The University of the State of New York

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

No. 20-099

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

Appearances:
Gulkowitz Berger LLP, attorneys for petitioner, by Shaya M. Berger, Esq.

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Nathaniel Luken, 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 his request for the costs of the student's provider of special education teacher support services (SETSS) at an enhanced rate for the 2019-20 school year. The appeal must be sustained in part.

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

Given the limited nature of the instant appeal, 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. Moreover, 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.

Briefly, the student was parentally placed in a nonpublic school for the 2018-19 (kindergarten) school year, and the CSE convened on March 14, 2018, to create an IESP for the student (see Parent Ex. B at pp. 1, 8). The March 2018 IESP recommended that the student receive eight periods of SETSS per week in a "[s]eparate [l]ocation" along with individual speech-language therapy twice a week for 30 minutes and group speech-language therapy once a week for 30 minutes (id. at p. 6).

For the student's 2019-20 school year, the parent placed the student in a nonpublic school (NPS) (Tr. pp. 13-14; see Parent Ex. H).[1] The parent contacted a list of SETSS providers at the beginning of the 2019-20 school year to arrange for SETSS for the student, but was unable to find a provider who would be able to provide SETSS to the student (Parent Ex. D).

On November 15, 2019, the parent filed a due process complaint notice asserting that for the 2019-20 school year, the student required the same special education services as set forth in the March 2018 IESP; however, the district did not provide a SETSS provider for the student (Parent Ex. A at p. 1).[2] The parent argued that he was unable to locate a SETSS provider to work with the student at the district's standard rates; however, the parent was able to find a provider who was willing to provide the student with all of her mandated SETSS for the 2019-20 school year at a "rate higher than [the] standard [district] rate" (id.). As relief, the parent requested the following: (1) a pendency and impartial hearing to issue an order for the student to receive eight periods per week of SETSS at "an enhanced rate" for the 2019-20 school year; (2) allowance of funding to the student's SETSS provider for the provision of eight periods per week of SETSS at "an enhanced rate" for the 2019-20 school year; and (3) an award of all related services on the March 2018 IESP and related services authorizations (RSAs) for such services if required by the parent (id. at p. 2).

The parties proceeded to an impartial hearing related to the student's pendency on December 11, 2019 (Tr. pp. 1-9). During the pendency hearing, both parties agreed that the student's pendency program arose from the student's March 2018 IESP (Tr. pp. 4-6; Parent Ex. B). In an interim order on pendency dated December 15, 2019, the IHO memorialized the parties' agreement reached at the pendency hearing and found that in accordance with the March 2018 IESP, the student's pendency placement consisted of: (1) eight periods of SETSS instruction per week; (2) individual speech-language therapy twice per week for 30 minutes; and (3) group speech-language therapy once per week for 30 minutes (December 15, 2019 Interim Order on Pendency at p. 1). The IHO also ordered that the pendency order was retroactive to the day of the filing of the parent's due process complaint notice, November 15, 2019 (id.).

[1] The administrator of the agency that provided the student's SETSS testified that the student repeated "primary" at the NPS for the 2019-20 school year because "they couldn't bring her to 1st grade" (Tr. p. 39). The administrator of the agency explained that "primary" is equivalent to kindergarten at the NPS (Tr. p. 40).

[2] The parent also argued that the district failed to provide the student with a FAPE by failing to hold an annual meeting and develop an annual education plan (Parent Ex. A at p. 1).

The parties proceeded to an impartial hearing on February 3, 2020 and concluded on April 23, 2020, after three days of proceedings (Tr. pp. 10-66). In a final decision dated, April 26, 2020, the IHO found that "based on the usual practice of other cases and other agencies," payment of $105.00 per hour to the student's SETSS provider was appropriate (IHO Decision at p. 6). The IHO also noted that the invoices in the hearing record from the agency providing SETSS to the student, were "not sufficiently credible as evidence" that the district should pay "double" the provider's rate (id.). Accordingly, the IHO ordered: (1) that the district pay for eight hours of SETSS per week not to exceed the amount of $105.00 per hour; (2) that payment should not begin until after September 20, 2019, four days after the parent attempted to contact a SETSS provider; (3) that the SETSS provider provide proof of the days and times she worked with the student; (4) that the parent provide a letter from the school as to the date it closed its doors due to the pandemic; (5) that the parent and provider in a notarized statement provide the dates and times of any hours services were provided at home through the computer or telephone; and (6) that the provider send an end-of-year report to the district (id. at p. 7).

IV. Appeal for State-Level Review

The parent appeals, asserting that the IHO erred in denying his request for the costs of the SETSS delivered to the student at "an enhanced rate." More specifically, the parent argues that the IHO's analysis in inspecting the agency's costs and expenses and using his own deductions to lower the rate awarded for SETSS to $105.00 has no basis in the law. The parent also argues that the IHO erred in ordering that payment should not begin until after September 20, 2019 because the administrator of the agency providing SETSS for the student testified that the student began receiving SETSS on September 4, 2019 and the IHO's assumption as to when certain phone calls were made to figure out when the student began receiving SETSS was "farfetched."

In an answer, the district argues to uphold the IHO's denial of the parent's request for "an enhanced rate" for SETSS and reimbursement for services between September 4, 2019 and September 20, 2019. The district also argues to dismiss the parent's appeal with prejudice.

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 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]).[3] "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.).[4]

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85).

VI. Discussion

This case is analogous to Application of a Student with a Disability, Appeal No. 20-087 and Application of a Student with a Disability, Appeal No. 20-115, in which the SRO in both cases noted an alarming level of dysfunction regarding the provision of special education with respect to the provision of SETSS to dually enrolled students and the procedural safeguards that are supposed to protect students. Notably, the SRO stated "[t]hat 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" (Application of a Student with a Disability, Appeal No. 20-087).

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 here as a rate dispute. In the instant case, the district did not present any witnesses or documentary evidence to show that it either arranged for, or even attempted to arrange for, SETSS for the student for the 2019-20 school year. Moreover, the district representative failed to appear in person or by telephone for the last impartial hearing, which took place on April 23, 2020 (Tr. p. 61). The limited evidence in the hearing record regarding the provision of SETSS seems to indicate that someone attempted to call

[3] 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]).

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

ten SETSS providers on behalf of the parent to arrange for SETSS for the student for the 2019-20 school year (Parent Ex. D).

In any event, even if the district provided the parent with a list of SETSS providers to contact and arrange for services on her own, the creation of a list of "independent" special education teachers to provide SETSS, as it applies to this student, is 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 [3d 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 [3d 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]).[5]

Additionally, in a July 29, 2009 guidance document, the State 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, the State 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).[6] The State explained the statutory instances in which school districts were authorized to contract for the

[5] 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 disms'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."

[6] 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).

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]).

With the above described seeming impropriety of the district's current reliance on parents to obtain the services of independent providers to implement SETSS services mandated by an IESP as a backdrop, I note that, in this case, as mentioned above, the district did not present any evidence or witnesses to show that it either arranged for or delivered the SETSS as recommended in the student's March 2018 IESP during the 2019-20 school year. Moreover, during the hearing when given the opportunity to respond to the parent's request for SETSS at an "enhanced rate," the district representative responded, "I don't have anything to comment" (Tr. pp. 30-31). Accordingly, there can be no dispute that the student is entitled to receive eight hours of SETSS per week for the 2019-20 school year and this matter now presents itself as a dispute solely as to the rate the district should pay the private provider arranged for by the parent to deliver those services after the district failed to meet its obligations.

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 in the first instance.[7] Furthermore, the available evidence in this case shows that even if the district attempted to utilize this process, it did not result in the student receiving services. This appears to be another case where the district's initial failure to provide SETSS has compelled a parent to engage in self-help and undertake the untenable task of determining how much services mandated by the IESP should cost. This de facto delegation from the district to the parent of the obligation to find a SETSS provider to implement the IESP at an acceptable rate is manifestly unreasonable because it is the district's nondelegable responsibility to ensure that services are delivered, whether in accordance with an IESP, an IEP, or pursuant to the stay put rule, and cost is not a permissible reason to defer or avoid the obligation to implement a student's services (see Application of a Student with a Disability, Appeal No. 20-087; Educ. Law § 3602-c[2][a]; [7][a]-[b] [providing that "[b]oards 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 that the cost for services is recoverable from the district of

[7] 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.

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]).[8]

While districts 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 approved by the State in favor of an unapproved option is not itself a bar to reimbursement."]).

Similar to the situation in Application of a Student with a Disability, Appeal No. 20-087 and Application of a Student with a Disability, Appeal No. 20-115, because the parent has not actually paid any money for which he must be reimbursed (see Tr. p. 42), this matter is in a subset of more complicated cases in which the financial injury to the parent and the appropriate remedy are less clear.

The Second Circuit Court of Appeals has held that a direct payment remedy is an appropriate form of relief in some circumstances, and that "[i]ndeed, where the equities call for it, direct payment fits comfortably within the Burlington–Carter framework" (E.M. v. New York City Dep't of Educ., 758 F.3d 442, 453 [2d Cir. 2014]; see also Mr. and Mrs. A. v. New York City Dep't of Educ., 769 F. Supp. 2d 403, 430 [S.D.N.Y. 2011] [finding it appropriate to order a school district to make retroactive tuition payment directly to a private school where equitable considerations favor an award of the costs of private school tuition but the parents, although legally obligated to make tuition payments, have not done so due to a lack of financial resources]). However, here, unlike the E.M. case, the hearing record contains no written contract between the parent and the agency providing the student the SETSS (or the SETSS provider herself) that indicates that the parent was responsible for the costs of the SETSS services for the 2019-20 school year, at least at any point in time contemporaneous with the initiation of the services.

Here, the administrator of the agency which provided the SETSS to the student, testified that the agency charged the parent $150 per hour for the cost of the student's SETSS; however, the parent did not pay for any of the services (Tr. pp. 42-43). Although the hearing record contains an affidavit from the student's SETSS provider, acknowledging the she provided the student with SETSS for the 2019-20 school year, there is nothing in the affidavit that indicates that the parent is financially responsible for the SETSS (Parent Ex. E). In addition, there are no invoices or logs

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

to indicate that the parent was ever billed for SETSS or to identify when the student was provided SETSS. Furthermore, the parent did not testify or appear during the impartial hearing and as there is no other evidence in the hearing record, such as a written contract between the parent and the agency or even an invoice for services, it is difficult to find that the parent incurred a financial obligation for the SETSS delivered to the student.

In the absence of evidence showing the parent ever paid for SETSS, the IHO appears to have attempted to determine what a reasonable rate would have been for the services that were delivered to the student by questioning the administrator of the agency that delivered SETSS about the rate that the agency paid the provider (Tr. pp. 43-44, see IHO Decision at pp. 5-6). The administrator testified that the agency paid the provider $80 per hour after taxes (Tr. pp. 43-44). This was followed up with questions regarding other expenses the agency might have had that would justify the rate being requested (Tr. pp. 44-51). This then led to the IHO requesting that the administrator of the agency produce receipts with respect to any materials that the provider purchased for the student (Tr. p. 51). The administrator produced an invoice from a school supply company to the agency for over $15,000 in supplies (Parent Ex. F at pp. 1-2). However, this invoice does not indicate what supplies were purchased nor does it indicate if any of these supplies were used with the student (id.). There is also an invoice for a reading training course in the impartial hearing record, and an affidavit indicating that it was used with the student (Parent Exs, E; G at p. 1); however, this was a comparatively small expense (compare Parent Ex. G at p. 1, with Parent Ex. F).

As there is inadequate proof that the parent is legally obligated to pay the costs of the SETSS services delivered to the student by the private agency, it is not appropriate equitable relief in these circumstances to require the district to pay the cost of the services as requested by the parent at a rate of $150 per hour. As the parent has not demonstrated a legal obligation to pay the costs of the SETSS or an inability to do so and there is inadequate proof that the parent has expended any funds to pay for SETSS for the 2019-20 school year, it would generally not be an appropriate form of equitable relief to require the district to either reimburse the parent for the costs of SETSS or to directly fund SETSS under the relevant legal standards discussed above.[9] However, as the district has not appealed from the IHO's order for the district to pay the costs of SETSS delivered to the student for the 2019-20 school year at a rate of $105 per hour, that order will stand.

In addition, to the extent that the IHO's order did not cover services that the parent obtained until after September 20, 2019 because the parent had not yet completed all of the telephone calls to SETSS providers in order to obtain services, as discussed in more detail above, the district was the party responsible for providing SETSS to the student in the first instance, and any attempt to push off that obligation onto the parent to arrange for services was improper. Accordingly, I will modify the IHO's order for the district to pay the student's SETSS for the entire 2019-20 school year.

[9] I note that this decision does not address the district's separate obligation to implement pendency in this case pursuant to the December 15, 2019 Interim Order on Pendency which has not been appealed by either party.

VII. Conclusion

Having determined that the evidence in the hearing record does not require reversal of the IHO 's denial of the parent's request for a higher rate for SETSS the 2019-20 school year, the necessary inquiry is at an end.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that that the IHO's decision dated April 26, 2020 is modified by deleting that portion of the decision that limited the relief awarded for the 2019-20 school year to the period after September 20, 2019.

Dated: **Albany, New York**
September 21, 2020

_____
CAROL H. HAUGE
STATE REVIEW OFFICER