The University of the State of New York

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

No. 21-096

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

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

Judy Nathan, Interim Acting General Counsel, attorneys for respondent, by Thomas W. MacLeod, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request that respondent (the district) fund the costs of special education teacher support services (SETSS) from a private agency, AIM Further Inc., at a specified rate for the 2020-21 school year. The district cross-appeals from the IHO's decision asserting that the parents' request for district funding of SETSS delivered by AIM Further Inc. for the 2020-21 school year should be denied for an additional ground and that the IHO's order for speech-language therapy be modified to conclude at the end of the 2020-21 school year. The appeal must be dismissed. The cross-appeal must be sustained.

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 March 18, 2018 (see Parent Ex. B). The March 2018 IESP reflected that the student was parentally placed in a non-public school and recommended that the student receive four periods per week of direct SETSS in a group, as well as two 30-minute sessions per week of individual speech-language therapy (id. at pp. 6, 8).

The student was parentally placed in a nonpublic school for the 2019-20 school year (first grade) (see Tr. pp. 45-46). While the circumstances are unclear, it appears that the district authorized the parents to locate a special education teacher to deliver SETSS to the student for the 2019-20 school year (see Tr. pp. 40-48). According to the student's mother, she contacted approximately 15 special education teachers from a list provided by AIM Further Inc. in an attempt to arrange for delivery of SETSS for the student from a district-approved teacher but was unable to find a teacher with availability (Tr. pp. 40-41, 43-44, 46-47). According to the student's mother, during the 2019-20 school year, the student received special education instruction beginning in February 2020 from a provider from AIM Further Inc. (Tr. pp. 41-42).

For the 2020-21 school year (second grade), according to a log kept by the parent dated July 12, 2020, the parent contacted 10 special education teachers in an attempt to again arrange for delivery of SETSS for the student but was unable to find a teacher with availability (see Tr. pp. 46, 48-49; Parent Ex. C). In an affidavit dated November 10, 2020 and affirmed on November 16, 2020, a private agency, AIM Further Inc., indicated that "[t]he estimated amount that will be charged" for SETSS for the student for four hours per week, over 40 weeks from September 10, 2020 through June 30, 2021, at a rate of $165 per hour, would total $26,400 (Parent Ex. D). The affidavit also indicated that no payments had been made at that point by the parents or the district (id.).

A. Due Process Complaint Notice

In a due process complaint notice dated September 10, 2020, the parents alleged that the district failed to offer or provide the student with an appropriate program and services on an equitable basis for a portion of the 2019-20 school year and the 2020-21 school year (Parent Ex. A). Initially, the parents requested a finding that the student's stay put placement during the pendency of the proceedings lay in the March 2018 IESP and consisted of four periods per week of SETSS "at an enhanced rate" (id. at pp. 1, 2).

Regarding the 2019-20 school year, the parents alleged that the student's mother had not been able to locate a provider to deliver the student's SETSS until February 2020 and that, therefore, the student had "lost 5 months' worth of SETSS that he require[d] to be made up" (Parent Ex. A at p. 1).

The parents alleged that for the 2020-21 school year, the student required the same level of program and services as set forth in the March 2018 IESP (Parent Ex. A at p. 1). The parents also

indicated that they were unable to locate a special education teacher who would "work with the [s]tudent at the [district's] standard rates" to implement SETSS for the student (id.).

The parents asserted that they located a provider who would deliver the student's SETSS "at a rate higher than standard [district] rate" (Parent Ex. A at p. 1). For relief, the parents requested that the district be required to fund the costs of the privately-obtained SETSS at an enhanced rate (id. at p. 2). In addition, the parents requested that the district issue related services authorizations (RSAs) for the student's related services if required by the parents (id.). Finally, the parents requested an award of compensatory SETSS hours to be made up during the 2020-21 and 2021-22 school years, for the SETSS hours that the district failed to deliver in the 2019-20 school year (id.).

B. Impartial Hearing Officer Decision

An impartial hearing convened on October 13, 2020, on which date the issue of the student's pendency placement was addressed (see Tr. pp. 1-13). In an interim decision dated October 25, 2020, the IHO found that the student's pendency placement lay in the March 2018 IESP and consisted of four periods per week of SETSS and two 30-minute sessions per week of individual speech-language therapy (Interim IHO Decision at pp. 3-4). The IHO ordered that the SETSS "be provided at a rate no greater than $110 per hour" (id. at p. 4).

The impartial hearing continued on November 20 and December 16, 2020 (see Tr. pp. 14-76). During the impartial hearing, the parents' attorney indicated that the parents intended to present evidence that the SETSS provider's rate was $165 per hour (Tr. p. 18). The district's representative stated that the district agreed that the student was entitled to SETSS and speech-language therapy but disagreed with "the enhanced rate" sought by the parents and had some issues regarding the provider's credentials (Tr. pp. 17, 21).

In a decision dated March 12, 2021, the IHO determined that the district "conceded" that the student needed four periods of SETSS per week which the district had failed to provide (IHO Decision at p. 7).

As for the parents' request for compensatory education to make up for a lapse in services during the 2019-20 school year, the IHO found that it was "undisputed that the child did not receive SETSS [from] September 2019 through January 2020" (IHO Decision at p. 8). Therefore, the IHO ordered compensatory education amounting to four weekly periods of SETSS for a 20-week period to be provided by a qualified special education teacher at a reasonable rate no greater than the market rate (id. at pp. 8-9). The IHO ordered the district to establish a bank of 80 periods of SETSS upon which the parents could draw for those services, for a period of two years from the date of the decision (id. at p. 9).

Regarding the private services obtained by the parents during the 2020-21 school year from the agency AIM Further Inc., the IHO noted that the provider was not a teacher certified in special education and that there was "some uncertainty" regarding whether the provider's "speech and language disabilities" certification was current (IHO Decision at p. 7). The IHO agreed with the parents' position that, in order for a unilateral placement to be deemed appropriate, a teacher need not possess State certification (id.). However, the IHO noted that the evidence in the hearing

record did not show what instruction the provider delivered to the student (id. at pp. 7-8). Based on the lack of evidence regarding the services delivered, the IHO denied the parents' request for district funding of the costs of the SETSS delivered during the 2020-21 school year (id. at pp. 8, 9). However, the IHO ordered the district to continue to provide RSAs for the student to receive speech-language therapy services (id. at p. 9).

IV. Appeal for State-Level Review

The parents appeal, arguing that the IHO erred in denying the parents' request for district funding of the costs of SETSS from the agency AIM Further Inc. for the 2020-21 school year. Specifically, the parents argue that the IHO erred in finding that there was no evidence regarding the SETSS delivered to the student and points to the testimony of the student's mother and the provider's educational supervisor, as well as the lack of evidence in the hearing record from the district regarding what services were intended when the CSE recommended SETSS for the student. Further, the parents note that the district did not contest the parent's testimony that she located the agency to provide the student SETSS and agreed with the agency that it would provide the services at the rate of $165 per hour. Based on the foregoing, the parents request that the district be required to fund the SETSS delivered to the student for the 2020-21 school year at the rate of $165 per hour.

In an answer, the district responds to the parent's allegations and argues to uphold the IHO's decision denying the parents' request for funding of the SETSS services delivered by AIM Further Inc. during the 2020-21 school year. For a cross-appeal, the district alleges that, in addition to the grounds identified by the IHO, the parents' requested relief should also be denied because there was no evidence in the hearing record that the parents incurred any financial obligation to pay for the SETSS delivered by AIM Further Inc. during the 2020-21 school year. In addition, the district requests that the IHO's order requiring the district to continue to provide RSAs for the student's speech-language therapy services be modified to provide that such order shall conclude at the end of the 2020-21 school year.

In an answer to the cross-appeal, the parents argue that they submitted evidence demonstrating that they incurred a financial obligation to pay the provider in the form of an affidavit of the AIM Further Inc. administrator, affirming that the agency was providing SETSS to the student at the rate of $165 per hour, and that the district did not seek to cross-examine the administrator or argue at the impartial hearing that the parents had no financial obligation to pay. The parents further state that there is no basis to suggest that the IHO meant anything other than ordering speech-language therapy services to continue for the 2020-21 school year and that, therefore, it is unclear what issues the district believes need to be addressed on appeal.

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]).[1] "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.).[2] 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

A. Scope of Review

State regulation governing practice before the Office of State Review requires that the parties set forth in their pleadings "a clear and concise statement of the issues presented for review

[1] 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]).

[2] 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.).

and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately," and further specify that "any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer" (8 NYCRR 279.8[c][2], [4]; see 8 NYCRR 279.4[a]). An IHO's decision is final and binding upon the parties unless appealed to a State Review Officer (34 CFR 300.514[a]; 8 NYCRR200.5[j][5][v]).

Here, neither party appealed the IHO's findings regarding the student's entitlement to SETSS and speech-language therapy services, the district's failure to provide SETSS for a portion of the 2019-20 school year, or the IHO's award of compensatory SETSS for 2019-20 school year. As such, those findings have become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

B. Privately Obtained SETSS

Turning to the parents' request for district funding of the privately-obtained SETSS, 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 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 2019-20 and 2020-21 school years; however, the district did not present any documentary or testimonial evidence to show that it provided for, or even attempted to provide, the student with SETSS for those school years, although it agrees that the student was entitled to the services (see Tr. pp. 17, 19-20, 71). The limited evidence in the hearing record regarding the provision of SETSS seems to indicate that the parents were given a list of providers from which they could locate a district-approved special education teacher to deliver the student's SETSS, and, in July 2020, the student's mother attempted to call 10 teachers to arrange for SETSS for the student for the 2020-21 school year (see Tr. pp. 40-49; Parent Ex. C). While the hearing record is scant regarding the circumstances surrounding the parents' initiation of efforts to locate a teacher, the parents' request in their 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).[3] 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]).[4]

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).[5] The

[3] On the other hand, unlike the circumstances is these other matters, where the district provides a parent with a SETSS authorization form and a list of district-approved providers, here, the student's mother testified that she did not "think" she received an authorization form from the district and indicated that she received a list of district-approved teachers to contact from AIM Further Inc. (Tr. pp. 43-45).

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

[5] The questions and answers guidance draws a distinction between core instruction and instruction that represents a supplemental or additional resource, providing that a district may not contract with private entitles for the former

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 2019-20 or 2020-21 school years. Accordingly, there is no dispute that the student is entitled to receive four periods of SETSS per week for the 2019-20 and 2020-21 school years. However, this matter now presents itself as a dispute as to what instruction the private provider delivered to the student and the rate the district should pay the provider to deliver those services.

First, 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).[6] 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 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

("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).

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

for a district of location to share information or through the Commissioner of Education and the State Comptroller]).[7]

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

Accordingly, the parents' request for four 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 four hours of SETSS delivered to the student by AIM Further Inc., constituted an appropriate unilateral placement of the student such that the cost of the SETSS is reimbursable to the parents or, alternatively, should be directly paid by the district to the provider upon proof that the parents have paid for the services or is legally obligated to pay but does not have 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

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

[8] 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/).

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.

As the SETSS delivered by AIM Further Inc. are of the type and frequency of service which the district agrees it was required to provide, the parents did not have to establish that four sessions per week of SETSS was specially designed to meet the student needs. However, here, the IHO denied the parents' requested relief based on the lack of evidence of the appropriateness of the SETSS delivered to the student by AIM Further Inc. during the 2020-2021 school year. In finding that the parents failed to meet their burden, the IHO rested on questions regarding the qualifications of the provider and what services were actually provided to the student (see IHO Decision at pp. 7-8). As the IHO acknowledged, 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 to address the student's deficits and delivered by private providers who have reasonable qualifications. The IHO's concerns about an underdeveloped hearing record relevant to demonstrating what instruction the provider from AIM Further Inc. delivered to the student are understandable. As the IHO noted, a progress report or similar evidence would have been useful to determining what skills or deficits the private provider was working on with the student and if the student was making progress. Ultimately, however, it is unnecessary to determine whether the IHO was correct in finding the evidence insufficient in this regard as there is an independent basis for denying the parents' requested relief. That is, as raised by the district in its cross-appeal, and 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, the evidence in the hearing record shows that the parents have not actually paid any money for which they must be reimbursed, this matter is in a subset of more complicated cases in which the financial injury to the parents 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 parents are legally obligated to pay the agency or the provider for SETSS delivered to the student.

Here, the affidavit of service provided on the letterhead of the private agency, AIM Further Inc., indicated that the rate that the agency would charge for SETSS for the student was $165 per hour (Parent Ex. D); however, the letter is not addressed to the parents and does not reflect in any way that the parents currently were or would ultimately be responsible for such amount. There is no indication in the hearing record that the parents paid for the services. Although there is some evidence that a provider from AIM Further Inc. delivered four hours per week of SETSS to the student for all or some of the 2020-21 school year (see Tr. pp. 41-42; Parent Ex. D), there is nothing in the hearing record to indicate that the parents are financially responsible for such services. As there is no other evidence in the hearing record, such as a written contract between the parents and

the agency or an invoice directed to the parents, it is difficult to find that the parents incurred a financial obligation for the SETSS delivered to the student.

As there is inadequate proof that the parents have expended any funds to pay for SETSS for the 2020-21 school year or are legally obligated to do so, it is not appropriate equitable relief in these circumstances to require the district to either reimburse the parents for the costs of SETSS or to directly fund SETSS under the relevant legal standards discussed above.[9]

C. Speech-Language Therapy

The district requests that the IHO's order requiring the district to continue to provide RSAs for the student's speech-language therapy services be modified to provide that such order shall conclude at the end of the 2020-21 school year.

At the impartial hearing, when asked whether the requested relief was also for an order for speech-language therapy, the parents' counsel clarified that the parents didn't need an award of it since it was mandated, but requested "something in the order that recognizes that the related services on the IESP should continue throughout the end of the [school] year," with which the district agreed (Tr. p. 37, 68). Further, in the parents' answer to the district's cross-appeal, they state that there is no basis to suggest that the IHO meant anything other than ordering speech-language therapy services to continue for the 2020-21 school year.

As this issue does not appear to be disputed, I will modify the IHO's order to acknowledge that the student's speech-language therapy services are to continue through the end of the 2020-21 school year.

VII. Conclusion

The evidence in the hearing record supports the IHO's denial of the parents' request for SETSS at an enhanced rate for the 2020-21 school year on different grounds. Specifically, the hearing record does not support a finding that the parent paid for or is legally obligated to pay for the SETSS delivered by AIM Further Inc. during the 2020-21 school year and, therefore, the parents are not entitled to an award of district funding of those services.

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[9] There are also equitable considerations that would bear on the parents' requested relief in this instance (see Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see also Carter, 510 U.S. at 16). For example, the student's mother testified that she did not contact the district for assistance in locating a provider, figuring that she would "try [her]self" and "did [her] best" to locate a district provider and, then decided to "ask the school [or] Aim, if they had someone else" (Tr. p. 45). However ill-designed and violative of State policy the district's independent SETSS provider system may be, parents would be better situated to secure a district-approved teacher or obtain relief in the form of private services if they make attempts to communicate with the district before proceeding with a private teacher of their own choice. Further, if parents wish to avail themselves of the self-help remedy of a unilaterally-obtained services, they are required to provide the district with 10-day notice of their 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, 361-63 [S.D.N.Y. 2009] [finding that parents of students enrolled in private school were not exempted from 10-day notice requirements]; see 20 U.S.C. § 1412[a][10][C][iii][I]; 34 CFR 300.148[d][1]). There is no evidence that the parents provided such notice in this instance.

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.

THE CROSS-APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision dated March 12, 2021 is modified to reflect that the district shall be required to continue to provide related service authorizations for the student to receive two 30-minute sessions of individual speech-language therapy for the 2020-21 school year.

Dated: **Albany, New York**
May 26, 2021

SARAH L. HARRINGTON
STATE REVIEW OFFICER