The University of the State of New York

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

No. 16-044

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

Appearances:
Law Offices of Martin Marks, attorneys for petitioners, Martin Marks, Esq., of counsel

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, Alexander M. Fong, Esq., of counsel

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. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request for the costs of the student's provider of special education teacher support services (SETSS) at an enhanced rate. The appeal must be dismissed.

II. Overview—Administrative Procedures

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

On March 16, 2015, the CSE convened to conduct the student's "turning five" conference (Dist. Ex. 1 at p. 1; see Tr. pp. 16, 111). Because the parents planned on placing the student in a nonpublic school for kindergarten, the CSE developed an individualized education services program (IESP) for the student for the 2015-16 school year (see Dist. Ex. 1 at pp. 1, 2, 9). Finding the student eligible for special education as a student with a speech or language impairment, the March 2015 CSE recommended that the student receive 10 periods per week of direct SETSS in a group in a separate location, along with the following related services: one 30-minute session per week of individual speech-language therapy, one 30-minute session per week of speech-language

therapy in a group, and two 30-minute sessions per week of individual occupational therapy (OT) (id. at pp. 1, 7).[1, 2]

In a prior written notice, dated May 6, 2015, the district summarized the services recommended in the March 2015 IESP (Dist. Ex. 3). According to the hearing record, in approximately August 2015, the parent received a copy of the IESP and an undated authorization form for independent SETSS for parentally-placed students (Tr. pp. 118-19; Dist. Ex. 10; see Tr. p. 53).[3] The authorization notified the parents that the student could "receive SETSS from an eligible independent provider" at district expense and provided a link to a website for a list of eligible providers (Dist. Ex. 10 at p. 1). The authorization also provided contact information for a district official who could provide assistance locating a provider (id.).

The student's mother testified that she contacted 12 to 14 providers from the list of eligible providers referenced in the authorization form but that the individuals with whom she spoke were unavailable (Tr. p. 120). The hearing record also indicates that there were both district and independent SETSS providers working with students who attended the nonpublic school during the 2015-16 school year (Tr. pp. 41-45, 49-51, 84-86, 99-101; see Dist. Ex. 9 at p. 1). The student's mother testified that she spoke with the nonpublic school prior to the beginning of the 2015-16 school year and was informed that there was no provider available who could "work with [the student] individually" (Tr. p. 120).

The parents chose the student's uncle, a certified special education teacher whose name appeared on the district's eligible list, to deliver the student's SETSS; however, the uncle informed the parent that he only accepted an enhanced rate (Tr. p. 121; see Tr. p. 70). The parent testified that she did not enter a formal contract with the student's uncle for delivery of the student's SETSS and had not yet paid him for the services but could not "leave him high and dry" (Tr. pp. 143-44). The uncle delivered SETSS to the student during the 2015-16 school year on an individual-basis, initially as a pull-out service, but for the most part within the classroom (Tr. pp. 69-70, 91-92).

A. Due Process Complaint Notice

By due process complaint notice dated January 14, 2016, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2015-16 school year

[1] The student's eligibility for special education programs 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]).

[2] The parent testified that she was informed at the CSE meeting that the SETSS would be delivered on an individual basis and that they could be delivered "in the classroom" at the discretion of the provider (Tr. pp. 116-17).

[3] According to an event log maintained by the district, the IESP was mailed to the parent on April 14, 2015 (Dist. Ex. 6 at p. 1); however, the student's mother testified that the parents did not receive the IESP until August 2015 and noted that it might have gotten "lost in the mail" or the district may have "had the wrong address . . . because [the parents] had moved" (Tr. pp. 118-19).

(IHO Ex. I).[4] Pertinent to this appeal, the parents alleged that, despite contacting numerous providers, they could not find a SETSS provider willing to accept the district's rate (id. at p. 2). The parents claimed that they located a provider willing to work with the student at an enhanced rate (id.). As a remedy, the parents requested an order directing the district to pay the SETSS provider they selected at an enhanced rate for the period of September 1, 2015 through June 30, 2016 (id.).[5]

B. Facts Post-Dating the Due Process Complaint Notice

In an email, dated February 2, 2016, the district notified the parents that it still had not received the authorization form assigning a provider to deliver the student's SETSS (Dist. Ex. 9 at p. 8). The district also noted its understanding that the parent had declined providers available at the nonpublic school (id.). The district followed up in a second email the next day with the names and phone numbers of two providers delivering services to kindergarten students at the nonpublic school (id. at p. 6). The parents responded on February 3, 2016 and notified the district that they had selected a different provider for the student (id. at pp. 5-6). The parents explained that they "did not use a provider from [the nonpublic school] because [the student] [w]as not a candidate for group sessions" and the nonpublic school could not "guarantee that they w[ould] not add to the group" if additional students needed SETSS (id. at p. 5). By email, dated February 4, 2016, the district noted that the student's IESP recommended SETSS in a group and reiterated that providers were available to be assigned to the student (id.).

C. Impartial Hearing Officer Decision

After a prehearing conference on February 23, 2016, an impartial hearing convened on April 4, 2016 and concluded on May 4, 2016, after two days of hearings (Feb. 23, 2016 Tr. pp. 1-6; Tr. pp. 1-162). By decision dated May 20, 2016, the IHO determined that SETSS providers were available at the beginning of the school year to implement the SETSS mandate in the student's IESP at the district rate but that the parents chose to hire the student's uncle as his SETSS provider because he provided services to the student on an individual basis and within the classroom (IHO Decision at pp. 7-8). However, the IHO found that the parents failed to allege in their due process complaint notice that the March 2015 CSE should have recommended the SETSS on an individual basis or within the classroom (id. at p. 8). As an additional basis for denying the parents' request for payment to the SETSS provider at an enhanced rate, the IHO found that the parents neither entered into a formal agreement with the provider nor expended any monies for his services (id.).

[4] Related to the claim that the student was denied a FAPE for the 2015-16 school year, the parents alleged that the March 2015 CSE was improperly composed due to the absence of the student's special and regular education teachers, a district special education teacher, and an additional parent member (IHO Ex. I at p. 2). The parents also alleged that, although the March 2015 CSE asked the parent for information regarding the student, the district failed to evaluate or observe the student (id.). Next, the parents alleged that the March 2015 CSE "inexplicably" and inappropriately changed one of the two recommended speech-language therapy sessions from individual to group (id.). In addition, the parents contended that the annual goals on the March 2015 IESP were "insufficient to address the student's academic, social, speech and language and sensory needs" (id.).

[5] The parents also requested an award of "compensatory SETSS hours for services not rendered" during the 2015-16 school year, as well as an order directing the district to add one weekly 30-minute session of individual speech-language therapy to the March 2015 IESP and to provide compensatory related services and related services authorizations (RSAs) for all mandated related services not yet provided to the student during the 2015-16 school year (IHO Ex. I at pp. 2-3).

Although the IHO denied the parents' request for payment of an enhanced rate for SETSS, the IHO remanded the matter to the CSE to determine whether the student required SETSS on an individual basis and within the classroom (id.).[6]

IV. Appeal for State-Level Review

The parents appeal the IHO's decision to the extent that it denied their request for the costs of the student's SETSS provider at an enhanced rate. The parents allege that the district failed to establish that it could provide the student's mandated SETSS services at the beginning of the 2015-16 school year. Specifically, the parents argue that, while the March 2015 IESP called for SETSS as a direct and group service, no providers were available to deliver the student's SETSS services on a direct basis. The parents believe "direct" service to mean on an individual basis. The parents additionally argue that the district provided the parent with a copy of the March 2015 IESP and the SETSS authorization form with the information about locating an independent provider too late, such that the parent did not have time to locate a provider prior to the beginning of the 2015-16 school year. Therefore, the parents allege that the hearing record supports a finding that the parents' chosen provider is entitled to direct payment at an enhanced rate.

In an answer, the district responds to the parents' allegations, and argues to uphold the IHO's decision in its entirety.

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, no such students are 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]).

Education Law § 3602-c—commonly referred to as the dual-enrollment statute—requires parents who seek to obtain educational services for students with disabilities placed in nonpublic schools to file a request for such services in the district of location where the nonpublic school is

[6] With respect to the parents' other claims, the IHO determined that the speech-language annual goals included in the March 2015 IESP were inadequate because they failed to address the student's needs as outlined in the speech-language progress report (IHO Decision at p. 7). The IHO further found that the hearing record did not include any evidence to refute the parents' claim that the student missed three weeks of speech-language therapy during the month of September 2015 and 11 weeks of OT before OT services commenced on November 25, 2015 (id.). To make up for the deprivation of speech-language therapy sessions and OT sessions, the IHO directed the district to issue related services authorizations (RSAs) for 6 sessions of speech-language therapy and 22 sessions of OT to be delivered in 30-minute increments (id. at p. 8). The IHO additionally ordered that the district reconvene the CSE to review and develop appropriate annual goals and consider whether the student should receive SETSS on an individual basis (id. at pp. 7-9). Neither party has appealed these determinations; therefore, those aspects of the IHO's decision have become final and binding on the parties and will not be further reviewed (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]). Moreover, in its answer, the district submits that it has already implemented the IHO's order (Answer ¶¶ 21, 49).

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]). "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.).[7] Additionally, unlike the provisions of the IDEA, section 3602-c provides that a parent may seek review of the recommendation of the CSE pursuant to the impartial hearing and State-level review procedures pursuant to Education Law § 4404 (id.).

VI. Discussion

The only issue to be resolved on appeal is whether the IHO erred in determining that the district does not have an obligation to pay the SETSS provider at the enhanced rate. Before relief in this form may be considered, it must be determined whether or not the district denied the student equitable services by failing to ensure the availability of a service provider who could implement the SETSS mandate set forth in the March 2015 IESP.

As summarized above, the March 2015 CSE recommended that the student receive 10 periods per week of direct SETSS in a group in a separate location (Dist. Ex. 1 at p. 7). The parents interpret the term "direct service" as a mandate for individual services (see Tr. pp. 116, 120). The parents have consistently maintained that they could not engage the providers available at the nonpublic school because such providers could not deliver the services on an individual basis (see Tr. p. 120; Dist. Ex. 9 at p. 3).

SETSS are not defined in State or federal laws or regulations and are not identified on the State continuum of special education services. However, the reference in the March 2015 IESP to the service as "direct" is in keeping with the language used in State regulations for consultant

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

teacher services (Dist. Ex. 1 at p. 7; see 8 NYCRR 200.6[d]).[8] State regulations distinguish between "direct consultant teacher services," which consist of "specially designed individualized or group instruction provided by a certified special education teacher . . . to a student with a disability," from "indirect consultant teacher services," which consist of "consultation provided by a certified special education teacher . . . to regular education teachers" (8 NYCRR 200.1[m] [emphasis added]; see 8 NYCRR 200.6[d]). Therefore, it appears that the March 2015 CSE intended to recommend that the SETSS be delivered directly to the student (as opposed to the student's teacher) in a group setting and not on an individual basis (Dist. Ex. 1 at p. 7).

While the student's mother testified that she understood at the March 2015 CSE meeting that the SETSS mandate would be individual (Tr. pp. 116-17), the IESP indicated that the recommended SETSS consisted of a "direct service" and a "group service" (Dist. Ex. 1 at p. 7). Therefore, even if the "direct service" aspect of the SETSS mandate was less than clear, the latter description of the SETSS as a "group service" was unambiguous.[9] Notwithstanding the "group service" designation, the parent would only engage a provider who would deliver the student's SETSS mandate wholly on an individual basis (see Tr. p. 120; Dist. Ex. 9 at p. 6).[10, 11] As the district was not obligated to provide the student with individual SETSS, the parents' claim that there were no providers available to deliver the service on an individual basis at the beginning of the school year does not support her request for relief (Tr. pp. 41-45, 49-51, 84-86, 99-101; see Dist. Ex. 9 at p. 1). On the other hand, the hearing record supports a finding that there were providers available to deliver the SETSS in a group setting as the March 2015 IESP required (Tr. pp. 41-45, 49-51, 84-86, 99-101; see Dist. Ex. 9 at p. 1). Therefore, the district committed no

[8] In addition, information on website listed on the SETSS authorization form includes a description of SETSS, as well as an explanation of the distinction between direct and indirect SETSS, which is in keeping with the regulatory distinction between direct and indirect consultant teacher services (Dist. Ex. 10 at p. 1; see 8 NYCRR 200.6[d]; New York City Dep't of Educ., Special Education Teacher Support Services (SETSS), http://schools.nyc.gov/Academics/SpecialEducation/programs/environment/setss.htm).

[9] The SETSS authorization form also identified the maximum group size for the SETSS as eight students (Dist. Ex. 10 at p. 1).

[10] The parents' argument that they did not receive the March 2015 IESP and SETSS authorization form until August 2015 and, therefore, had an insufficient amount of time to locate a SETSS provider is belied by the hearing record, which indicates that providers were available at the nonpublic school and that the parent spoke with a representative from the nonpublic school and declined providers prior to the beginning of the 2015-16 school year because they could not work with the student individually (Tr. pp. 41-45, 49-51, 84-86, 99-101, 120; see Dist. Ex. 9 at p. 6).

[11] Furthermore, as the IHO noted, the parents did not challenge the recommendation for SETSS as a group service in their due process complaint notice (IHO Decision at p. 8; see IHO Ex. I). The IDEA and its implementing regulations provide that a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.507[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b). Here, there is no indication in the hearing record that the parent's sought to amend the due process complaint notice even after the district clarified to the parents that the March 2015 IESP included a recommendation for group SETSS (Dist. Ex. 9 at p. 5). In addition, there is no indication in the hearing record that the district opened the door to the issue of whether the March 2015 IESP appropriately included a mandate for group SETSS, or otherwise agreed to expand the scope of the impartial hearing (see Tr. pp. 116-17).

violation upon which to base an award of relief in the form of payment at an enhanced rate to the provider the parents chose.

As a final note, according to the district, subsequent to the impartial hearing, the SETSS provider chosen by the parents requested payment from the district at the district rate (Answer ¶¶ 42, 53). An invoice submitted by the district with its Answer reflects that the district has paid the SETSS provider for services rendered during the 2015-16 school year at the district rate (Answer Ex. 1).[12, 13] Further, there is no evidence in the hearing record to establish that the parents have incurred any financial obligation to pay the difference between the enhanced rate and the district rate (see Tr. pp. 143-45). The student's mother testified that the parents did not "make a specific arrangement" or otherwise enter into "a contract or an actual agreement" with the provider to pay the provider if the impartial hearing process did not result in an award of the enhanced rate (Tr. p. 143-44). She further indicated that, if they were unsuccessful at the impartial hearing, the parents would like to pay the difference between the district's rate and the enhanced rate but that they could not "afford that" and would try to "figure something out" (Tr. pp. 143-45). Therefore, even if the parents' prevailed on the merits of their claim, it would be unclear at this juncture whether or not any relief would be warranted absent evidence that the provider was owed additional compensation based on an agreement with the parents or the district. In any event, it is unnecessary to speculate on this state of affairs since the evidence in the hearing record does not support a finding that the district failed to make available to the student special education programs and services on an equitable basis (Educ. Law § 3602-c[2][b][1]).

VII. Conclusion

The evidence in the hearing record supports the IHO's determination that the parents are not entitled to an order requiring the district to pay for services provided by their chosen SETSS provider at an enhanced rate.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
September 2, 2016

SARAH HARRINGTON
STATE REVIEW OFFICER

[12] The district offers the invoice reflecting payment to the student's SETSS provider at the district rate for services rendered during the period of September 1, 2015 through June 30, 2016 as additional evidence for consideration on appeal (Answer Ex. 1). Generally, documentary evidence not presented at an impartial hearing may be 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 (8 NYCRR 279.10[b]; see, e.g., Application of a Student with a Disability, Appeal No. 15-033; see also L.K. v. Northeast Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013]). The invoice was not available during the impartial hearing and is necessary in order to consider the district's argument that the provider accepted the district's rate.

[13] Although permitted to do so by State regulation, the parents did not submit a reply to the additional evidence served with the district's answer (8 NYCRR 279.6).