detail"; to "follow multi-step directions that incorporate[d] a variety of linguistic concepts"; and to "respond to higher level thinking questions" (id.).

In the area of social development, the March 2022 IESP indicated that the student enjoyed interacting with his peers although "there ha[d] been some incidents" with peers (Parent Ex. B at p. 3). However, the IESP further indicated that the student's overall attention had improved, although he "call[ed] out occasionally," and the parent reported that the student "ha[d] outbursts due to frustration in expressing himself" (id.).

With respect to the student's physical development, the March 2022 IESP reflected that the student had been diagnosed as having an attention deficit hyperactivity disorder (ADHD) and received medication for it; overall, the student was reportedly in "good health" (Parent Ex. B at p. 3). Pursuant to an OT progress report, the student's OT services addressed his impulsive behaviors during writing tasks that led to omitting grammar rules; "forming letters with incorrect sizing, spacing, and line alignment"; and "confusing upper and lowercase formations" (id.). Additionally, the student exhibited difficulty reviewing his work for errors, accurately copying from the board, and waiting to hear all the directions in a multistep activity before attempting to engage in it (id. at pp. 3-4). The student required moderate to maximum verbal cues to transition through subsequent steps of an activity and complete the task (id. at p. 4). Further, the student had difficulty using eating utensils due to difficulty with bilateral coordination and grasp (id.).

To address the student's needs, the March 2022 CSE recommended that the student receive four periods per week of SETSS in a group, one 30-minute session per week of speech-language therapy in a group, one 30-minute session per week of individual OT, one 30-minute session per week of OT in a group, and one 30-minute session per week of counseling services in a group (see Parent Ex. B at pp. 8-9). In addition, the March 2022 CSE recommended strategies to support the student's management needs, including simplifying instructions and directions, checking for understanding, encouraging the student to ask questions when he did not understand, using positive reinforcement, and providing cues and prompts as needed (id. at p. 4). The March 2022 CSE also

developed annual goals targeting the student's needs in reading comprehension; expressing himself in oral and written form; developing inferential thinking skills; and improving fine motor, visual motor, impulse control, executive functioning, sustained attention, bilateral coordination, and frustration tolerance skills (id. at pp. 5-8).

**2. SETSS Provided by EdZone**

With respect to the IHO's finding that the SETSS were not appropriate to meet the student's needs, the parent contends that the IHO cannot ignore a progress report or fail to consider it when analyzing whether the unilaterally-obtained SETSS were appropriate. She relatedly contends that progress, however, is not a determinative factor, and EdZone's services were not required to "follow the mandate exactly." With respect to the February 2024 progress report and session notes, the parent argues that this evidence supports a finding that the SETSS delivered to the student constituted a "comprehensive approach" that aligned with the student's annual goals in the March 2022 IESP. According to the parent, the student's annual goals could be addressed in the context of any subject, including mathematics, noting further that the annual goals targeting his "anger issues" and reading comprehension skills could be worked on with mathematics word problems. She further alleges that the student's teacher "requested additional help in math."

Based on the evidence in the hearing record, the student was in fourth grade during the 2023-24 school year and continued to attend the same religious, nonpublic school he had attended for second grade (compare Parent Ex. D, and Parent Ex. F ¶ 7, and Parent Ex. G at p. 1, with Parent Ex. B at p. 2). The evidence reflects that the student began receiving SETSS from EdZone for the 2023-24 school year at his religious, nonpublic school in a "small group setting," and he began receiving SETSS on "October 23, 2023" (Parent Ex. F ¶¶ 6-7). At the impartial hearing, the parent presented the educational supervisor at EdZone (supervisor) as a witness (see generally Parent Ex. F; Tr. pp. 26-38). According to the supervisor, the student was "mandated" to receive "[four] hours per week of SETSS," and his SETSS provider held a "master's degree in special education and [wa]s certified by New York State to work with students with disabilities" (id. ¶¶ 7-8). At the impartial hearing, the supervisor clarified that she "believe[d]" the SETSS provider was certified to instruct students in grades "K through 6" (Tr. pp. 27-28). According to the supervisor, at the beginning of the 2023-24 school year the student "was assessed" in the areas of reading decoding and comprehension and was given "informal assessments" for mathematics (id. ¶ 9). The supervisor testified that the student had made "notable progress in decoding and fluency," his "writing skills [we]re gradually improving" in that he demonstrated "significant growth engaging in writing tasks," and he was "performing at grade level" in mathematics (id. ¶¶ 10-12; see Tr. p. 36). She further testified that, as difficulties in these academic areas persisted, the supervisor recommended that the student continue to receive SETSS (id. ¶¶ 10-12; see Tr. p. 36).

In addition to the supervisor's testimony, the parent entered a progress report, dated February 5, 2024 (February 2024 progress report), into the hearing record as evidence (see Parent Ex. G at p. 1). The February 2024 progress report had been prepared by the student's SETSS provider who delivered services during the 2023-24 school year and the report was electronically signed by the supervisor (id. at p. 3). According to the progress report, the student received "four hours of specialized small group education" and had "demonstrated significant improvement in managing his emotions and displaying a positive attitude"; additionally, the student had become "more cooperative in attending sessions outside of the classroom, [thereby] demonstrating a

receptiveness" to supports and a positive response to encouragement (id. at p. 1). The SETSS provider reported that, with regard to the student's "Learning Style," he "benefit[ed] from a visual and hands on approach," and he appeared "to be benefitting from the repetition" provided through the small group instruction (id. at p. 2). Annual goals for the student in the February 2024 progress report included that he would follow multistep directions including various concepts in structured activities and to promptly complete his independent schoolwork (id. at p. 3).

With respect to reading and mathematics, the SETSS provider described the student as performing at a fourth grade level, and noted that he "ha[d] shown improvement in his decoding and fluency skills since third grade" but "encounter[ed] difficulties" with summarizing and interpreting texts in his own words (Parent Ex. G at p. 1). Furthermore, despite his ability to read at grade level, the SETSS provider reported that the student's reading comprehension remained "somewhat weak," especially when he was faced with higher level thinking questions that required him to infer information from the text (id.). An annual goal for reading targeted the student's ability to use implied meaning to answer comprehension questions after reading a short passage (id. at p. 3). The progress report indicated that the student continued to need support to "strengthen his reading comprehension skills" (id. at p. 1).

According to the February 2024 progress report, the student's "primary challenges" were in writing, and although the SETSS provider indicated that his skills in this area were "gradually improving," she also indicated that it remained his least favorite activity (Parent Ex. G at p. 1). Despite this, the student had "shown significant growth in his willingness to engage with writing tasks over the year" (id.). At that time, it was noted that the student "continue[d] to face challenges in organizing his ideas coherently on paper," he "struggle[d] with maintaining grammatical correctness," and he "experience[d] frustration with spelling difficulties" (id. at p. 2). Additionally, the student "tend[ed] to have difficulty sustaining focus during prolonged writing sessions" and needed "breaks or changes in activity to prevent frustration" (id.). According to the progress report, to address those challenges, instruction focused "extensively on expanding sentences, allowing [the student] to practice adding details," and scaffolding assignments (id.). Further, the SETSS provider reported that the student's fine motor skills were "a little weaker," and could affect his writing at times (id. at p. 3). The progress report reflected one annual goal in writing targeting the student's ability to write a grade-level legible paper with complete and grammatically correct sentences (id.).

Turning to mathematics, the SETSS provider described the student as "excel[ling] in math," "demonstrat[ing] proficiency in math," and as "performing at grade level" (Parent Ex. G at pp. 1-2). More specifically, the February 2024 progress report indicated that the student exhibited skills such as successfully memorizing multiplication tables, grasping the concept of division, adeptly absorbing new concepts, and gaining the "comprehension necessary to remain on par with grade-level expectations" (id. at p. 2). According to the progress report, the student encountered challenges recalling all the steps required for long-division problems," and "require[d] further assistance with multi-step scenarios" (id.). Annual goals in mathematics targeted the student's ability to correctly multiply and divide two to three digit numbers, determine the correct computation to use and solve multistep word problems, and find the least common multiple and most significant common factor (id. at p. 3).

Finally, in the area of social development, the February 2024 progress report noted that the student "engage[d] positively with peers, foster[ed] strong relationships and [was] held in high regard by his friends" (Parent Ex. G at p. 2). According to the progress report, the student demonstrated a "noticeable improvement in his attitude and self-esteem in recent months" and exhibited "cooperation and respect towards adults and peers during sessions," which contributed to a "conducive learning environment" (id.). In addition, the progress report reflected that the student's "motivation [wa]s evident, [as it was] reflected in the quality of work he produce[d], indicating significant progress" (id.).

In addition to the February 2024 progress report, the parent also entered a document entitled "Session Notes," which reflects the activities and outcomes of weekly sessions, as well as the annual goals related to those specific activities and outcomes and how the student performed on the annual goals (i.e., "Rating: 6") (Parent Ex. H at pp. 1-9). The session notes date from the week of October 30, 2023, through the week of April 15, 2024 (id. at pp. 1, 9). Overall, a review of the session notes reflects that approximately 13 sessions out of a total of 24 sessions were devoted to mathematics skills, approximately 3 out of the 24 total sessions were devoted to writing skills, approximately 5 out of the 24 total sessions were devoted to reading skills, and approximately 3 sessions out of the 24 total sessions were devoted to either independently completing his schoolwork or his ability to read problems to solve and were worked on in the context of mathematics (id. at pp. 1-9). [11]

In reaching the conclusion that the parent failed to sustain her burden to establish the appropriateness of the SETSS, the IHO reviewed and considered the description of the student's needs as found in the March 2022 IESP, the information contained in the February 2024 progress report and the session notes, and timesheets entered into the hearing record as evidence, as well as the testimonial evidence (see IHO Decision at pp. 6-8). With respect to the session notes, the IHO indicated that he gave "little weight" to the information contained therein because the document mistakenly referred to a "different student," and the IHO opined that the SETSS provider "was either describing another student's progress or borrowed another student's progress report in preparing this document" (id. at p. 8). Therefore, the IHO found the session notes were "unreliable" (id.).

Based on the remaining evidence, the IHO concluded that the SETSS EdZone delivered was not specially designed to meet the student's "documented struggles with reading and writing," but instead, focused on the student's "relative strength" in mathematics (IHO Decision at p. 8). While noting that a parent was not required to establish that she had "furnishe[d] every service necessary to maximize [the s]tudent's potential," the IHO determined that EdZone's "inexplicable concentration on a subject where [the s]tudent already excel[led], with a relatively small amount of time devoted to [the s]tudent's actual areas of need" in reading and writing "render[ed] these services inappropriate" (id.).

In addition, the IHO found that, based on the evidence, the student did not receive the full complement of mandated SETSS on a weekly basis (see IHO Decision at p. 8). This determination,

[11] Some of the session notes refer to a different student's name, rather than the student in this matter (see, e.g., Parent Ex. H at p. 4).

coupled with the foregoing, resulted in the IHO's conclusion that the SETSS delivered to the student were not appropriate (id.).

As noted above, to qualify for reimbursement under the IDEA, parents must demonstrate that the unilateral placement provided instruction specially designed to meet the student's unique needs, supported by services necessary to permit the student to benefit from instruction (Gagliardo, 489 F.3d at 112; see Frank G., 459 F.3d at 364-65). Regulations define specially designed instruction, in part, as "adapting, as appropriate to the needs of an eligible student under this Part, the content, methodology, or delivery of instruction to address the unique needs that result from the student's disability" (8 NYCRR 200.1[vv]; see 34 CFR 300.39[b][3]).

Initially, having reviewed the evidence in the hearing record, the IHO's concerns about the focus of the student's SETSS are understandable. The evidence reflects that the SETSS delivered to the student—or at least as revealed for the time frame documented in the session notes and in the February 2024 progress report—appeared to concentrate more on his mathematics skills, which, as noted in the progress report, were reported as being on a fourth grade level while the student was attending fourth grade (see generally Parent Exs. G-H). In addition, the student's March 2022 IESP, while outdated, did not include any annual goals related to his mathematics skills, which, as noted in the IESP, were reported as being on a second grade level while the student was attending second grade (see generally Parent Ex. B). However, the February 2024 progress report included goals, strategies such as scaffolding, small group instruction, repetition and working with the student on sentence building and reading comprehension, as well as using a visual and hand-on approach as support for his individual learning style, which reflected how the SETSS delivered to the student addressed his academic needs generally and his reading and writing needs specifically (see generally Parent Ex. H). While the IHO noted that the evidence in the hearing record supported a finding that the student had more significant needs in writing than in reading and math, he further noted that he found the session notes, which indicated a greater number of SETSS sessions devoted to math as compared to reading and writing, "unreliable" (see generally Parent Ex. G).

Accordingly, the IHO erred by finding that the SETSS delivered to the student were not appropriate. Here, the hearing record contains sufficient evidence demonstrating that the SETSS delivered by EdZone to the student constituted instruction that was specially designed to address the student's identified needs, particularly when crediting, as the IHO indicated was warranted, evidence in the hearing record other than the session notes, including the February 2024 progress report which describes the SETSS delivered to the student in terms of the specific strategies and supports used, and goals developed, to address his unique needs (see generally Parent Ex. H). Additionally, the evidence in the hearing record indicates that the SETSS were delivered to the student at his religious, nonpublic school in a small group setting, and with the delivery of these services, the student was making progress (see generally Parent Exs. F-H).

Consequently, the IHO's determination that the SETSS were not appropriate to meet the student's needs for the 2023-24 school year must be vacated.

### B. Equitable Considerations

Having found that the SETSS EdZone provided to the student were appropriate, the next inquiry is whether equitable considerations weigh in favor of the parent's requested relief. In this matter, the IHO addressed equitable considerations for the completeness of the hearing record and found that the parent's failure to provide the district with a 10-day notice of unilateral placement and the additional failure of not having a valid contract in place with EdZone would have warranted a 30 percent reduction in the rate awarded to the parent for SETSS had the IHO determined that the SETSS were appropriate.

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"]).

#### 1. 10-Day Notice of Placement

The parent asserts that the IHO erred by finding that she failed to provide the district with a 10-day notice of unilateral placement. The parent argues that, given the purpose of a 10-day notice is to provide the district with an opportunity to address the parent's concerns, the lack of precision within such notice would not warrant a reduction or denial of funding. Regardless, the parent also argues that she provided the district with a timely 10-day notice consistent with the law. In response, the district asserts that the parent entered into an agreement with EdZone on August 17, 2023 and failed to notify the district of her intentions to unilaterally-obtain services through a private provider prior to that date. The district also notes that the IHO properly concluded that the hearing record lacked sufficient evidence to demonstrate that the parent actually sent a 10-day notice to the district. In a footnote, the district adds that the purported 10-day notice in the hearing record was not signed by the parent and was written on Prime Advocacy's letterhead.

Reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to their removal of the student from public school, or by written notice ten business days before such removal, "that they were rejecting the

placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger v. Medina City Sch. Dist., 348 F.3d 513, 523-24 [6th Cir. 2003]; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G., 459 F.3d at 376; Voluntown, 226 F.3d at 68).

At the impartial hearing, the IHO questioned the parent's advocate about the letter entered into evidence as parent exhibit D, which the advocate had identified as the parent's 10-day notice dated August 23, 2023 and signed as "Prime Advocacy, LLC, duly Authorized o/b/o Parent" (see Tr. pp. 14, 23; Parent Ex. D). The IHO asked whether the advocate had any evidence "of how or when this [letter] was sent" (Tr. p. 23; see Parent Ex. D). The advocate stated that "[w]e don't need proof" and "[i]t was sent to them, but this is not something that we need proof for" (Tr. p. 24). The IHO repeated his question, and the advocate continued to express that it was a standard letter that they "always" sent and it was on "our letterhead," and proof was not otherwise required (Tr. pp. 24-25). The IHO agreed that the letter had been written on Prime Advocacy's letterhead, and inquired about how the letter had been sent and to whom (Tr. p. 25). According to the advocate, she emailed the document (id.).

In his decision, and based on the foregoing exchange at the impartial hearing together with the documentary evidence, the IHO did not "credit" the parent advocate's responses, "as they only offered a letter on their letterhead with no indication as to its delivery, compared to the June 1 letter [in the hearing record], for which [the p]arent [advocate] included the email as well as the letter itself that would have been included as an attachment" (IHO Decision at pp. 9-10, citing Parent Ex. E). As a result, the IHO concluded that the 10-day notice "was not sent to [the d]istrict" (id. at p. 10).

The IHO's concerns about the parent's alleged 10-day notice are well-founded. Initially, even if the hearing record contained sufficient evidence to demonstrate that the parent sent the 10-day notice to the district, the parent did not send the 10-day notice—dated August 23, 2023—prior to entering the agreement with EdZone on August 17, 2023 to unilaterally obtain services for the student for the 2023-24 school year, which the parent was required to do. Additionally, New York law provides a presumption of mailing and receipt by the addressee where there is proof of a standard office practice or procedure designed to ensure that items are properly addressed and mailed (T.C. v. New York City Dep't of Educ., 2016 WL 1261137, at *9 [S.D.N.Y. Mar. 30, 2016]; Nassau Ins. Co. v. Murray, 46 N.Y.2d 828, 829 [1978]; see News Syndicate Co. v. Gatti Paper Stock Corp., 256 N.Y. 211, 214 [1931] [stating that the presumption is founded on the probability that the officers of the government will do their duty and the usual course of business]). As long as there is adequate testimony by one with personal knowledge of the regular course of business, it is not necessary to solicit testimony from the actual employee in charge of the mailing (T.C., 2016 WL 1261137, at *9; Nassau Ins. Co., 46 N.Y.2d at 829-30; In re Lumbermens Mutual

Casualty Co. v. Collins, 135 A.D.2d 373, 374 [1st Dep't 1987]; Gardam & Son v. Batterson, 198 N.Y. 175, 178-79 [1910] [stating that "the rule upon the subject requires . . . in the absence of any evidence as to its being deposited with the post office authorities, that the proof shall establish the existence of a course of business, or of office practice, according to which it naturally would have been done"]; but see Rhulen Agency, Inc. v. Gramercy Brokerage, Inc., 106 A.D.2d 725, 726 [3d Dep't 1984] ["It is necessary to prove by testimony of the person who mails them that letters are customarily placed in a certain receptacle and are invariably collected and placed in a mailbox."]). In order to rebut the presumption of mailing and receipt, the addressee must show more than the mere denial of receipt and must demonstrate that the sender's "routine office practice was not followed or was so careless that it would be unreasonable to assume that the notice was mailed" (T.C., 2016 WL 1261137, at *9; Nassau Ins. Co., 46 N.Y.2d at 829-30).

Here, other than indicating that the 10-day notice had been written on Prime Advocacy's letter head and that it had been sent via email, the parent offered no evidence with respect to the "standard office practice or procedure" concerning the mailing or emailing of the 10-day notice—which, as noted by the IHO, was not addressed to any specific individual or address—to the district. In addition, the parent has not attempted to submit additional documentary evidence, to wit, the email mentioned by the advocate at the impartial hearing that the 10-day notice, to now establish that the 10-day notice had, in fact, been sent to the district (see generally Req. for Rev.). Instead, the parent contends that she signed a "legally enforceable Retainer Agreement" that appointed Prime Advocacy to represent the parent and allowed Prime Advocacy to act on the parent's behalf (id. ¶ 3 at p. 10). The parent did not submit the Retainer Agreement with the request for review (see generally Req. for Rev.). Accordingly, there is no documentary evidence and no testimony by someone with personal knowledge of the regular course of business to support the legal presumption that the parent attempts to rely upon. As a result, the IHO's determination that the parent sent the 10-day notice to the district will not be disturbed (see IHO Decision at pp. 9-10).

**2. Financial Obligation**

The parent contends that the IHO erred by finding that her agreement with EdZone was not valid and therefore, the parent was not financially obligated pursuant to the terms of the agreement for payment of the SETSS delivered. According to the parent, any blanks present in the agreement did not automatically render the agreement invalid or void, so long as the intent of the parties could be reasonably ascertained.

At the impartial hearing, the IHO questioned the parent's sole witness—the supervisor—about the parent's agreement with EdZone (see Tr. pp. 28-33; see generally Parent Ex. C). More specifically, the IHO asked the supervisor to identify within the agreement exactly what services were being provided to the student, and in response, the supervisor pointed to language in the agreement indicating the following: "'Services w[ould] be provided in frequency and duration agreed to by the parents and EdZone'" (Tr. p. 29; Parent Ex. C at p. 2). The IHO continued to press the supervisor to explain what that specific statement meant, and based on her understanding, the supervisor clarified that it was "what is said on the IESP would be implemented by the agency" (Tr. pp. 20-30). The supervisor testified that the student's IESP included "[f]our times a week" of SETSS, as well as related services of OT, speech-language therapy, and counseling services; however, the supervisor testified that EdZone only provided the student's SETSS and had not

provided the student with any related services due, primarily, to the lack of providers available and also because the parent never requested that the agency deliver related services to the student (Tr. pp. 30-33).

In the decision, the IHO found that, given the lack of terms in the parent's agreement with EdZone, the parent had failed to establish a financial obligation for the services rendered (see IHO Decision at p. 10). As determined by the IHO, the supervisor "conceded" that the agreement between the parent and EdZone was "not indicated in the document, but [that] the addendum list[ed] the services and rates" (id.). The IHO found that "while rates [we]re listed on the addendum, there [wa]s no indication as to which of these services [we]re being provided to [the s]tudent" (id.). Accordingly, the IHO determined that without this information, it was "impossible to determine the extent of [the p]arent's financial obligation" to EdZone, and therefore, it was "unreasonable and impermissible for the costs of services to now be assigned" to the district (id.). The IHO was also not persuaded by the parent's post-hearing arguments (id.; see generally IHO Ex. I). Thus, as a result of the IHO's findings with regard to the parent's 10-day notice and the validity of the parent's agreement with EdZone, the IHO concluded that a 30 percent reduction in the rate requested by the parent would have been warranted (see IHO Decision at p. 10).[12]

However, upon review it appears that the IHO did not consider the actual language contained in the agreement, itself, when finding that it lacked essential terms obligating the parent to pay for EdZone's services (see IHO Decision at p. 10). For example, the parent's agreement with EdZone reflects an acknowledgement by the parent that, by signing the document, the "fees for services [we]re listed in Addendum 1," and that she "assume[d] complete financial responsibility for the services provided" to the student by EdZone and moreover, that she was "legally obligated to pay, when due, the total costs of fees" (Parent Ex. C at p. 1). Nevertheless, the parent's agreement with EdZone does not specifically reference the March 2022 IESP or otherwise specify the exact services to be delivered to the student for the 2023-24 school year, other than noting that services would be provided "in accordance with the last agreed upon" IESP, which the supervisor later identified at the impartial hearing as only being SETSS and not any related services (id. at p. 3; see Tr. pp. 30-33).

Thus, given the evidence in the hearing record, and while agreeing that the IHO understandably noted some concerns with the parent's agreement with EdZone, the evidence as a whole supports a finding that the parent was financially obligated to pay for SETSS pursuant to her agreement with EdZone and this aspect of the IHO's decision must be vacated.

[12] To the extent that the parent asserts on appeal that the IHO improperly reduced the hourly rate of the SETSS because the hearing record was devoid of any evidence of reasonable market rates, the parent's argument is inapposite. The IHO did not reduce the hourly rate by 30 percent based on an excessive cost analysis; rather, the IHO found that the rate reduction was warranted due to the fact that equitable considerations related to the issues of the 10-day notice and EdZone contract, as discussed herein, did not fully weigh in favor of the parent's requested relief.

### C. Other Relief

The district asserts as part of its cross-appeal that the IHO's award of RSAs to the parent to obtain related services was overly broad, and must be modified to account for any related services already provided to the student.

In the decision, and after finding that the SETSS EdZone delivered was not appropriate, the IHO noted that it was undisputed that the student's March 2022 IESP included recommendations for the following related services: one 30-minute session per week of speech-language therapy in a group, one 30-minute session per week of individual OT, one 30-minute session per week of OT in a group, and one 30-minute session per week of counseling services in a group (see IHO Decision at p. 9; Parent Ex. B at pp. 8-9). The IHO also found that it was undisputed that the student had not received any related services during the 2023-24 school year, and ordered the district to fund, through RSAs, the student's related services for the 2023-24 school year as mandated in the March 2022 IESP (id. at pp. 9, 11).

In its cross-appeal, the district offers nothing more than supposition that the student may have been provided with related services during the 2023-24 school year and fails to point to any testimonial or documentary evidence to support its assertions (see Answer & Cr. App. ¶ 19). The hearing record does not include any type of information concerning pendency services, which may have constituted an appropriate basis upon which to modify the IHO's order regarding RSAs, and the district does not argue pendency services as a basis upon which to modify the IHO's order (see generally Tr. pp. 1-45; Parent Exs. A-I; IHO Ex. I; Answer & Cr. App. ¶ 19). As a result, there is no reason to disturb the IHO's order.

## VII. Conclusion

Having found that the evidence in the hearing record does not support the IHO's finding that the SETSS delivered by EdZone was not appropriate to meet the student's needs and that the evidence does not support the IHO's finding that the parent was not financially obligated pursuant to the terms of her agreement with EdZone, these determinations are vacated and, contrary to the IHO's decision, the parent is entitled to funding for the SETSS delivered to the student during the 2023-24 school year by EdZone. However, based on equitable considerations, the parent's failure to provide the district with a 10-day notice of unilateral placement weighs against an award of the parent's requested hourly rate of $144.00 per hour and will be reduced by 20 percent.

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

**THE CROSS-APPEAL IS DISMISSED.**

**IT IS ORDERED** that the IHO's decision, dated May 30, 2024, is modified by vacating that portion which found that the SETSS delivered by EdZone to the student during the 2023-24 school year was not appropriate; and,

**IT IS FURTHER ORDERED** that the IHO's decision, dated May 30, 2024, is modified by vacating that portion which found that the parent was not financially obligated to pay for the SETSS delivered by EdZone to the student during the 2023-24 school year; and,

**IT IS FURTHER ORDERED** that the district shall fund the costs of the student's SETSS delivered by EdZone during the 2023-24 school year at a rate not to exceed $116.00 per hour, upon the presentation of invoices and affidavits attesting to the frequency and duration of the SETSS delivered to the student during the 2023-24 school year.[13]

**Dated:** **Albany, New York**
**August 26, 2024**

**CAROL H. HAUGE**
**STATE REVIEW OFFICER**

[13] While the EdZone contract specified that the SETSS sessions were to be provided to the student at a cost of $148.00 an hour, I have based the rate per hour to be awarded to the parent on a cost of $144.00 per hour, the cost per hour requested by the parent in her request for review, reduced as calculated herein.