The University of the State of New York

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

No. 20-087

Application of a STUDENT WITH A DISABILITY, by her 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 Lauren A. Baum, PC, attorneys for petitioners, by Lauren A. Baum, Esq.

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Theresa Crotty, 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. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request to increase the hourly rate paid by the district for their daughter's special education teacher for services provided during the 2018-19 school year. The appeal must be dismissed.

II. Overview—Administrative Procedures

When a student who resides in New York is eligible for special education services and attends a nonpublic school, Article 73 of the New York State Education Law allows for the creation of an individualized education services program (IESP) under the State's so-called "dual enrollment" statute (see Educ. Law §3602-c). The task of creating an IESP is assigned to the same committee that designs educational programing for students with disabilities under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482), namely a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414 [d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts related to IESPs, State law provides that "[r]eview of the recommendation of the

committee on special education may be obtained by the parent or person in parental relation of the pupil pursuant to the provisions of [Education Law § 4404]," which effectuates the due process provisions called for by the IDEA (Educ. Law § 3602-c[2][b][1]). Incorporated among the procedural protections of the IDEA and the analogous State law provisions is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 300.507[a][1]). First, after an opportunity to engage in a resolution process, the parties appear at an impartial hearing conducted at the local level before an IHO (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j]). An IHO typically conducts a trial-type hearing regarding the matters in dispute in which the parties have the right to be accompanied and advised by counsel and certain other individuals with special knowledge or training; present evidence and confront, cross-examine, and compel the attendance of witnesses; prohibit the introduction of any evidence at the hearing that has not been disclosed five business days before the hearing; and obtain a verbatim record of the proceeding (20 U.S.C. § 1415[f][2][A], [h][1]-[3]; 34 CFR 300.512[a][1]-[4]; 8 NYCRR 200.5[j][3][v], [vii], [xii]). The IHO must render and transmit a final written decision in the matter to the parties not later than 45 days after the expiration period or adjusted period for the resolution process (34 CFR 300.510[b][2], [c], 300.515[a]; 8 NYCRR 200.5[j][5]). A party may seek a specific extension of time of the 45-day timeline, which the IHO may grant in accordance with State and federal regulations (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5]). The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]).

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

III. Facts and Procedural History

The hearing record is sparse with respect to the student's educational history. This is most likely due to the limited scope of the parties' dispute and the largely uncontested facts in this proceeding, at least with regard to the student's need for special education services. Accordingly,

the parties' familiarity with the detailed facts and procedural history of the case and the IHO's decision is presumed and will not be recited in detail here.

According to a 2015 administrative decision, the student was referred to the CSE to determine her eligibility for special education and related services while she attended the Cathedral School during the 2014-15 school year (Parent Ex. B at pp. 4-5). Thereafter the student was dually enrolled in the district for the purpose of receiving special education services under an IESP, which called for, among other things, Special Education Teacher Support Services (SETSS) five times per week in the classroom and five times per week in a separate location (Parent Ex. B at pp. 3, 5).[1] According to the administrative decision, the "case centers around the ability of the DOE to find a provider for the services mandated in the IESP" (id. at p. 10). According to the parent, the district sent the parent a list of "independent" SETSS teachers, but none on the list would provide the student's services during the school day (Parent Ex. B at p. 6). As a result, the parent located a teacher who was certified by the state of Connecticut, but she was not "accepted" by the district as a provider for the student's services (id.). Thereafter two other individuals (at least one if not both of whom was a contractor) were identified by the district but neither one would provide the student's SETSS services (id. at pp. 6-7). The parents continued to have the Connecticut-certified teacher push into Cathedral to deliver SETSS services to the student and paid her $100 in cash for each session (id. at pp. 7-9). The 2015 decision awarded the parents reimbursement for their out of pocket expenses for SETSS, direct funding for the remainder of the 2014-15 school year, and compensatory education for missed services (id. at pp. 12-13).

It appears that the student continued to attend Cathedral up through the instant proceeding (Parent Ex. At at p. 3). By summer 2018 the district's responsiveness to the student's special education needs deteriorated further. According to the parents, "the CSE last convened on May 16, 2017 to develop an IESP for [the student] for the 2017-2018 school year and recommended a program of …SETSS… in a group, ten (10) times per week, in a separate location, along with the related service of speech and language therapy (2x30x1:1), in a separate location" (Parent Ex. A at p. 1). The parents also indicated that

> [f]ollowing this meeting, the parent began contacting SETSS providers from the DOE's Independent Approved SETSS Provider List, but despite the parent's efforts, the parent was unable to secure a provider who was willing to work at the NYC DOE approved rate during the necessary times of day. The CSE did not recommended a specific provider to implement the services. The parent was able to identify a provider who was willing to work with [the student] at an enhanced rate for the 2017-2018 school year and that provider is willing to continue to provide the services during the 2018-2019 school year at the enhanced rate

(Parent Ex. A at p. 2). Unlike the 2014-15 proceeding, it is also undisputed that the district failed to create an IESP for the student's 2018-19 school year (Tr. p. 24).

[1] The term "SETSS" is not specifically identified on New York State's continuum of special education services, a problem within this district that has been discussed in numerous State level review decisions (Application of a Student with a Disability, Appeal No. 17-034; Student with a Disability, Appeal No. 16-056).

Consequently, the parents filed another due process complaint notice dated August 23, 2018, alleging that the district failed to timely provide an IESP for the student or identify a SETSS teacher for the 2018-19 school year. As relief, the parents requested an order requiring the district to fund 10 sessions per week during the 2018-19 school year for the SETSS teacher that the parents identified for the student at the "provider's rate" because the district's did not offer a SETSS teacher "willing to work at the DOE's rate of pay for such services, at the times the student requires the services during the school day, and upon information and belief, has no such staff with the appropriate qualifications available for push-in services throughout the school day" (Parent Ex. A at p. 2).

After the 2018-19 school year commenced the student began receiving SETSS from a company called Keys to Literacy and Learning LLC (Keys to Literacy) on or about August 27, 2018, which was operated by the same Connecticut-certified teacher that provided services to the student during the 2014-15 school year (Parent Ex. G at p. 1; see Parent Ex. F).

An impartial hearing convened on October 1, 2018 by IHO 1 (Tr. pp. 1-17). In an interim decision dated October 2, 2018, IHO 1 determined that the student's pendency consisted of those services found in an unappealed IHO decision dated July 9, 2015 (see Parent Ex. B p. 1).

The hearing record further shows that the student continued to receive SETSS services throughout the entirety of the 2018-19 school year from Keys to Literacy (Parent Exs. F; G at pp. 2-10).[2]

IHO 1 recused himself on or about January 6, 2020, and the impartial hearing was delayed until a second impartial hearing officer (IHO 2) was assigned to the case on March 11, 2020, who reconvened and concluded the impartial hearing on April 6, 2020 during which the district did not contest that it had failed to develop an IESP for the student and the parent sought a directive to increase the SETSS teacher's remuneration for working with the student from $100 per hour to $150 per hour (Tr. pp. 18, 20).[3] Documentary evidence was received from the parents, but no witness testimony was proffered by either party (see Parent Exs. A-L). In a decision dated April 6, 2020, IHO 2 denied the parents request to have the district reimburse [fund? reimbursement seemingly not at issue] the student's SETSS provider at $150 per hour retroactive to the 2018-19 school year (IHO Decision at p. 4).

IV. Appeal for State-Level Review

The parents appeal from IHO 2's decision. The parents contend that IHO 2 erred in denying the parents' request to increase the rate for the student's SETSS teacher from Keys to Literacy for the 2018-19 school year from $100 per hour to $150 per hour and that IHO 2 erred in finding that there was a contract between the district and the SETSS teacher for $100 per hour. In an answer,

[2] The provider invoices show that the student received SETSS instruction for the last week in August 2018, and thereafter for the first half of each month from September 2018-June 2019, except for the entire month of April, for which there is no invoice (Parent Ex. G).

[3] Another IHO assignment and recusal may have occurred in the interim as well as settlement negotiations by the parties (Tr. pp. 21-22).

the district argues that the parents argument that the SETSS teacher's rate should be increased should be rejected because IHO 2 had broad discretion to fashion equitable relief and that the "[t]he hearing record is 'devoid of evidence regarding any contract between the SETSS provider and the parent(s) that financially obligates them to pay the SETSS provider' $150/hour for 10 periods of SETSS per week for the 2018-2019 school year."

V. Applicable Standards

Under State law, parents of a student with a disability who have privately enrolled their child in a nonpublic school may seek to obtain educational "services" for their child by filing a request for such services in the district of location where the nonpublic school is located on or before the first day of June preceding the school year for which the request for services is made (Educ. Law § 3602-c[2]). "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.).

VI. Discussion

The case involving this student has all of the hallmarks of what is approaching complete systemic dysfunction regarding the provision of special education services and the procedural safeguards that were supposed to protect the student. That dysfunction has twisted itself into a murky dispute that the parents should not even be involved in, but for their efforts to locate services that the district was responsible to plan and provide for.

Despite being dually enrolled in the district for purposes of receiving special education services, there is no evidence that district has ever actually provided the student with SETSS since the student was found eligible for special education during 2014-15 school through the current proceeding. Additionally, while the current proceeding involves the 2018-19 school year, it appears from the hearing record that a due process complaint notice was filed alleging similar problems during the 2019-20 school year (Tr. pp. 28-30).

The difficulty with the parties' arguments regarding the provision of the student's services is that they do not reach the foundation of the problem that manifests as a rate dispute year after year. First the evidence shows that just as it did before in the 2014-15 school year proceeding, in the current proceeding the district does not refute that it failed to assign a special education teacher to provide the student with SETSS services (after failing to conduct a CSE meeting or develop an IESP), nor does the district refute pushing that responsibility off onto the parents to locate a teacher by creating an "Independent Approved SETSS Provider List" for them to search (compare Parent Ex. A. at p. 2 with Parent Ex. B at p. 6). The problem with the district's system for providing

SETSS services as it applies to this student is that creating a list of "independent" special education teachers is also a violation of State law.

The Commissioner of Education has made it abundantly clear and has "repeatedly held that a board of education lacks authority to provide instructional services through an independent contractor" (Appeal of Sweeney, 44 Ed Dept Rep 176, Decision No. 15,139; Appeal of Woodarek, 46 Ed Dept Rep 1, Decision No. 15,422) and this application of State law requiring that core instruction provided by a school district must be performed either by teachers who are employees of the district or pursuant to a contract for special education services that a district is specifically authorized by law to enter into has been upheld in the courts (see Bd. of Co-op. Educ. Servs. for Second Supervisory Dist. of Erie, Chautauqua & Cattaraugus Ctys. v. Univ. of State Educ. Dep't, 40 A.D.3d 1349, 1350 [3rd Dep't 2007] [noting that the relevant provisions of the Education Law did not provide for instruction by employees of for-profit corporations such as Kelly Services Inc.]; see also Averback v. Bd. of Educ. of New Paltz Cent. Sch. Dist., New Paltz, 147 A.D.2d 152, 154 [3rd Dep't 1989] ["Explaining that "[a]bsent a 'plain and clear' prohibition in statute or decisional law, boards of education are empowered to agree to terms of employment" of a teacher] [emphasis added]).[4]

Additionally, in a July 29, 2009 guidance document, NYSED also clarified that a school district does not have the authority "to provide core instructional services through contracts with nonprofit and other entities" ("Clarifying Information [R]elated to Contracts for Instruction," Office of Special Educ. Mem. [July 2009], available at http://www.p12.nysed.gov/resources/contractsforinstruction/documents/contractsforinstruction2009.pdf). In response to several questions from the field, NYSED issued further guidance ("Q and A related to Contracts for Instruction" Office of Special Educ. Mem. [June 2010], available at http://www.p12.nysed.gov/resources/contractsforinstruction/documents/contractsforinstruction2010covermemo.pdf).[5] NYSED explained the statutory instances in which school districts were

[4] One begins to question if a school district is abandoning its core functioning when it contracts out the instruction for a student who is able to attend a general education setting for most of the day. Appeal of Boyd, (51 Ed Dept Rep, Decision No. 16,364) provides that "except where so authorized or necessary, school districts lack the authority to contract with an independent contractor to provide core instructional services through employees of that independent contractor" (Appeal of McKenna, et al., 42 Ed Dept Rep 54, Decision No. 14,774), such as social work services (Appeal of Barker and Pitcher, 45 Ed Dept Rep 430, Decision No. 15,375), psychological services (Appeal of Friedman, 19 Ed Dept Rep 522, Decision No. 10,236), or to hire substitute teachers (Appeal of Woodarek, 46 Ed Dept Rep 1, Decision No. 15,422; pet. to review dismss'd Kelly Services, Inc. v. USNY, et al., Sup Ct Albany County, 5/22/07, Index No. 7512-06). In Appeal of McKenna, et al. (42 Ed Dept Rep 54, Decision No. 14,774), the Commissioner explained that "establish[ing], conduct[ing], manag[ing] and maintain[ing] a course of instruction in general academic fields" does not involve "peripheral services such as security services or a recreational program, but is the very core function of a school district."

[5] The questions and answers guidance draws a distinction between core instruction and instruction that represents a supplemental or additional resource, providing that a district may not contract with private entitles for the former ("Questions and Answers Related to Contracts for Instruction," Office of Special Educ. [June 2010], available at http://www.p12.nysed.gov/resources/contractsforinstruction/qa.html). Additionally, the guidance acknowledges that, in several specified instances, State law and/or regulation authorizes a school district to contract with other entities, including authorizing a district to enter into any contractual or other arrangement necessary to implement approved pre-kindergarten program plans ("Questions and Answers Related to Contracts for Instruction," citing Educ. Law § 3602-e).

authorized to contract for the instruction of students including Education Law §305(33) (for supplemental educational services, which section has since been repealed); Education Law §3202(6) (students that are hospitalized or institutionalized); Education Law §3602-e (approved prekindergarten programs); Education Law §§4401(2) and 4402(2)(b) (special education services with other school districts, BOCES, State-operated and State-supported schools, approved private schools and the State University at Binghamton which are approved by the Commissioner of Education); Education Law §4401(2)(n) (transition services for students with disabilities in programs such as vocational training programs approved by certain state agencies) (id.). Moreover, the district is required by State law to locate and assign the student's publicly provided teachers for a dually enrolled student (Educ Law § 3602-c[2][a]).

In this case, the available evidence indicates that the district has engaged in an illegal practice by attempting to contract out for the delivery of instruction by a special education teacher and has encouraged the parents to participate in that process by creating a list of independent SETSS teachers that are not employees of the district since at least the 2014-15 school year and continuing through the 2018-19 school year. There is no evidence of what representations, if any, the district has made to those teachers who appear on its list of independent SETTS teachers and the full list utilized by the parents was not included in the hearing record. Instead, the district chose not to present evidence (Tr. pp. 24) but the parents offered a four-page handwritten list of individuals from the list that they contacted to no avail (Parent Ex. E).

Within this context, any notion of a public rate for independent SETSS instruction for this student that may be sanctioned in a policy of the district is flawed and cannot be reasonably relied upon by either party, because the district was not authorized to contract for the provision of an independent special education teacher.[6] For example, the parent references the district's "enhanced rate" in the parents' due process complaint notice and referenced it as being approved by the district in the 2014-15 proceeding (Parent Exs. A; B at p. 6). Furthermore, the available evidence in this case shows that the process, even if it wasn't illegal, does not appear to work anyway. As far as this case is concerned, the process only appears to thrust the parents into a quagmire of trying to figure out how much the public services for their daughter should cost which is manifestly unreasonable because it is the district's responsibility to ensure that services are delivered, whether in accordance with an IESP, an IEP or pursuant to the stay put rule is and the cost not a permissible reason to defer or avoid the obligation to implement a student's services (Educ. Law § 3602-c[2][a], [7][a] [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 and the cost for services is recoverable from the district of residence, either directly with the consent of the parent for a district of location to share information or through the Commissioner of Education and the State Comptroller]).[7]

[6] The State has also imposed a compliance assurance plan upon the district requiring it to "reduce the use of [related service authorizations]" (see New York City Department of Education Compliance Assurance Plan" at p. 16 [May 2019] available at https://www.regents.nysed.gov/common/regents/files/120p12d3.pdf). There is nothing to support the notion that instruction by a special education teacher is a related service.

[7] Parents are required to cooperate with the provision of services by producing a child for services properly arranged for by the district.

In this case, where the district failed to develop an IESP for the 2018-19 school year, took no initiative to identify an employee to continue the student's SETSS services from the 2017 IESP or to implement the student's stay put between the August 2018 due process complaint notice and IHO 1's November 2018 interim decision, it is easy to see why the parents were inclined to seek help from Keys to Literacy, especially when this dispute just repeats from year to year.

While school officials cannot deliver special education services called for by their educational programming in an unauthorized manner due at least in part to the requirements that school officials and employees remain accountable under the statutory and regulatory mechanisms put in place by state and federal authorities, they can be made to pay for a privately obtained parental placement, a process that is essentially the same as the federal process under IDEA. "Parents who are dissatisfied with their child's education can unilaterally change their child's placement during the pendency of review proceedings 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 Cty. Sch. Dist. Four v. Carter, 510 U.S. 7, 14 [1993] [Parents' failure to select a program known to be publicly approved in favor of an unapproved option is not itself a bar to reimbursement]). The evidence shows that during the 2014-15 proceeding the parents chosen teacher was "not New York certified but has qualifications necessary for New York State certification as a special education teacher… . Her certification is being processed" but at that time she was "not accepted" by the district as a teacher for the student (Parent Ex. B at p. 6). In this proceeding, the same teacher claimed that she is capable of attaining New York certification, except that she is no longer seeking certification, indicating that it is not necessary to obtain New York State certification because she has the necessary credentials for her work in the private sector (Parent Ex. L at p. 2). No one challenges the teacher's skills or qualifications in her work with the student, the point is that her work must fall under a parentally selected option because she simply is not accountable to state or local school officials either as an employee or a holder of a New York certification.

Accordingly, in this case the parent's argument on appeal that IHO 2 erred in determining that a contract existed for that rate between the provider and the DOE is without merit first because IHO 2 did not find in his decision that there was a contract between the SETSS teacher and, moreover, such a contract is not permissible in any event. The evidence shows that the parents sought "funding/reimbursement for 10 sessions per week of SETSS at the provider's rate during the 2018-2019 school year beginning September 5, 2018" and it does not appear that the parent was seeking an order directing implementation of a public plan that contained one or more of the litany of publicly approved options for services that the State envisioned that local school districts would provide (albeit tailoring such plans to the individual needs of the student) (see 8 NYCRR 200.6), or remedial relief in the form of compensatory education.

Unlike the 2014-15 proceeding, in which the parents offered evidence that they paid out of pocket for the teacher's services, which they were ultimately successful in recovering (Parent Ex. B at pp. 9, 12), in this proceeding there is no evidence that the parents have paid money for which they must be reimbursed, which brings the matter into that subset of more complicated cases in which the financial injury to the parent and the appropriate remedy are less clear. The Second

Circuit Court of Appeals has held that a direct payment remedy is an appropriate form of relief in some circumstances, and that "[i]ndeed, where the equities call for it, direct payment fits comfortably within the Burlington–Carter framework" (E.M. v. New York City Dep't of Educ., 758 F.3d 442, 453 [2d Cir. 2014]).

Also unlike the 2014-15 proceeding, the parents claim in this case that they will be liable for the difference in the rate paid by the district pursuant to IHO 1's stay put order and the rate now being requested for as a retroactive increase in reimbursement if the district is not ordered to reimburse the special education provider for the $150 an hour she currently seeks from the district. The district argues that the hearing record was devoid of evidence of a contract between the parent and Keys to Literacy that would support the parents' assertion that they were liable for $150 per hour for the SETSS provided to the student and that finding was implied in IHO 2's decision denying the requested increase in rate from the $100 per hour stated in IHO 1's interim decision. Here, unlike the E.M. case, the hearing record contains no written contract between the parent and Keys to Literacy (or the SETSS teacher herself) that indicates that the parent was responsible for the costs of the SETSS services for the 2018-19 school year, at least at any point in time contemporaneous with the initiation of the services. In E.M. the court faulted the IHO and the SRO for going beyond the written contract and relying on extrinsic documentary evidence that suggested that the parent was not obligated to pay the private school, but the question in E.M. was not whether oral contracts obligating the parents will suffice to be enforceable (E.M., 758 F.3d at 456–57). Instead E.M. held that some blanks that the parties did not fill in in the written agreement would not render the entire contract void and that indicated that "the contract's essential terms—namely, the educational services to be provided and the amount of tuition—were plainly set out in the written agreement, and we cannot agree that the contract, read as a whole, is so vague or indefinite as to make it unenforceable as a matter of law (E.M., 758 F.3d at 458). Instead, the August 2018 due process complaint notice indicates that the parents sought direct funding for "SETSS at the provider's rate during the 2018-2019 school year beginning September 5, 2018" (Parent Ex. A at p. 2), however they did not indicate the rate agreed to at that time.[8] Instead, the evidence shows that the student's SETSS provider made an affidavit on August 29, 2019, after the conclusion of the 2018-19 school year (Parent Ex. F). The affidavit shows that Keys to Literacy provided the student with SETSS services during the 2018-19 school year, and the district reimbursed the provider at rate of $100 per hour (Parent Exs. F; G). Of note, the affidavit states that the provider contracted with the parents and not the district; that under IHO 1's pendency order the provider was paid at $100 per hour; that as of August 2019 the provider charges $150 per hour; and that the provider is seeking the remainder balance from the district (id.).[9] Finally, while the affidavit states that the provider was hired by the parents, no evidence of a contract was placed into the hearing record to establish the provider's rates at the time of purported contract, or that the parents would be held liable for any difference in reimbursement rate. Affidavit would be liable for any difference in payments, and the only invoices admitted at the impartial hearing were those submitted by the private special education provider to the district (Parent Exhibit G).

[8] During the 2014-15 proceeding the provider indicated that she charged the parents "$100.00 per session which is not at the higher end of her rates" (Parent Ex. B at p. 11).

[9] According to the affidavit, the rate difference between $100 per hour and $150 per hour amounts to a difference of $20,500 (Parent Ex. F).

For the following reasons, I find that there is insufficient reason to overturn IHO 2's decision rejecting the parents' request for an order directing the district to directly pay the student's SETSS provider $150 per session for the 2018-19 school year. The available evidence shows that the due process complaint notice did not specify a specific rate for the parents' direct funding request; the student was provided with the SETSS services and there is no evidence that the parents paid out of pocket for SETSS services provided at a higher rate during the 2018-19 school year; the affidavit from the parent submitted in evidence before the impartial hearing officer was unsigned (see Parent Ex. K);[10] and the Keys to Literacy teacher had previously indicated a willingness to charge the parents "less than the higher end of her rates" (Parent Ex. B at p. 11). Thus, while it is possible, that Keys to Literacy intended to charge a higher amount for the teacher's services, the evidence really only demonstrates how difficult it can be to prove the terms of an oral contract, (even if one is permissible in this context), that shows the "contract's essential terms—namely, the educational services to be provided and the amount" in accordance with E.M. (758 F.3d at 458). Obviously, a written contract with the price that the parents were responsible for, signed in advance or contemporaneously with the initiation of the unilaterally obtained services would have been much more convincing, at least under the scant case law available on this topic.

Furthermore the vouchers submitted by the Keys to Literacy teacher only complicated matters for the parent more, as the district was ordered in this proceeding to "pay for the services of the child's provider, who was chosen by the parents, at the enhanced rate of $100 per hour" under the stay put (8 NYCRR 200.5[m]) based upon the outcome of the 2014-15 proceeding (IHO Interim Decision at p. 2; see Parent Ex. B). The same evidence that undermines the parents' assertion of a contract with Keys to Literacy for $150 per session with respect to the merits of their direct payment claim equally dooms their argument that that $150 per session should be paid to maintain the student's pendency placement, especially when the teacher continued to provide the services. Consequently, the parents claim that IHO 1's interim decision was erroneous is without merit.

As there is inadequate proof that the parents are legally obligated to make up the difference between the payments that the district has made pursuant to pendency and there is no evidence that the parents have paid any excess out of pocket, is not appropriate equitable relief in these circumstances to require the district directly pay the additional funds to Keys to Literacy that the parents seek. One of the first cases in this State on the topic, indicated that "[w]here there is evidence that a private school has artificially inflated its tuition, hearing officers and courts are required to take this into account in determining an appropriate tuition award, whether that award constitutes prospective relief, retroactive reimbursement, or retroactive direct payment of tuition" (Mr. and Mrs. A. v. New York City Dep't of Educ., 769 F. Supp. 2d 403, 430 [S.D.N.Y. 2011] [finding it appropriate to order a school district to make retroactive tuition payment directly to a private school where equitable considerations favor an award of the costs of private school tuition

[10] For that matter, the supplemental affidavits offered by the parents as additional evidence with their Request for Review were created after IHO 2 rendered his final decision. The parents should not be allowed to offer evidence of the alleged contract terms for a unilateral placement that was created after the impartial hearing has concluded, nearly two years after the services were provided to the student.

but the parents, although legally obligated to make tuition payments, have not done so due to a lack of financial resources]).[11]

VII. Conclusion

Having determined that the evidence in the hearing record does not require reversal of IHO 2's denial of the parents' request for an order requiring an increase in the renumeration for the special education teachers services instruction for the 2018-19 school year, the necessary inquiry is at an end.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
August 20, 2020

JUSTYN P. BATES
STATE REVIEW OFFICER

[11] Courts have differed with the determinations of administrative hearing officers, especially on issues involving the terms of a contract, a point with which the courts have made abundantly clear that no deference is owed such determinations (see, e.g. E.M. 758 F.3d at 45; A.R. v. New York City Dep't of Educ., 2013 WL 5312537, at *7 [S.D.N.Y. Sept. 23, 2013]).