The University of the State of New York

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

No. 21-028

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

Appearances:
Natan Shmueli, Esq., attorney for petitioner

Judy Nathan, Interim Acting General 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. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request for direct payment for special education instructional services for the 2019-20 school year. Respondent (the district) cross-appeals from that portion of the IHO's decision which failed to determine whether the parent was legally obligated to pay for the special education services provided to the student. The appeal must be dismissed. The cross-appeal must be sustained.

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

This case involves a student that the parties appear to agree is eligible for special education services, but the evidentiary record is so thin that the student's needs were not identified by anyone. Instead of being a dispute about the student's eligibility for special education or the appropriate way to address his needs, the dispute focuses not on the student, but on how much a private, independent teacher should be paid for performing work and who is legally responsible to do so.

Among the few things known about the student is that according to the parents, he attended a parochial school for the 2019-20 school year, and he would likely have been enrolled in the fourth or fifth grade. There is no indication that the CSE convened to develop an IEP or IESP to address student's needs. According to the comptroller with the Diamond Achieving Corp., the

student "has an autistic diagnosis" (Tr. p. 12). On September 1, 2019, the district issued a form described as an "Authorization for Independent Special Education Teacher Support Services for Parentally-Placed Student" to the parent (Parent Ex. B). The form indicated the student was authorized by the district to receive five hours of Special Education Teacher Support Services (SETSS) per week to begin on September 1, 2019 "from an eligible independent provider at no cost to [the parent]" (id.). The form further indicated to the parent that "you may select a SETSS provider other than those listed, but the provider must register with the DOE before being authorized to begin service" (id.). The form also stated to the parent "[i]f you need assistance locating a provider, or if you have any questions, please contact the [district] person listed in Section 1 of this form" (id.). The form does not specify a pay rate(s) for a SETSS teacher (id.). The parent affirmed that she attempted to contact 19 providers to obtain SETSS for the student but that none of those providers were willing to provide services to the student at the district's standard rate (Parent Ex. C).

A. Due Process Complaint Notice

By due process complaint notice dated May 1, 2020, the parent alleged that the district did not develop an individualized education services program (IESP) for the 2019-20 school year (Parent Ex. A at p. 1). Further, the parent asserted that the district had authorized five hours of SETSS per week for the student; however, the district did not provide these services (id.). The parent stated that she was unable to obtain these services at the district's standard rate and was only able to obtain the services at a rate higher than the standard rate (id.).

The parent argued that the district failed to offer the student a free appropriate public education (FAPE) for the 2019-20 school year for its failure to create an IESP and supply a SETSS teacher for the student (Parent Ex. A at p. 1).

The parent requested an order finding that the student is entitled to five hours of SETSS per week for the 2019-20 school year at the enhanced rate and an directing the district to fund payment those services (Parent Ex. A at p. 2).[1]

B. Impartial Hearing Officer Decision

The IHO in a decision dated October 16, 2020 found that the district failed to provide the student with a FAPE for the 2019-20 school year (IHO Decision at p. 5). The IHO held that it was undisputed that the district did not create an IESP for the 2019-20 school year, but instead provided the parent with an independent SETSS authorization for five hours of SETSS per week (id. at p. 3). Further, it was undisputed that the district then failed to produce any evidence that it provided SETSS to the student for the 2019-20 school year (id.). Therefore, the IHO found that the district failed to provide a FAPE for the 2019-20 school year (id.).

[1] Additionally, the parent requested all related services set forth on the student's last IESP for the "full 2019-20 school year" and related service authorization forms for such services (Parent Ex. A at p. 2). There is no evidence in the hearing record describing these services, and during the impartial hearing, it appears that the parent was no longer seeking them (Tr. pp. 4-5; see IHO Decision at p. 2).

The IHO also determined that it was undisputed that the parent attempted to locate a SETSS provider, reaching out to 19 providers "who were either unavailable or unwilling to provide the SETSS at the District's standard rate," even though the parent was not required to do this by either law or regulation (IHO Decision at p. 4). However, the IHO pointed out that the "problem for the [p]arent in this case [wa]s that it provided no credible evidence about the [s]tudent's official disability classification, and provided contradictory evidence about whether the purported SETSS provider was qualified to provide any special educational services whatsoever" (id.). The IHO noted that the parent witness testified that the provider was a certified special education teacher, but the parent's documentation stated only that the provider has a "Reading Teacher Permanent Certificate" (id.). The IHO found that the parent witness was not credible because the testimony was contradicted by the parent's own documentary evidence and determined that the record showed this testimony was "false" (id.).

The IHO "agree[d] with the [p]arent that the [d]istrict's failure to provide SETSS placed an unfair burden on the [p]arent to provide the services that should have been provided by the [d]istrict" (IHO Decision at p. 4). However, the IHO found that, in order to receive an award of SETSS funding at the enhanced rate, the parent must "establish, at the bare minimum, that special education teacher services were actually provided and that they were provided by at least a minimal qualified special education teacher" (id. at pp. 4-5). Finding that the parent failed to establish both criteria, the IHO determined that the parent had not established "eligibility for the enhanced rate for SETSS because she failed to establish that SETSS were provided by a qualified special education professional during the 2019-2020 school year" (id. at p. 5). Based on his findings, the IHO dismissed the parent's due process complaint notice (id.).

IV. Appeal for State-Level Review

The parent appeals. The parent contends that IHO erred because the district conceded that the student was entitled to five hours per week of SETSS for the 2019-20 school year and that it failed to provide the student those services.

The parent argues that the IHO misinterpreted the record because the facts were not in dispute and the only issue was the rate of services. According to the parent, the IHO erred by finding the parent's evidence regarding the provider's credentials contradictory. The parent contends the witness testimony that the provider was a certified special education teacher was not contradicted by the documentation that the provider had a reading teacher permanent certificate. The parent asserts that the IHO's decision to deny the requested relief based on the provider's qualifications must be reversed as it is "contrary to law and fact." Notably, the parent argues that the district questioned the witness, but the issue of the SETSS provider qualifications were never raised and that it was never raised as an issue by the district at any point during the hearing. Since the district did not raise the argument, the IHO erred by taking that position on behalf of the district. Moreover, the parent contends that the IHO never raised the issue during the hearing, which "deprived the Parent of the opportunity to defend her position on this matter, and denied the Parent's due process rights to present her case." If the IHO raised this issue, she would have been able to "easily" submit proof that the SETSS provider was on the district's list of eligible SETSS providers. The parent asserts that there "is no law or regulation that requires SETSS teachers at unilateral placements to have any particular certification" and notes that teachers at unilateral placements do not need to be State-certified.

According to the parent, the burden of proof in this matter should rest solely on the district. The parent contends that the issue before the IHO was simple and straightforward: the student was entitled to SETSS for the 2019-20 school year, the district failed to offer these services, and the parent obtained a provider for these services at a rate of $150 per hour. There is "no evidence to rebut any of these points and therefore, the Parent is entitled to the relief requested in her due process complaint." Consequently, the parent requests that the undersigned reverse the IHO decision and award the costs of SETSS services for the 2019-20 school year at the rate of $150 per hour for up to five hours per week.[2]

In an answer with cross-appeal, the district argues that the IHO decision should be upheld. The district contends that contrary to the parent's allegations, the provider's credentials were at issue at the hearing as the parent's attorney questioned the witness on the issue and submitted documentary evidence regarding the provider's credentials. The IHO was required to render a decision based solely on the record in front of him, which the IHO did. The district asserts that the IHO's decision was within his purview, the IHO complied with the regulations regarding evidence, and therefore, the parent's allegation should be dismissed. Further, the district argues that the IHO made a credibility determination based on the record before him, and that determination should be given "due deference."

The district cross-appeals the IHO's failure to find that the provider agency was not entitled to payments due to the lack of evidence of a contract between the parent and the provider agency. The district argues that the IHO should have found that the provider agency is not entitled to direct payments because there is no enforceable contract for any SETSS rate. Specifically, the record is devoid of any evidence of a contract or that the parent is "contractually obligated to pay for SETSS at the enhanced rate, or at all." Further, there are "no invoices or logs to indicate that the Parent was ever billed for the SETSS or to identify when the Student was provided SETSS."

Moreover, the district contends that the record does not support the rate of $150 per hour as the witness testified the provider was only paid $65 per hour and "that this rate was commensurate with what other SETSS agencies charge in her area without presenting any proof of other rates." The district acknowledges that the rate of $150 allegedly included overhead costs for the agency and support services from a Board Certified Behavior Analyst (BCBA). However, the district notes that , the parent failed to provide any invoices or proof of cost for these expenses and the parent failed to establish entitlement "for payment of these services, or that they should be paid at the rate of" $150 per hour.

Finally, the district contends that since the parent has not demonstrated a legal obligation to pay for the cost of these services or an inability to front the costs of these services, and the provider agency has not yet been paid, that it would "not be an appropriate form of equitable relief to require" the district to directly fund any SETSS services that were obtained by the parent and that instead any such relief should only be provided on a reimbursement basis.

[2] Although the parent's request for review was served upon the district late, the parent provided good cause in her request for review to serve a late request for review of the IHO decision in accordance with the terms of the "Thirteenth Revised General Order Regarding Coronavirus 2019 and Recommencement of Timeliness under 8 NYCRR Part 279."

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] This is commonly known in New York as the "dual enrollment" statute. "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] Thus, under State law an eligible New York State resident student may be voluntarily enrolled by a parent in a nonpublic school, but at the same time the student is also enrolled in the public school district for the purpose of receiving special education programming under Education Law § 3602-c, services for which a public school district may be held accountable through an impartial hearing.

[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.).

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

The dispute in this case is similar to a growing number of recent matters in which the State Review Officers have addressed a dispute over the amount of remuneration for teachers that parents have sought through due process for special education services, particularly when the parent has selected a private, independent teacher (see Application of a Student with a Disability, Appeal No. 21-029; Application of a Student with a Disability, Appeal No. 20-141; Application of a Student with a Disability, Appeal No. 20-125; Application of a Student with a Disability, Appeal No. 20-115; Application of a Student with a Disability, Appeal No. 20-087). As a practical matter this kind of dispute can really only be effectively examined using a Burlington/Carter unilateral placement framework because the administrative due process system was not designed to set rate making policies for what has grown into a completely unregulated cottage industry of independent special education teachers that parents within the New York City Department of Education are increasingly reliant upon, an industry that is not authorized by the State in the first place.[5] The attempts that I have seen thus far that do not use a Burlington/Carter analysis have tended to lead to chaos.

"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 IEP dispute is resolved, if they satisfy a three-part test that has come to be known as the Burlington-Carter test. A parent can obtain such reimbursement if: '(1) the school district's proposed placement violated the IDEA' by, for example, denying a FAPE to the student because the IEP was inadequate; (2) 'the parents' alternative private placement was appropriate'; and (3) 'equitable considerations favor reimbursement.'" (Ventura de Paulino v New York City Dept. of Educ., 959 F3d 519, 526-27 [2d Cir 2020] [citations omitted]).

A. Rate Dispute—Unilateral Services

At the outset, I agree with the IHO that the district has caused the parent no small amount of problems by failing to adhere to the requirements of State law and policy by failing to convene a CSE, develop an IESP under the dual enrollment statute, and then implement that dual enrollment plan through special services provided by district employees. However, when that failed to occur, the remedy sought by the parent in this matter, who was represented by counsel, was a haphazard approach with little regard to the formalities set forth in statute, regulation, or case law for seeking privately obtained services through due process litigation. While the parties agreed at the outset that the only issue in this case should be whether the parent is entitled to direct payments for

[5] The State Education Department only permits local educational agencies to contract for the use of teachers and personnel in private settings that are approved by the Commissioner of Education and upon such approval the State's rate setting unit routinely addresses the issue of establishing local rates that districts may pay such private entities (see http://www.oms.nysed.gov/rsu/).

SETSS at the enhanced rate of $150 per hour, even if that was the primary issue, as further described below, there is a dearth of evidence upon which to make a determination.

The evidence shows that there is no dispute that the district failed to create an IESP for the 2019-20 school year nor is an IESP for the 2019-20 school year in the record (see Parent Ex. A at p. 1).[6] The only evidence regarding what services the parties intended was the SETSS authorization form, which indicated that the student was eligible for a maximum of five hours of SETSS per week in a maximum group of eight students beginning on September 1, 2019 (Parent Ex. B). But the authorization form, which is no substitute for an IESP, failed to define the student needs, SETSS, or to describe with any specificity that nature of the services to be provided.

The district did not present any evidence during the hearing and accordingly there is no evidence that the district provided, or even attempted to provide, the student with the SETSS authorized for the 2019-20 school year, via the SETSS authorization form (see Parent Ex. B). What can only be described as evidence of systemic dysfunction, at the outset of the hearing, the district representative stated the district would not present any evidence or witnesses, as "the district firmly believes that the student is entitled to the services recommended on the IESP, the 2019/2020 IESP. What we are more concerned about is the appropriate rate that the parent's are requesting" (Tr. p. 3). The parent submitted a signed statement indicating that she attempted to contact 19 SETSS providers and that she was unable to find a SETSS provider willing to provide services to the student at the district's standard rate (Parent Ex. C). However, the parent did not present any evidence that she sought assistance from the district, and the form provided by the district, as indicated above, stated "you may select a SETSS provider other than those listed, but the provider must register with the DOE before being authorized to begin service" and that "[i]f you need assistance locating a provider, or if you have an questions, please contact the [district] person listed in Section 1 of this form (Parent Ex. B).

As the IHO noted, and as noted in prior State-level review decisions, the problem with the district's system for providing SETSS services, evidenced by the form in this case (Parent Ex. B), is that the parent should not have been required to seek out and arrange for the student's instruction by an independent special education teacher because it was the district's responsibility to provide any special education teacher services called for by an IESP with a district employee, not an independent provider (see Application of a Student with a Disability, Appeal No. 20-115; Application of a Student with a Disability, Appeal No. 20-087). 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

[6] The parent raised the failure to create an IESP in the due process complaint notice; however, the district never disputed this fact. The district did indicate that the student was entitled to the services on the 2019-20 IESP (Tr. p. 3). Further, the IHO specifically found that the district failed to create an IESP and the district did not cross-appeal this finding (see IHO Decision at p. 3).

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]).[7]

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).[8] The State explained the statutory instances in which school districts were 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]).

Within this context, any notion that the district could require a parent to locate an independent SETSS instruction for this student that could be later sanctioned under a local policy of the district is flawed and cannot be reasonably relied upon by either party, because the district

[7] 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."

[8] 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).

was not authorized to contract for the provision of an independent special education teacher.[9] 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 parent into a quagmire of trying to figure out how much the public services for her son 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, and cost is not a permissible reason to defer or avoid the obligation to implement a student's services (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 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]).[10]

Here, as noted above, the district provided no IESP and instead substituted a SETSS authorization form which placed the onus on the parent to contact and retain a provider for the student. Assuming for the moment, that the parties are correct that a special education teacher is the appropriate way to provide services to the student, the student should have received instruction from a special education teacher who was an employee of the district in a location specified by an IESP (i.e. general education setting, separate location, etc.). Indeed, the authorization form contemplates the provision of SETSS to the student in a group setting while remaining silent as to any other details of the location of the SETSS or nature of the services. Moreover, SETSS as a service is not defined under the regulations such as a resource room or direct consultant teacher services and as such, SETSS as a recommended service requires the CSE to define the service the student is entitled to. By the district failing to create an IESP and attempting to toss special education teaching at the student via a SETSS authorization form, it is attempting to contract out core instruction, which the district is not allowed to do. When the district chooses to delegate its core function—that is, instruction by teachers—to independent contractors, such as the agency in this case, so long as such a contractor is cheap enough, the district is, in essence, draining the public coffers through an expensive, publicly-funded middleman which is not sanctioned by New York education law or its implementing regulations. As previously discussed, this particular means of meeting the special education needs of privately placed students, which over time apparently has developed its own procedures, including dedicated forms and a list of district-approved providers, is not contemplated by State law. Instead, it constitutes an illegal shadow system running parallel to the framework contemplated by State law and regulation, seemingly only intersecting with the appropriate legal standards when a rate dispute erupts and an IHO decision is sought that is rooted not in the needs of the student, but solely in the economics of the New York City education markets of which there is no record in this case. Unfortunately, when that happens, and the matter reaches the impartial hearing stage as a rate dispute only, the record

[9] 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.

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

is often sparse when it comes to the most important factors under the IDEA, namely the student's needs and the nature of the special education being provided to meet those needs. This case is a prime example, in which the comptroller of the private agency indicated that the student was "only allowed to really be in class for two hours because he couldn't sit. And he was very difficult. And he couldn't interact with the class. But since we put a provider in there, and since we put the BCBA supervisor in there, he is now in school" (Tr. pp. 12-13). While the private agency's comptroller cannot be faulted for answering the question asked of her, it would have been far more helpful if educational information about the student such as a recent IESP, an evaluation, progress reports, or report cards had been located by someone.

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, parents are not without recourse if a district fails to provide an appropriate IESP or deliver special education services called for by the IESP. Districts 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."]).

There is no question that when the district failed to provide special education programming, that the parents located their own, unilaterally selected private special education services. The parents request for review makes it clear that the parent is operating on a false assumption. The parent asserts that because they are not seeking tuition reimbursement that they therefore do not have to comply with the rules for establishing the appropriateness of a unilateral placement under the Burlington-Carter test. But that is not the case. 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]).

The district correctly argues that the parent failed to present sufficient evidence of an obligation to pay for the SETSS provided to the student. Further, the parent presented a witness who testified that the agency, Diamond Achieving Corp., provided SETSS and BCBA supervisor services to the student (Tr. pp. 6-7, 12-13). The witness was unable to testify to the amount of services the student received, but did testify that the SETSS provider was a certified special education teacher and that the agency had not been paid for the services (Tr. pp. 7-9). Moreover,

the witness testified that the parent entered into an agreement with the agency for it to provide services to the student and the rate for services was $150 per hour (Tr. p. 8). The parent submitted documentation that the student's SETSS provider had a "Reading Teacher Permanent Certificate" (Parent Ex. D). The parent's witness testified that the parent had not yet paid for the services the agency provided the student and that the parent entered into an agreement with the agency for services (Tr. pp. 8-9). However, the parent failed to enter into the hearing record evidence of any agreement between her and the agency. Further, the parent's witness could not testify to the amount of services that the student was provided, only that the agency provided services, and the parent did not enter any documentary evidence, such as invoices, reflecting the amount of services provided or the rate charged. Since, the parent has not actually paid any money for which she must be reimbursed, this matter is in a subset of more complicated cases in which the parent has standing to bring a case, but the financial injury to the parent and an appropriate remedy, if any are less clear (see, e.g., Mr. and Mrs. A., 769 F. Supp. 2d at 430).[11]

Unlike the E.M. case, there is no persuasive proof of any agreement, either written or oral, between the parent and the agency that delivered SETSS providing that the parent was responsible for the costs of the SETSS services for the 2019-20 school year. Under the circumstances of this matter, the parent's request for a determination that the services should be funded at the rate of $150.00 must be denied. The hearing record lacks any convincing evidence of a contract or legal obligation binding the parent and, therefore, there is no reason to disturb the outcome reached by the IHO, namely that the parent is not entitled to the enhanced rate paid by the district. Although this matter can be resolved on this basis alone, I also note that a Burlington-Carter analysis would require a review of whether the equities favor reimbursement (or direct funding). However ill-designed and violative of State policy the district's independent SETSS provider system may be, the SETSS form did request that the parent inform the district if there were difficulties locating a provider (Parent Ex. B), and there is no evidence that the parent did so in this case before proceeding with a private teacher of her own choice. If a parent wishes to avail themselves of the self-help remedy of a unilaterally obtained services, a parent is required to provide the district with 10-day notice of her/his intention to unilaterally place a student and failure to provide this notice can warrant the denial of reimbursement or direct payment (see S.W. v. New York City Dep't of Educ., 646 F. Supp. 2d 346, 364 [S.D.N.Y 2009]).

[11] The parent's attorney questioned the witness about the provider's qualifications and presented documentary evidence regarding this issue (see Tr. p. 8; Parent Ex. D). As such, the parent opened the door to the issue and the argument that the issue of the provider's qualifications was not properly before the IHO is without merit. At this stage of the proceedings, the parent requests that I take judicial notice of the district's local independent provider list (Req. for Rev. at ¶ 17), but the fact that the district may or may not have created a registry does not alter the fact that the district is not permitted to do this. More importantly, treated as a unilateral placement, teachers at a unilateral placement need not be State-certified (Carter, 510 U.S. 7, 14 [noting that unilateral placements need not meet state standards such as state certification for teachers]); however, there must be objective evidence of special education instruction or supports that are specially designed by the student's providers at the private school who have reasonable qualifications that are specifically related to the student's deficits. An independent provider list does not do that. Further, under a Burlington-Carter analysis, the qualifications of a provider would be the burden of the parent to prove as part of its case presented in support of the appropriateness of the unilateral placement. In this instance, the IHO should have more clearly specified that this was a Burlington-Carter analysis.

I note that a private entity has stepped in and appears to have actually provided services to this student that the district does not dispute it should have. But Diamond Achieving Corp. is not a proper party to a due process proceeding because it is not a public agency like the district, and it is not the parent. Although, the parent cannot recover under the Burlington/Carter framework with the lack of evidence presented in this case, I express no opinion regarding whether the provider, Diamond Achieving Corp., can nevertheless recover some or all of the costs from the district in a different, appropriate legal forum (i.e. quantum meruit, unjust enrichment or any other applicable legal theory).

VII. Conclusion

The parent is not entitled to the requested relief of direct payments at the enhanced rate of $150.00 because the parent failed to demonstrate that she was financially responsible for the services provided to the student.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED.

Dated: **Albany, New York**
March 22, 2021

JUSTYN P. BATES
STATE REVIEW OFFICER