The University of the State of New York

The State Education Department
State Review Officer
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No. 17-034

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

Appearances:
Law Offices of Lauren A. Baum, PC, attorneys for petitioner, Kristen M. Chambers, Esq., of counsel

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, Mary H. Park, Esq., of counsel

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 a decision of an impartial hearing officer (IHO) which denied her request for reimbursement or direct funding of the costs of the provision of special education teacher support services (SETSS) to her daughter at an enhanced rate. The appeal is sustained in part. The appeal must be remanded to the IHO for further administrative proceedings.

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

In this case, the student's eligibility for special education and related services is not disputed by the parties. For the 2016-17 school year, the student was voluntarily placed by the parent at the Trevor Day School ("Trevor"), a nonpublic school (Tr. p. 110; Dist. Exs. 1 at p. 6; 2 at p. 1). On April 20, 2016, the district convened a CSE to conduct the student's annual review and to develop the student's individualized education services program (IESP) for the remainder of the 2015-16 school year and the 2016-17 school year (Dist. Ex. 1 at p. 1). The resultant IESP became effective May 19, 2016 (id.). Finding the student eligible for special education services as a student with

an other health-impairment and in light of the parent's decision to place the student in a nonpublic school, the April 2016 CSE recommended the student receive services pursuant to Education Law section 3602-c in the form of five periods per week of direct SETSS in a group in a separate location during a 10-month school year (Dist. Exs. 1 at p. 4; 2 at p. 1).[1] Additionally, the April 2016 CSE recommended testing accommodations of extended (1.5) time, exams taken in a separate location/room in a small group, and revised directions (read and reread aloud) (Dist. Ex. 1 at p. 5). In a prior written notice, dated May 5, 2016, the district summarized the services recommended in the April 2016 IESP (Dist. Ex. 2 at p. 1).

As discussed in further detail below, the district gave the parent a list of SETSS providers; the parent first attempted to find a provider on her own during September and October 2016 and contacted the CSE in October 2016 when she was unable to do so (see Tr. pp. 24, 40, 96, 98; Parent Ex. H at pp. 1-4). The district referred the parent to additional providers, who the parent contacted; however, her efforts to find a provider for the student were unsuccessful (see Tr. pp. 24-26, 96-98, Parent Exs. C; H at pp. 4-8).

A. Due Process Complaint Notice

By due process complaint notice dated December 5, 2016, the parent requested an impartial hearing (Due Process Compl. Notice).[2] The parent asserted that the district failed to identify a SETSS provider for the 2015-16 and 2016-17 school years (id. at p. 2). With respect to the 2015-16 school year, the parent alleged that the student did not begin receiving services until November 2011 (id.). Additionally, the parent contended that the district failed to identify a SETSS provider for summer 2016 (id.). The parent next claimed that she "had been using" the SETSS provider from the 2015-16 school year to provide services to the student "since September 2016" while the parent waited for the district to find a SETSS provider or until the district approved the "enhanced rate" (id.). For relief, the parent requested that the district pay the current SETSS provider at the enhanced rate for the entirety of the 2016-17 school year; the parent also requested that the district provide "retroactive services" for services that were missed during the 2015-16 school year and not made up during summer 2016, and reimburse the current SETSS provider at the enhanced rate for services provided during summer 2016 (id.).[3]

B. Impartial Hearing Officer Decision

The parties proceeded to an impartial hearing, which began on January 9, 2017, and concluded on February 17, 2017, after two days of proceedings (see Tr. pp. 1-132). In a decision dated March 30, 2017, the IHO concluded that "the district met its obligation to provide qualified SETSS providers who were readily available to provide the IESP mandated services" (IHO

[1] The student's eligibility for special education services as a student with an other health-impairment is not at issue in this appeal (see 34 CFR 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

[2] Several of the parent's exhibits contain material post-dating the filing of the due process complaint notice (see Parent Exs. D; E: F; H). However, neither the parent nor the district challenge the inclusion of this evidence on appeal.

[3] The hearing transcript reflects that the parent's claims related to the 2015-16 school year were resolved during the impartial hearing (Tr. pp. 113-15; Parent Ex. J).

Decision at p. 7). The IHO determined the evidence in the record supported a finding that the district "recommended providers that were available and qualified to provide SETSS services to the student at the district's rate" (id. at p. 6). The IHO found that the district recommended "at least five providers" to the parent, and that while the parent "rejected the providers because they did not teach advanced math," the hearing record did not indicate that the student required instruction in advanced math (id. at pp. 6-7). The IHO also determined that the parent offered "no written proof" that the student's current SETSS provider was on the district's "list of approved providers," and noted that, had the SETSS provider been on that list, she would have been subject to the district's standard rate (id. at p. 7). Thus, the IHO denied the parent's request for an "enhanced rate" for SETSS (id.).

IV. Appeal for State-Level Review

The parent appeals, arguing that the IHO improperly found that the district recommended providers who were "available, able and qualified to provide SETSS" to the student at the district rate. The parent claims that the district did not identify or provide a qualified SETSS provider who was readily available to provide the services mandated in the April 2016 IESP in a timely fashion. In particular, the parent asserts that the district conceded that the first SETSS provider identified by the district at the impartial hearing (SETSS provider 1) was not available to implement the student's IESP. Furthermore, the parent argues that the second SETSS provider identified by the district (SETSS provider 2) was not qualified to provide the support required by the student in mathematics. In any event, the parent asserts that the district did not offer a SETSS provider capable of implementing the student's IESP before the beginning of the 2016-17 school year. Accordingly, the parent contends that the IHO erred in failing to order that the district provide the student with SETSS at the enhanced rate.

The parent also argues that the IHO erred in failing to determine the student's pendency placement. The parent claims that the district funded the student's SETSS provider at the enhanced rate for the 2014-15 and 2015-16 school years, and the student should have continued to receive five hours of SETSS per week with the same provider at the enhanced rate under pendency. The parent requests that an SRO consider additional evidence attached to her request for review as support for the parent's pendency request. The parent also argues that the IHO failed to advise her, as a pro se parent, of the student's pendency rights and how to invoke those rights during the hearing. The parent further argues that the IHO failed to advise her that she could have requested "a continuance of the hearing to secure the testimony of" the student's current SETSS provider, which would have been material to the case.

In an answer, the district generally responds to the parents' allegations with admissions and denials, and argues to uphold the IHO's determinations. In addition, the district asserts that the student's stay put entitlement applies to the program set forth in the student's IESP, and does not include the provision of SETSS at an enhanced rate. The district also contends that the additional evidence submitted by the parent should not be considered by an SRO because it was available at the time of the impartial hearing and is not necessary to resolve the issues on appeal.

In a reply, the parent responds to the defenses asserted by the district in its answer.

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]).

Education Law § 3602-c—commonly referred to as the dual-enrollment statute—requires parents who seek to obtain educational services for students with disabilities placed in nonpublic schools to file a request for such services in the district of location where the nonpublic school is located on or before the first day of June preceding the school year for which the request for services is made (Educ. Law § 3602-c[2]). "Boards of education of all school districts of the state shall furnish services to students who are residents of this state and who attend nonpublic schools located in such school districts, upon the written request of the parent" (Educ. Law § 3602-c[2][a]). In such circumstances, the district of location's CSE must review the request for services and "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an [IEP]" (Educ. Law § 3602-c[2][b][1]). The CSE must "assure that special education programs and services are made available to students with disabilities attending nonpublic schools located within the school district on an equitable basis, as compared to special education programs and services provided to other students with disabilities attending public or nonpublic schools located within the school district (id.).[4] Additionally, unlike the provisions of the IDEA, section 3602-c provides that a parent may seek review of the recommendation of the CSE pursuant to the impartial hearing and State-level review provisions of Education Law § 4404 (id.).

VI. Discussion

The parent argues that the district did not recommend qualified SETSS providers who were available to provide the services mandated in the April 2016 IESP in a timely fashion. The parent further claims that the IHO erred in failing to direct the district to provide the student with SETSS at the enhanced rate. The central issue, as presented by the parties, focuses on whether the IHO erred in determining that the district satisfied its obligations with respect to implementation of the

[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.).

IESP and, therefore, does not have an obligation to pay the privately-obtained SETSS provider at the enhanced rate. The parties have emphasized their differing views on the requirements related to the rates for the required service, but before relief in this form may be considered, it must be determined whether the district denied the student section 3602-c services by failing to furnish the student with the SETSS mandate called for in the April 2016 IESP. In this case, several murky issues must be adequately addressed before that ultimate question can be determined because clarification of these issues bears directly on the issue of relief. The first issue is what are the respective responsibilities of each party when implementing SETSS pursuant to an IESP under section 3602-c for a student who is attending a nonpublic school. That issue also leads to second set of questions—What is this service SETSS that the parent alleged in her due process complaint was not provided, and in what type of setting are SETSS to be implemented? I can offer some guidance on the development of a record to answer these questions, but as it currently stands, the record is inadequate to reach any conclusions.

With respect to the question of the parties' respective responsibilities to implement SETSS, the hearing record shows that initially the parent was either charged with or took on the responsibility of locating a service provider armed with an authorization form created by the district. The reasons why this approach was used—either generally or specifically with this student—are not entirely clear. During the hearing, the parent testified that while she "never turned down any provider," the SETSS providers identified by the district were unavailable to "teach a senior in high school" (Tr. pp. 96, 98, 106). The parent testified that she "emailed everyone in that 500-page" provider register and that "many didn't answer" (Tr. p. 96; see Tr. p. 5).[5]

After the parent was unsuccessful in her efforts to obtain SETSS, the district provided some additional assistance (Tr. pp. 40-42, 96; Dist. Exs. C; H at pp. 1, 4-5). The parent also testified that the district sent her an additional list of possible providers capable of delivering services to "high school students," but emails between the parent and the providers show that the providers did not have time available, were not able to provide appropriate services to the student according to the parent, were unable to provide services in the district based on distance, or were already working as full-time teachers (Tr. pp. 96-97; Parent Exs. C; H at pp. 1-8). The parent's difficulties finding a provider also became intertwined and were influenced by the parent's position that the student required services in advanced mathematics. The parent testified that the student had received SETSS services in both mathematics and English language arts (ELA) for several years, that the student required services in reading comprehension and mathematics for the 2016-17 school year, and that the district was unable to find a SETSS provider who was proficient in trigonometry (Tr. pp. 78, 97, 117). The school district employee in charge of finding service

[5] There were also some indications that the parent and district staff had difficulty maintaining contact with one another. SETSS provider 1 testified that when she first spoke with the parent she was available to provide SETSS to the student at the beginning of the school year; however, by the time the parent called her back SETSS provider 1 was no longer available (Tr. pp. 49, 53-54, 58). The parent denied this version of events and testified that SETSS provider 1 failed to return her phone calls (Tr. p. 120). There are also emails between the parent and district staff documenting difficulties that both had getting in touch with each other (see Parent Ex. H at pp. 6-9, 12-13, 15). In addition, the parent played a voicemail at the impartial hearing which the district stipulated was SETSS provider 1 stating that "she did not have availability" at that time (see Tr. pp. 109-10). This voicemail was not transcribed or entered into evidence by the IHO, but the parent testified that the voicemail was received on the Tuesday after Halloween 2016 (Tr. pp. 109-10, 120-21).

providers (district employee) for the student testified that the parent was concerned that the recommended SETSS providers did not teach "advanced math or . . . trigonometry," and as far as she was aware, most of the providers were not comfortable with trigonometry (see Tr. pp. 25-27, 28, 34).[6]

While the statutory scheme of Education Law section 3602-c places the responsibility of selecting and placing the student in a nonpublic school on the parent, the implementation of the services called for by a student's IESP falls on the district insofar as "[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, upon the written request of the parent" (Educ. Law § 3602-c[2][a]). While it may very well be permissible for a district to include the parent in the identification of a particular provider, especially if the parent is willing and able to do so, it does not follow that the responsibility to redress a parents' inability to locate a provider is shifted permanently to the parent. In this case, at no point during the impartial hearing did the district offer any evidence that, after the parent had difficulty locating a provider and the IESP mandates were going unfulfilled, that it attempted to select or assigned a SETSS provider to deliver the services required by the student's IESP during the 2016-17 school year. While neither party has offered evidence that the district authorized the parent to participate in the process of obtaining SETSS services for the 2016-17 school year,[7] the district does not challenge that the parent was authorized to select a provider of her choosing. Furthermore, it is readily apparent that the parent continued to have a keen interest in the qualification and ultimate selection of the particular SETSS provider. The core of the district's defense seems to be that it identified available SETSS providers. Implied in the district's position is that the parent then failed in a duty to select the provider and proceed with arranging the services, but the district does not provide any legal authority that explains how this duty to participate in the implementation of the IESP falls on the parent's shoulders. Factually, the district maintains that the parent unreasonably refused several different providers identified by district personnel, and that contrary to the parent's claims, two of the providers were available to provide services at the beginning of the 2016-17 school year (see Tr. pp. 123-25). However, the district did not explain why it did not simply schedule the SETSS services as envisioned under the IESP and, in essence, inform the parent where and when the SETSS would be available, and at which time the parent would have the responsibility to produce the student in order to receive the services.[8] A district cannot be absolved of its statutory obligation to implement SETSS for the student simply by asserting that the parent did not engage the services of the SETSS providers to whom the district referred her. The district had the obligation to provide services to the student in conformity with her IESP (Educ. Law § 3602-c[2][a], [b][1]; see 20

[6] The parent stated that the student was taking a mathematics class during the 2016-17 school year that was a "combination of pre-calculus, trigonometry, and geometry," and the work was in "the form of a word problem," so it was "really important that [the SETSS provider was] proficient in math" (Tr. p. 78). The district employee testified that she spoke with an academic support staff member at Trevor, who stated that while the student "need[ed] help with basic math, which was algebra," the school was more focused on the student's ELA needs (Tr. p. 27).

[7] An example would be a signed copy of an authorization for independent SETSS services form for the 2016-17 school year.

[8] As further discussed below, the time and place of the services must not be inconsistent with the IESP and should not otherwise be unreasonable.

U.S.C. § 1401[9][D]; 34 CFR 300.17[d]; see also 20 U.S.C. § 1414[d]; 34 CFR 300.320). The district has not offered any evidence that it assigned the student a SETSS provider, either before the beginning of the 2016-17 school year or thereafter, including when it became clear that the parent did not accept the SETSS providers to whom the district had referred her. For that reason, the IHO's finding that the district met its obligation to implement the student's IESP must be reversed, and the hearing record establishes that the district failed to show how it furnished the mandated SETSS services from the development of the student's IESP on April 20, 2016 to the filing of the due process complaint notice on December 5, 2016. The parent also maintains that the IHO erred in failing to order that the district provide the students with SETSS at the enhanced rate. However, this particular aspect of the parent's claim cannot be addressed as the result of a lack of evidence in the hearing record. As the parent continued to search for an appropriate SETSS provider, she testified that the student received five hours per week of SETSS services with a district special education teacher "that she worked with . . . for the last two years" (Tr. pp. 107, 111-12, 115-16; see Due Process Compl. Notice at p. 2). However, the hearing record contains no evidence describing the SETSS services the student received from the district special education teacher, whether the student received the entirety of the services to which she was entitled under the IESP during the 2016-17 school year, or whether the services provided by the district special education teacher conformed to the services recommended in the student's April 2016 IESP. This matter must be further addressed in the context of an impartial hearing.

The second question faced in this implementation claim is the definition of SETSS. There is no evidence describing the SETSS services that the April 2016 CSE contemplated the student was to receive as recommended in the April 2016 IESP. In a recent decision, the undersigned SRO explained that "an administrative hearing officer cannot take judicial notice of facts attendant to a highly specialized term like SETSS" that is not used outside this district and that "the district . . . should be prepared to develop the evidentiary hearing record regarding the definition of SETSS in all cases in which it bears on disputed issues in the case" (Application of a Student with a Disability, Appeal No. 16-056),[9] and this is precisely such a case. Such evidence would be especially useful because the term "SETSS" is not specifically identified on New York State's continuum of special education services (see generally 8 NYCRR 200.6; see also 8 NYCRR 200.6[d], [f]). In Application of a Student with a Disability, Appeal No. 16-056, the district was directed by the undersigned to submit documentation defining and explaining the exact nature of SETSS, which was described as being created pursuant to the innovative program waiver regulations and consisting of "a flexible hybrid service combining Consultant Teacher and Resource Room Services," as those terms are defined in New York State's continuum of special education services (Application of a Student with a Disability, Appeal No. 16-056).

In New York State's continuum of services, consultant teacher services are linked by State regulation to the classroom instruction received by a student with a disability, and provide either specially designed instruction directly to the student to enable the student to benefit from regular classroom instruction, or consultation to the student's regular education teachers in order to assist them in modifying the environment or their instruction to meet the student's needs (see 8 NYCRR 200.1[m]). A resource room program provides specialized supplementary instruction in an

[9] The term SETSS has appeared in SRO decisions for almost 14 years, but the nuances and contours defining the service in each case have been scant (see, e.g., Application of a Child with a Disability, Appeal No. 03-078).

individual or small group setting for a portion of the school day, with the instructional group not to exceed 5 students (8 in New York City upon seeking a variance from the Commissioner of Education) (8 NYCRR 200.1[rr], 200.6[f]).

Similar to the circumstances in Application of a Student with a Disability, Appeal No. 16-056, the district in this case did not create a hearing record before the IHO that offers any explanation as to what "SETSS" entails. I will not take judicial notice of the meaning of the term. It is not at all clear from the hearing record in this case how the SETSS services were supposed to be linked to and/or support the student's classroom instruction at Trevor Day School. The IESP indicated only that the student "continues to need support with reading comprehension and sophisticated writing assignments. [The student] has developed basic summarizing and descriptive writing skills but struggles to demonstrate an in-depth understanding of the material. Although she does cite evidence from the text to support her topic, she continues to have difficulty showing [sic]." The IHO referred to the student's SETSS provider as a "tutor" on multiple occasions during the hearing without objection from the parties (see Tr. pp. 78, 126, 130). The IHO also asked the parent what subjects "the student was to be tutored in," and the parent responded, "math and reading" (Tr. p. 78). The parent also submitted a letter from the student's psychologist that stated the student should "remain with her current tutor and not change her tutor mid-year" (Parent Ex. F [emphasis added]), but there is no indication that the student's psychologist was familiar with the student's IESP, the meaning of the term SETSS or the specifics of how the district provides SETSS. However, if I were to assume that SETSS is, as the district has represented in other matters, a hybrid between consultant teacher and resource room services, neither the district nor the parent explains in their arguments why tutoring services separate and apart from Trevor Day School would meet that service recommendation listed in the student's IESP. These matters should be addressed in a hearing. Additionally, despite the parent's testimony that the district did not recommend SETSS providers proficient in mathematics, there are no indications in the April 2016 IESP that the student was recommended to receive SETSS to address needs in mathematics (see Dist. Ex. 1 at pp. 1-4). While the parent contended that the student had math needs that could not be addressed by the district's recommended providers, the April 2016 IESP focus on reading and writing skill deficits and did not identify any math needs or provide math goals for the student (id.).

Although for different reasons, both parties in this case seem to agree that the student did not actually receive some portion of the SETSS services in the IESP, but the record is confounding with regard to what those SETTS services were supposed to consist of. On the one hand, the parent testified that she agreed with the program developed in the April 2016 IESP and did not object to the services provided on the IESP (Tr. pp. 111, 118). Similar to the IESP's focus on reading and writing skill deficits, all of the annual goals included on the April 2016 IESP were related to the student's reading comprehension and written expression skills; the April 2016 IESP also identified that the student "receives SETSS to help improve her reading comprehension, written and expression skills" (District Ex. 1 at pp. 1-4).[10] On the other, as discussed previously, parent was deeply concerned with the qualifications of the SETSS providers in terms of their ability to support

[10] In addition to the April 2016 IESP, the September 2015 IESP is also illuminating. The September 2015 IESP noted that the student was "performing on grade level in math" and that mathematics was "an area of strength"; the September 2015 IESP also identified that the student was "earning an A in" an introduction to algebra course (Dist. Ex. 3 at pp. 1-2).

the student in the area of mathematics, an area which the IESP does not appear to call for support. These blatant contradictions go unaddressed in this proceeding. The parties need to be given an opportunity to address these matters in the context of a hearing.

The next question with regard to the alleged non-implementation of SETSS is to identify where the services were to be provided. As the student is parentally placed at Trevor, a nonpublic school, the district should have considered whether it was necessary for the student to receive SETSS at Trevor, at a district school, or a third location in order to implement her IESP in accordance with the intention of the CSE. In interpreting the provisions of a substantially similar prior version of Education Law § 3602-c, the New York Court of Appeals addressed the question of whether a district must provide special education programs and services to a student with a disability at the nonpublic school a student attends, and found that the location in which services are provided to a parentally-placed nonpublic school student with a disability pursuant to section 3602-c should be determined based on what is appropriate to meet the individual educational needs of the student, with consideration given to least restrictive environment principles (Bd. of Educ. of Bay Shore Union Free Sch. Dist. v. Thomas K., 14 N.Y.3d 289, 293-94 [2010]; Bd. of Educ. of Monroe-Woodbury Cent. Sch. Dist. v. Wieder, 72 N.Y.2d 174, 183-88 [1988]). The April 2016 IESP did not identify the location in which SETSS services were to be provided, beyond a "Separate Location," and there is no additional evidence in the record identifying that location (see Dist. Ex. 1). It is also unclear where the district special education teacher provided services to the student during the 2016-17 school year.[11] The hearing record also does not specific how the SETSS provider was expected to coordinate with and/or support the instruction that the student was receiving in the general education setting at Trevor Day School, and again this should be done in the context of a hearing.

Therefore, based upon the paucity of evidence in the hearing record concerning the definition of SETSS, the manner in which the services recommended on the April 2016 IESP were envisioned to be implemented by the April 2016 CSE, and the services actually provided by the district special education teacher during the 2016-17 school year (including whether or not such services were the type contemplated by the April 2016 IESP), this matter must be remanded to the IHO in order to further develop the record and determine whether the district is required to reimburse the parent or make direct payment to the district special education teacher for SETSS provided to the student during the 2016-17 school year.[12] The IHO should also require the parties to explain their positions and develop the record to determine the location in which the district's CSE intended SETSS to be provided, as well as the location that services were actually provided to the student by the district special education teacher; furthermore, if necessary, the district should

[11] The additional evidence submitted by the parent appears to indicate that the student received services at the nonpublic school during the 2015-16 school year (Req. for Rev. Ex. A at p. 3).

[12] The parent testified that she had not paid the district special education teacher for services provided to the student during the 2016-17 school year (Tr. p. 111). The parent also testified that she originally obtained the services of the district special education teacher because the teacher was on a list of district-approved providers (Tr. p. 112).

be prepared to explain how SETSS services were intended to be coordinated with the student's general education program at Trevor.

The parent also claims that by operation of pendency, the student should have continued to receive five hours of SETSS per week with the district special education teacher at the enhanced rate. As an initial matter, while this case is related to services provided in an IESP under section 3602-c, that section provides that a "[r]eview of the recommendation of the committee on special education may be obtained by the parent . . . pursuant to the provisions of section forty-four hundred four of this chapter" (Educ. Law 3602-c § [2][b][1]), and the Education Law provides that a student shall remain in his or her then-current educational placement "[d]uring the pendency of any proceedings conducted pursuant to" Education Law § 4404 (Educ. Law § 4404[4][a]).[13] Although not defined by statute, the phrase "then current placement" has been found to mean either: (1) the placement described in the student's most recently implemented IEP; (2) the operative placement actually functioning at the time when the due process proceeding was commenced; or (3) the placement at the time of the previously implemented IEP (Dervishi v. Stamford Bd. of Educ., 653 Fed. App'x 55, 57-58 [2d Cir. June 27, 2016], quoting Mackey v. Bd. of Educ. of the Arlington Cent. Sch. Dist., 386 F.3d 158, 163 [2d Cir. 2004]; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 170-71 [2d Cir. 2014] [holding that the pendency provision "requires a school district to continue funding whatever educational placement was last agreed upon for the child"]; see Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 452 [2d Cir. 2015] [holding that a student's entitlement to stay-put arises when a due process complaint notice is filed]; Susquenita Sch. Dist. v. Raelee, 96 F.3d 78, 83 [3d Cir. 1996]; Letter to Baugh, 211 IDELR 481 [OSEP 1987]). Furthermore, the Second Circuit has stated that educational placement means "the general type of educational program in which the child is placed" (Concerned Parents and Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 753, 756 [2d Cir. 1980]), and that "the pendency provision does not guarantee a disabled child the right to remain in the exact same school with the exact same service providers" (T.M., 752 F.3d at 171). When the due process complaint notice was filed, by operation of the pendency provision, the student was entitled to five periods a week of SETSS in accordance with then current educational placement, which was the September 2016 IESP (Dist. Ex. 1 at p. 3). To the extent that the parent obtained services on her own as a result of the district's failure to ensure that the services in the April 2016 IESP were implemented pursuant to pendency after the commencement of the impartial hearing, the parent is entitled to reimbursement from the district for the amount she spent (see T.M., 752 F.3d at 172). If the district offered to provide these services directly and the parent refused such services in favor of obtaining services from a different, preferred provider, the district would only be required to reimburse the parent "up to the amount that it would . . . cost [the district] itself to provide" those services (id.). However, it is unclear from the record whether the district offered to provide SETSS to the student after the due process complaint notice was filed.

As to the parent's arguments related to the student's alleged right to continue receiving SETSS from the district special education teacher, a specific service provider is not considered part of a student's "then-current educational placement," (T.M. 752 F.3d at 171 [stating that the "IDEA's pendency provision does not entitle a disabled child to keep receiving services from the

[13] The district appears to concede that the student was entitled to the protections of the pendency provision.

exact same service providers while his proceedings are pending," and that "[i]t is up to the school district to decide how to provide that educational program, at least as long as the decision is made in good faith"]; see also T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 419 [2d Cir. 2009] [noting that "the term 'educational placement' . . . 'refers only to the general type of educational program in which the child is placed'"], quoting Concerned Parents, 629 F.2d at 756).

Thus, on remand, the IHO should develop the hearing record to determine whether the district offered SETSS to the student after the due process complaint notice was filed, to the extent that such information would be relevant to determining whether the district failed to implement the student's IESP as required under pendency. The IHO is further directed to determine to what extent the parent or the district special education teacher have been reimbursed by the district for services provided to the student during the 2016-17 school year, and whether such services were reimbursed at the enhanced rate requested by the parent. A dispute between parties must at all stages be "real and live," and not "academic," or it risks becoming moot (see Lillbask v. State of Conn. Dep't of Educ., 397 F.3d 77, 84 [2d Cir. 2005]; Toth v. New York City Dep't of Educ., 2017 WL 78483, at *9 [E.D.N.Y. Jan. 9, 2017]; see also Coleman v. Daines, 19 N.Y.3d 1087, 1090 [2012]; Hearst Corp. v. Clyne, 50 N.Y.2d 707, 714 [1980]). In this case, if the district has already paid for the full cost of the privately-obtained SETSS, the IHO may determine that the parent's claims are now moot.[14]

The parent also raises additional procedural claims that will be briefly addressed. First, the parent argues that the IHO failed to advise her of her rights related to pendency at the impartial hearing and failed to inform her that she could have requested a "continuance of the hearing to secure the testimony of" the student's current SETSS provider. As this case is being remanded to the IHO, it is unnecessary to determine whether the parent was harmed by the IHO's actions; the parent will have an opportunity to present additional evidence on remand. Moreover, the hearing record demonstrates that the IHO attempted to assist the parent, who was unrepresented by counsel, by explaining the hearing process and requesting clarification of issues when appropriate (Tr. pp. 7-10, 29-30). The parent was provided with an opportunity to present an opening and a closing statement (Tr. pp. 12, 128). The parent was also given opportunities throughout the hearing to question witnesses and, when she chose not to, the IHO questioned the witnesses to more fully develop the hearing record on those issues (Tr. pp. 28, 37, 50, 76-77; see 8 NYCRR 200.5[j][3][vii]).

Next, the parent offers as additional evidence for consideration on appeal an authorization for independent SETSS services form for the 2015-16 school year, an authorization for independent SETSS services form for summer 2015, and a document dated February 2005 relating to implementation of a "New Mathematics Regents Examination," (see Request for Review Exs. A-C). Generally, documentary evidence not presented at an impartial hearing may be 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 (8 NYCRR 279.10[b]; see, e.g., Application of a Student with a Disability, Appeal No. 15-033; see also L.K. v. Northeast Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013]). As this case is

[14] In correspondence to the Office of State Review, counsel for the district repeatedly asserted that the student was receiving SETSS at the enhanced rate during the course of this appeal.

being remanded to the IHO, it is unnecessary to address the parent's request at this time, as she may submit these documents into evidence at the impartial hearing, to the extent that they are still relevant to the issues on remand.

VII. Conclusion

The evidence in the hearing record does not support the IHO's determination that the district met its obligation to implement the student's April 2016 IESP. Nonetheless, for the reasons set forth above, the matter is remanded to the IHO for a determination on the merits of the claims identified herein.

I have considered the parties' remaining contentions and find that I need not address them in light of the determinations made herein.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision dated March 30, 2017 is modified, by reversing so much of the decision as found the district met its obligation to implement the student's IESP for the 2016-17 school year; and

IT IS FURTHER ORDERED that the matter is remanded to the same IHO who issued the March 30, 2017 decision, for further proceedings in accordance with this decision; and

IT IS FURTHER ORDERED that if the IHO who issued the March 30, 2017 decision is not available, another IHO shall be appointed in accordance with the district's rotational selection procedures and State regulations.

Dated: **Albany, New York**
August 10, 2017

JUSTYN P. BATES
STATE REVIEW OFFICER