The University of the State of New York

The State Education Department
State Review Officer
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No. 21-068

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

Judy Nathan, Interim Acting General Counsel, attorneys for respondent, by Cynthia Sheps, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request that respondent (the district) fund the costs of privately-obtained special education teacher support services (SETSS) at a specified rate for 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 only IESP entered into evidence during the impartial hearing was developed at a CSE meeting held on December 7, 2016 (see Parent Ex. B).[1] The December 2016 IESP recommended that the student receive five periods per week of group SETSS, as well as two 30-minutes sessions per week of individual speech-language therapy, and two 30-minute sessions per week of counseling (id. at p. 7).

The student was parentally placed in a parochial school for the 2018-19 school year (see Tr. p. 22). While the circumstances are unclear, it appears that the district authorized the parent to locate a special education teacher to deliver SETSS to the student for the 2018-19 school year from a list of approved teachers (see Tr. p. 25). According to a log kept by the parent, between August 20 and September 1, 2018, the parent contacted five special education teachers in an attempt to arrange for delivery of SETSS for the student but was unable to find a teacher with availability (Parent Ex. F).

In a notarized letter dated November 26, 2018, addressed "[t]o whom it may concern," a private agency, Succeed, Inc., indicated that "[t]he estimate amount to be charged" for SETSS for the student for five hours per week, over 40 weeks during the 2018-19 school year, at the rate of $175 per hour, would total $35,000 (Parent Ex. E).[2] According to the parent, during the 2018-19 school year, the student received special education instruction from "two providers" from Succeed, Inc. (Tr. pp. 23-24; see also Parent Ex. G).

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[1] During the impartial hearing, the district's representative indicated that an IESP had been developed on April 16, 2018 that recommended the same services as the December 2016 IESP; however, no such April 2018 IESP was offered in to evidence (see Tr. p. 11). With its answer, the district offers a copy of an April 2018 IESP, as well as a November 2012 IESP, as additional evidence and requests that they be considered. Generally, documentary evidence not presented at an impartial hearing is considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]). Here, the proffered documents were available at the time of the impartial hearing and are not necessary to resolve the issues presented on appeal, and, therefore, I decline to exercise my discretion to consider these documents as additional evidence.

[2] During the impartial hearing, the IHO characterized the notarized letter as direct testimony by affidavit in lieu of in-hearing testimony (Tr. p. 14), which is permitted by State regulation "provided that the witness giving such testimony shall be made available for cross examination" (8 NYCRR 200.5[j][3][xii][f]). The district's representative indicated that she wished to cross-examine the affiant (Tr. p. 14); however, the affiant was never called as a witness and, therefore, was not made available for cross-examination (see Tr. pp. 18-32). The parent's advocate did attempt to call a witness with the same surname as the affiant during the impartial hearing but the IHO disallowed that witness's testimony since the witness had impermissibly heard the parent's testimony (compare Tr. p. 27, with Parent Ex. E). In any event, given the different first names, it does not appear that the disallowed witness was the same individual who signed the notarized letter (compare Tr. p. 27, with Parent Ex. E). To the extent the witness was not made available for cross-examination, this may have affected the consideration of or weight to be afforded the affidavit; however, as discussed below, even considering the contents of the affidavit, the evidence does not alter the outcome of this matter.

A. Due Process Complaint Notice

In a due process complaint notice dated December 6, 2018, the parent alleged that the district failed to convene a CSE or develop a timely IESP for the student for the 2018-19 school year and, therefore, did not offer the student appropriate special education services on an equitable basis (Parent Ex. A at pp. 1-3). In addition, the parent alleged that the "IEP team may not have been duly constituted," the parent was denied the opportunity to meaningfully participate in the development of the student's IESP, the CSE predetermined the recommendation for five periods per week of SETSS, the district failed to conduct sufficient evaluations of the student, annual goals developed were not appropriate, and the CSE failed to recommend an appropriate program or services for the student, including extended school year services and five hours per week of SETSS (rather than five periods) (id. at pp. 2-3).

In addition, the parent asserted that she did not agree with the SETSS and related services recommendations made by the last CSE that convened for the student in December 2016 (Parent Ex. A at pp. 1-2). The parent also indicated that she was unable to locate a special education teacher who would "work for the [district] rate" to implement SETSS for the student (id. at p. 3).

The parent asserted that she located a provider who would deliver the student's SETSS if the provider could "be paid at an enhanced rate of $150 per hour" (Parent Ex. A at p. 3). For relief, the parent requested that the district be required to pay the special education teacher to provide the student SETSS at the rate of $150 per hour (id.). In addition, the parent requested that the district issue related services authorizations (RSAs) for the student's related services (id.). The parent also sought extended school year services for the student (id.).

B. Impartial Hearing Officer Decision

An impartial hearing took place on June 4 and July 21, 2020 (see Tr. pp. 1-32).[3] Because the district did not intend to offer any documentary or testimonial evidence, the IHO held that it had "default[ed] on its statutory obligation" and that, therefore, he was "finding . . . a denial of FAPE" and that the parent "cooperated with the Agency" (Tr. pp. 5, 18). The IHO indicated that the remainder of the impartial hearing was essentially to determine "what were the student's needs for the 2018/2019 school year" and "whether or not the relief sought [wa]s appropriate to address those needs" (Tr. p. 5). The district's representative indicated that the district agreed that the student was entitled to five periods per week of SETSS but that it disagreed with "the enhanced rate" sought by the parent (Tr. p. 15).

In a decision dated January 18, 2021, the IHO determined that the district "concede[d]" that there was an April 2018 IESP for the student that recommended five periods of SETSS for the student, along with related services, and that the district "default[ed]," which amounted to "a concession" that the district failed to make SETSS available to the student on an equitable basis (IHO Decision at p. 17). On the other hand, the IHO found that the evidence regarding the parent's efforts to secure a district special education teacher was "generalized" and, further, that there was

[3] At the June 4, 2020 hearing date, neither party appeared (see Tr. pp. 1-3). The IHO indicated that late that day the parent had requested an adjournment of the hearing date due to availability of witnesses without objection from the district, which request had been granted (Tr. p. 2).

no evidence that the parent complied with instructions on the district's SETSS authorization form to contact the district for assistance in locating a provider (id. at p. 9). The IHO found the parent's efforts "to be cursory at best and insufficient to support a finding that there were no [district] providers available for the 2018-2019 year" (id. at p. 16).

Regarding the parent's financial obligation to the provider, the IHO found that the contract offered by the parent as evidence was dated June 1, 2020 and, therefore was not relevant to the school year at issue (IHO Decision at pp. 10-11).[4] The IHO found no evidence of a contract between the parent and the agency or the provider for the 2018-19 school year which indicated the number of hours of SETSS or that contemplated "payment of the services by the [district]" or payment by the parent in the event the district did not pay (id. at p. 11). Thus, the IHO found insufficient evidence in the hearing record of an agreement between the parent and the agency or the provider for the delivery of SETSS to the student during the 2018-19 school year (id. at pp. 11-13, 16-17). The IHO also found no evidence that the parent made payments to the private provider or that the private provider had sought or would seek payment of fees from the parent (id. at p. 14). Thus, the IHO found that "it was the private provider, not the Parent, who incurred the financial burden associated with the student's SETSS . . . for the 2018-2019 school year" and, since the private provider was not a party to the proceeding, the provider was not entitled to relief under the IDEA (id. at pp. 14-15).

Based on the foregoing, the IHO denied the parent's request for district funding of the private SETSS at "an enhanced rate" (IHO Decision at p. 16). However, the IHO ordered the district to fund the costs of five periods per week of SETSS "at the established [district] rate" for the 2018-19 school year and provide the parent with RSAs for the student's related services that had "not already been provided" (id. at p. 17). Finally, the IHO ordered the district to conduct evaluations of the student in all areas of the student's suspected disability that had not been evaluated in the last two years and reconvene the CSE to consider such evaluations and to develop "a new IEP" for the student for the 2021-22 school year (id. at p. 18).

IV. Appeal for State-Level Review

The parent appeals, arguing that the IHO erred in finding that the student was entitled to SETSS for the 2018-19 school year only at the "established [district] rate" rather than the $150 per hour requested by the parent to cover the cost charged by Succeed, Inc. Initially, the parent asserts that the district was required to fund the SETSS at the higher rate pursuant to pendency.[5]

[4] The contract to which the IHO referred was not entered into evidence during the impartial hearing (see Tr. p. 10, 14-15).

[5] During the impartial hearing, the IHO indicated that there was "no request for pendency" and, upon being given an opportunity to "add or detract" or clarify any of the IHO's statements summarizing the issues and procedural matters germane to the case, the parent's advocate responded that she did not have any clarifications (Tr. p. 7). Further, there is no evidence in the hearing record that Succeed, Inc., provided the student with SETSS during any school year prior to the 2018-19 school year by agreement of the district or otherwise and, therefore, the parent's request for the ultimate relief sought in this matter pursuant to pendency is without support in the hearing record (see Araujo v. New York City Dep't of Educ., 2020 WL 5701828, at *3-*4 [S.D.N.Y. Sept. 24, 2020], reconsideration denied, 2020 WL 6392818 [Nov. 2, 2020]; see also Ventura de Paulino, 959 F.3d at 526, 536).

Next, the parent contends that the IHO erred in denying the relief sought based on a finding that the parent did not comply with instructions on a purported SETSS authorization form because such a form was not in evidence and, in any event, the district's practice of contracting out the delivery of SETSS is illegal.

As for the privately-obtained SETSS, the parent notes that the district did not contest that the parent and agency entered into an agreement for Succeed, Inc., to deliver SETSS to the student for the 2018-19 school year and argues that the IHO erred in taking a position on the district's behalf. The parent contends that the IHO erred in finding no agreement between the parent and Succeed, Inc., and points to an affidavit from the agency reflecting that the agency would charge $175 per hour for five periods per week of SETSS for the 2018-19 school year. The parent asserts that, by offering the affidavit as evidence, the parent demonstrated her clear "agree[ment] with its contents." The parent argues that the agreement did not need to be in writing and that the oral agreement between the parent and Succeed Inc. included all of the elements of a contract.

Based on the foregoing, the parent requests that the district be required to fund the SETSS delivered to the student for the 2018-19 school year at the rate of $150 per hour.[6]

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

V. Applicable Standards

A board of education must offer a free appropriate public education (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]).[7] "Boards of education of all school districts of the state shall furnish

[6] The parent asserts that, although Succeed, Inc., charged $175 per hour for delivery of SETSS for the 2018-19 school year, she only requested $150 per hour in the due process complaint notice and agrees that she is bound by the limits of that request.

[7] State law provides that "services" includes "education for students with disabilities," which means "special educational programs designed to serve persons who meet the definition of children with disabilities set forth in [Education Law § 4401(1)]" (Educ. Law § 3602-c[1][a], [d]).

services to students who are residents of this state and who attend nonpublic schools located in such school districts, upon the written request of the parent" (Educ. Law § 3602-c[2][a]). In such circumstances, the district of location's CSE must review the request for services and "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an [IEP]" (Educ. Law § 3602-c[2][b][1]). The CSE must "assure that special education programs and services are made available to students with disabilities attending nonpublic schools located within the school district on an equitable basis, as compared to special education programs and services provided to other students with disabilities attending public or nonpublic schools located within the school district (id.).[8] Thus, under State law an eligible New 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.

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 several recent appeals, in which SROs have noted an alarming level of dysfunction regarding the provision of SETSS to dually-enrolled students and the procedural safeguards that are supposed to protect students (see e.g., Application of a Student with a Disability, Appeal No. 21-029; Application of a Student with a Disability, Appeal No. 21-028; Application of a Student with a Disability, Appeal No. 21-025; Application of a Student with a Disability, Appeal No. 20-141; Application of a Student with a Disability, Appeal No. 20-140; Application of a Student with a Disability, Appeal No. 20-115; Application of a Student with a Disability, Appeal No. 20-099; Application of a Student with a Disability, Appeal No. 20-094; Application of a Student with a Disability, Appeal No. 20-087). In describing the effect of the district's seemingly systemic failure to perform its obligation to provide SETSS to dually-enrolled students, one SRO has noted "[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).

Here, the student was dually enrolled in the district for the purposes of receiving special education services for the 2018-19 school year; however, the district did not present any

[8] State guidance explains that providing services on an "equitable basis" means that "special education services are provided to parentally placed nonpublic school students with disabilities in the same manner as compared to other students with disabilities attending public or nonpublic schools located within the school district" ("Chapter 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.).

documentary or testimonial evidence to show that it provided for, or even attempted to provide, the student with SETSS for the 2018-19 school year, although it agrees that the student was entitled to the services (see Tr. p. 15). The limited evidence in the hearing record regarding the provision of SETSS seems to indicate that the district gave the parent a list of providers from which she could locate a special education teacher to deliver the student's SETSS, and, in August 2018, the parent attempted to call five teachers to arrange for SETSS for the student for the 2018-19 school year (see Tr. p. 25; Parent Ex. F). While the hearing record is scant regarding the circumstances surrounding the parent's initiation of efforts to locate a teacher, the parent's request in her due process complaint notice for an "enhanced rate" is reminiscent of other cases in which the district has provided parents with a list of independent special education teachers to contact and arrange for services on their own (see e.g., Application of a Student with a Disability, Appeal No. 21-029). Assuming without deciding that such a SETSS form or list was exchanged among the parties in this case, as set forth below, 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.

This is because the Commissioner of Education has made it abundantly clear, having "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]).[9]

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

[9] 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."

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).[10] 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]).

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, to which it agreed the student was entitled, during the 2018-19 school year. Accordingly, there can be no dispute that the student is entitled to receive five periods of SETSS per week for the 2018-19 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 "enhanced" 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 (see Application of a Student with a Disability, Appeal No. 20-087).[11] Furthermore, the available evidence in this matter shows that, even if it was appropriate for the district 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

[10] 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).

[11] 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.

the stay put rule, and cost is not a permissible reason to defer or avoid the obligation to implement a student's services (see 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]).[12]

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, 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], cert. denied sub nom., Paulino v. NYC Dep't of Educ., 2021 WL 78218 [U.S. Jan. 11, 2021], reh'g denied sub nom., De Paulino v. NYC Dep't of Educ., 2021 WL 850719 [U.S. Mar. 8, 2021]; 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."]).

Thus, 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.[13] The attempts that do not use a Burlington/Carter analysis have tended to lead to chaos.

Accordingly, the parent's request for five hours per week of SETSS must be assessed under this framework; namely, having found that the district failed to provide appropriate equitable services, the issue is whether the five hours of SETSS delivered to the student by Succeed, Inc., constituted an appropriate unilateral placement of the student such that the cost of the SETSS is reimbursable to the parent or, alternatively, should be directly paid by the district to the provider upon proof that the parent has paid for the services or is legally obligated to pay but does not have

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

[13] The State Education Department only permits local educational agencies to use teachers and personnel in private settings that are approved by the Commissioner of Education and 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/).

adequate funds to do so. As a result, the question of rate is somewhat beside the point as the cost of the SETSS, under the Burlington-Carter test, must be fully reimbursed or directly funded by the district unless, as a matter of equitable considerations, the costs sought to be reimbursed are excessive or otherwise should be reduced or, in the case of direct funding, the parent has not demonstrated a legal obligation to pay the costs and an inability to do so.[14]

Here, the appropriateness of the SETSS delivered to the student by Succeed, Inc., during the 2018-19 school year is not seriously in dispute in this matter as it is the same type of service which the district agrees it was required to provide pursuant to an IESP developed by a CSE. However, 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 she must be reimbursed, 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, unlike the E.M. case, the hearing record in this matter is devoid of any evidence that the parent is legally obligated to pay the agency or the provider for SETSS delivered to the student.

Here, the notarized letter on the letterhead of the private agency, Succeed, Inc., indicated that the rate that the agency would charge for SETSS services for the student was $175 per hour (Parent Ex. E); however, the letter is not addressed to the parent and does not reflect in any way that the parent currently was, or would ultimately be, responsible for such amount. The parent testified that she "wasn't the one who hired [the providers]" but instead that she "worked through a[n] agency," Succeed, Inc., that, in turn, hired the providers (Tr. pp. 23-24). Further, there is no indication in the hearing record that the parent paid for the services. Although there is some

[14] Although not raised on appeal, I note that the parent did not provide the district with a 10-day notice letter. Indeed, reimbursement for a unilateral placement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to their removal of the student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). While the parent's request for relief is denied on other grounds, the parent should be advised going forward of the purpose of the required 10-day notice letter and the traditionally equitable context in which such letter is considered (see S.W. v New York City Dep't of Educ., 646 F. Supp. 2d 346, 361-63 [S.D.N.Y. 2009] [finding that parents of students enrolled in private school were not exempted from 10-day notice requirements]).

evidence that a provider from Succeed, Inc., delivered five hours per week of SETSS to the student for all or some of the 2018-19 school year (see Tr. pp. 23-34; Parent Ex. G), there is nothing in the hearing record to indicate that the parent is financially responsible for such services. As there is no other evidence in the hearing record, such as a written contract between the parent and the agency or an invoice directed to the parent, it is difficult to find that the parent incurred a financial obligation for the SETSS delivered to the student.

As there is inadequate proof that the parent has expended any funds to pay for SETSS for the 2018-19 school year or is legally obligated to do so, it is not appropriate equitable relief in these circumstances 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. 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 2018-19 school year at "the established [district] rate," that order will stand.

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 2018-19 school year, the necessary inquiry is at an end.

I have considered the parties' remaining contentions and find that it is unnecessary to address them in light of my determinations above.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
April 21, 2021

CAROL H. HAUGE
STATE REVIEW OFFICER