The University of the State of New York

The State Education Department
State Review Officer
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No. 20-042

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 Office of Marvin L. Schwartz, attorney for petitioner, by Marvin L. Schwartz, Esq.

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Brian Davenport, Esq.

DECISION

I. Introduction

This proceeding arises under 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 to fully fund the special education teacher support services (SETSS) she obtained for the student for a portion of 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 §§ 3602-c; 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[a]). 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 matter, the hearing record contains very little, if any, evidence describing the student's educational history, especially as it pertains to the portion of the 2018-19 school year at

issue (see generally Tr. pp. 1-102; Parent Exs. A-E; Dist. Exs. 1-10; IHO Exs. I-II). Procedurally, this matter is similar to an impartial hearing conducted to resolve the parent's challenge pertaining to the 2017-18 school year, where the parent alleged in an October 2017 due process complaint notice that the district failed to "offer a payment rate" for SETSS "sufficient for [the student] to obtain these recommended services" (see Parent Exs. D; E at p. 2; compare Parent Ex. A at p. 2, with Parent Ex. E). The evidence in the hearing record demonstrates that the parties, together with an IHO, met for the pendency placement portion of that impartial hearing on November 7, 2017, which resulted in an order directing the district to provide services consistent with the recommendations in an April 2016 IESP for the pendency of that proceeding (see Parent Ex. E at p. 2).[1]

In an email to the parent's attorney dated November 21, 2017, the district's "Impartial Hearing Order Implementation Unit" sought documentation or information to "facilitate relevant authorizations" to implement the student's pendency placement (Parent Ex. D). The district email reflected that the district was required to "fund the student's receipt of 10 hours per week of SETSS . . . at the rate previously charged for these services for the 2016-17 school year (ex: $90 per hour)" (compare Parent Ex. D, with Parent Ex. E at p. 2).[2] The district email further noted that "[p]endency [was] effective from October 17, 2017 until the conclusion of th[e] case" (Parent Ex. D).

On or about November 24, 2017, a CSE convened and developed the student's IESP, which reflected a projected implementation date of November 27, 2017 and a projected annual review date of November 28, 2018 (see Parent Ex. B at p. 1; Dist. Ex. 3 at p. 1; see generally Dist. Exs. 2; 5).[3] After finding the student eligible for special education and related services as a student with a speech or language impairment, the November 2017 CSE recommended that the student receive seven periods per week of SETSS as a "[d]irect" and "[g]roup service," one 30-minute session per week of individual speech-language therapy, two 30-minute sessions per week of

[1] The IHO presiding over the impartial hearing held for the parent's October 2017 due process complaint notice also presided over the impartial hearing conducted for the parent's October 2018 due process complaint notice in the present matter (compare Tr. p. 1, with IHO Decision at p. 4, and Parent Ex. E at pp. 1, 4).

[2] The hearing record does not contain the IHO's interim order on pendency issued in November 2017 ((see generally Tr. pp. 1-102; Parent Exs. A-E; Dist. Exs. 1-10; IHO Exs. I-II). However, the services comprising the pendency placement were reflected in the IHO's April 2018 decision on the merits(see Parent Ex. E at p. 2). The district's email is the only evidence that included any reference to a specific rate to be paid for the SETSS provided under pendency in that proceeding (see Parent Ex. D; see generally Tr. pp. 1-102; Parent Exs. A-C; E; Dist. Exs. 1-10; IHO Exs. I-II).

[3] As a matter of State law, the school year runs from July 1 through June 30 (see Educ. Law § 2[15]). In light of the projected implementation and annual review dates, the November 2017 IESP included recommendations for a portion of the 2017-18 school year—i.e., November 27, 2017 through June 30, 2018 (as the conclusion of that school year)—and for a portion of the 2018-19 school year—i.e., from September 2018 through the projected annual review date of November 28, 2018 (see Parent Ex. B at p. 1; see also Educ. Law § 2[15]). Given the student's date of birth she would, chronologically, have been considered a kindergarten student during the 2016-17 school year; a first grade student during the 2017-18 school year; and as the parent testified at the impartial hearing, the student was in second grade during the 2018-19 school year (see Parent Ex. B at p. 1; see also Tr. p. 85).

speech-language therapy in a group, one 30-minute session per week of individual occupational therapy (OT), one 30-minute session per week of OT in a group, and one 30-minute session per week of individual physical therapy (PT) (Parent Ex. B at p. 10).[4] According to the November 2017 IESP, the student was "Parentally Placed in a Non-Public School" (id. at p. 12).[5]

In a notice sent to the parent, dated April 15, 2018 and titled "Parent Notice of Intent/Parentally Placed for [this student]," the district explained how the parent could access special education and related services for a student enrolled in a nonpublic school at parent expense (see Dist. Ex. 4 at p. 1). The notice also indicated that the parent must sign and return the "attached form" no later than "June 1, 2018" if the parent "wish[ed] to have [the student] receive special education services next year" (id. at pp. 1-2).[6]

In a decision dated April 16, 2018, the IHO issued a final decision on the merits of the parent's October 2017 due process complaint notice (see Parent Ex. E at pp. 1, 4). As noted in the April 2018 IHO decision, in the prior proceeding the parent testified that the SETSS provider (the same SETSS provider who attended the November 2017 CSE meeting) had been delivering SETSS to the student "at an enhanced rate since the pendency order was issued in November 2017" (Parent Ex. E at p. 3; compare Parent Ex. E at p. 3, with Parent Ex. B at p. 14). The IHO further noted that the parent also testified that, "prior to November, 2017," the student had been "without SETSS when school started in September, 2017" (Parent Ex. E at p. 3). Overall, the IHO concluded that the student was entitled, for the remainder of the 2017-18 school year, to receive the "continued provision of SETSS . . at the enhanced rate" by the SETSS provider who had been delivering services to the student since November 2017 (id.). In addition, for the period of time the student was without SETSS from the start of the school year until she began to receive pendency SETSS in November 2017, the IHO ordered compensatory educational services and directed the district to issue the parent an "authorization to obtain . . the SETSS at an enhanced rate" for that time period (id.).

In or around June 11, 2018, it appears that, consistent with the IHO's April 2018 decision, the district issued the authorization to the parent to obtain the SETSS not provided to the student from September 2017 through November 2017, as noted in the district's "SESIS" events log (see Dist. Ex. 7; see also Tr. pp. 42, 50; compare Parent Ex. D, with Dist. Ex. 7).[7] According to the evidence in the hearing record, district staff (SETSS coordinator) emailed the parent on July 30,

[4] The student's eligibility for special education programs and related services as a student with a speech or language impairment is not in dispute (see 34 CFR 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

[5] The November 2017 IESP reflected that a SETSS provider attended the CSE meeting via telephone (see Parent Ex. B at p. 14).

[6] The hearing record does not contain a signed version of this notice (see generally Tr. pp. 1-102; Parent Exs. A-E; Dist. Exs. 1-10; IHO Exs. I-II).

[7] Although not explained in the hearing record, "SESIS" typically refers to the district's Special Education Student Information System (see Application of a Student with a Disability, Appeal No. 20-036). The SESIS log entry dated June 11, 2018 reflects the same IHO case number assigned to the previous impartial hearing (compare Dist. Ex. 7, with Parent Ex. E at pp. 1-2).

2018, and informed her that the "district ha[d] identified a qualified SETSS teacher to provide the SETSS services for [the student] and [the student's sibling] for the school year 2018-19" (Dist. Ex. 9 at p. 1).[8] The email was also sent to the identified SETSS provider "so that [the parent and the SETSS provider] c[ould] both connect to arrange the schedule" (id.). The July 30, 2018 email to the parent appeared to forward another email, which district staff had sent to the SETSS provider to thank her "for confirming that [she was] available to provide SETSS to [the] student . . . and [the student's sibling] for school year 2018-19" (id. at pp. 1-2).[9] Upon receipt of the district's email, the parent forwarded the same to the principal at the student's nonpublic school in an email dated July 30, 2018, indicating that she "need[ed] to fight it out" and questioning whether she had met "these people" (id.; see Tr. p. 68). After receiving the parent's email, the nonpublic school principal sent an email to district staff, including the SETSS coordinator, dated July 30, 2018, which noted that this specific SETSS provider "was eliminated due to her exceedingly poor writing and lack of professionalism" (Dist. Ex. 9 at p. 1). According to the nonpublic school principal's email, the same information had been "communicated to [the district] twice th[at] week" and the principal demanded that the district "[s]top assigning her cases at [the nonpublic school]" (id.). The nonpublic school principal then sent an email directly to the identified SETSS provider, dated July 30, 2018, with a copy of the same email to district staff and the district SETSS coordinator, which advised the SETSS provider that she was "not a good fit for our school" (Dist. Ex. 8 a tp. 1). A district staff member responded to the principal's email, and asked for clarification regarding why the particular SETSS provider was not a "good fit so that [the district] c[ould] better assist in your search for a SETSS provider" (id.).[10]

At the impartial hearing, the district SETSS coordinator explained that, as part of the process used to arrange for the provision of SETSS services to students, the district issued a SETSS authorization form "to the home in mid-August" (see Tr. pp. 66-67; see generally Dist. Ex. 6 [noting "SETSS Authorization (8/2018)" at the bottom of the form]). The SETSS coordinator also noted that the form included his "contact information" if the parent required "assistance in locating a SETSS teacher" (Tr. p. 67; see Dist. Ex. 6 at p. 1). He further testified "subsequent to the issuance" of the SETSS authorization form, he worked with the parent "over the summer, during the month of late-July" and emailed the parent to connect her "to SETSS teachers" (Tr. pp. 67-68; see generally Dist. Exs. 6-7).

[8] The district SETSS coordinator testified at the impartial hearing, and explained that, as part of his job duties, he was "responsible" for arranging the provision of SETSS to the student in this matter (Tr. pp. 66-67).

[9] The SESIS events log documented the July 30, 2018 email to the parent (see Dist. Ex. 7). Other than the district email to the identified SETSS provider, which thanked her for confirming her availability to provide SETSS to this student, the hearing record does not include any email from that specific SETSS provider to corroborate that information (see generally Tr. pp. 1-102; Parent Exs. A-E; Dist. Exs. 1-10; IHO Exs. I-II). Instead, the only email in the hearing record composed by this SETSS provider is undated and fails to reflect who the email was sent to; within the same email, the SETSS provider indicated that she received an email from the district SETSS coordinator "regarding an eight hour mandate for a kindergart[e]n child who [was] allowed group instruction" and that her current student would be "exiting [her caseload] at the end of summer" (Dist. Ex. 8 at p. 2).

[10] The hearing record does not include any response to the district's email seeking clarification to further assist the search for a SETSS provider (see generally Tr. pp. 1-102; Parent Exs. A-E; Dist. Exs. 1-10; IHO Exs. I-II).

A. Due Process Complaint Notice

By due process complaint notice dated October 4, 2018, the parent alleged that she could not locate a "regular rate SETSS provider" for the student, indicating further that school started on "August 29, 2018" (Parent Ex. A at p. 2).[11] As a proposed solution, the parent sought permission to "use the enhanced rate SETSS provider" she located and secured for the student (id.).

B. Events Post-Dating the Due Process Complaint Notice

On October 10, 2018, the parent executed an "Authorization for Independent [SETSS] for [a] Parentally-Placed Student" (Parent Ex. C).[12] The parent completed "Section 2" of the authorization, identifying a specific SETSS provider by name and indicating that SETSS were to be provided at the "student's school" (id.).[13] The document authorized SETSS to be provided at a "maximum [of three] hours per day" and for a "maximum [of seven] hours per week" beginning no earlier than September 1, 2018 and ending no later than June 30, 2019 (id.).

On or about November 5, 2018, the parties held a resolution meeting (see Dist. Ex. 10 at p. 1).[14] The district SETSS coordinator attended on the district's behalf (id. at p. 2; see Tr. p. 67; see also Dist. Exs. 8 at p. 1; 9 at p. 1). According to a summary of the resolution meeting, the parent indicated that "she had emailed 16 regular rate SETSS teachers but had not been successful in finding one" for the student (Dist. Ex. 10 at p. 1). The parent "wanted the [district] to approve an enhanced rate SETSS teacher"—and specifically identified the same SETSS provider who delivered services to the student beginning in November 2017, and who also had attended the November 2017 CSE meeting to develop the student's November 2017 IESP (id.; compare Dist. Ex. 10 at p. 1, with Parent Ex. B at p. 14, and Parent Ex. E at p. 3).

The district SETSS coordinator indicated that, "during the summer the CSE had connected [the parent] via email to a regular rate SETSS teacher . . . who was available then to provide SETSS services to [the student]"; however, the parent indicated that that SETSS teacher had not "reached

[11] The parent's October 2018 due process complaint notice predated the student's projected annual review of November 28, 2018, as reflected in the November 2017 IESP (compare Parent Ex. A at p. 1, with Parent Ex. B at p. 1). The hearing record does not contain any evidence that a CSE convened to conduct an annual review for the student in November 2018, or at any other time during the impartial hearing, to make recommendations for the remaining portion of the 2018-19 school year from November 2018 through June 2019 (see generally Tr. pp. 1-102; Parent Exs. A-E; Dist. Exs. 1-10; IHO Exs. I-II).

[12] The parent's executed SETSS authorization form appears to be the same form sent by the district in or around August 2018 (compare Parent Ex. C, with Dist. Ex. 6).

[13] On the authorization form, the parent identified the same SETSS provider who delivered those services to the student beginning in November 2017; the SETSS provider was also the same individual who attended the November 2017 CSE meeting to develop the student's November 2017 IESP (compare Parent Ex. C, with Parent Ex. B at p. 14, and Parent Ex. E at p. 3).

[14] The parent's attorney also attended the November 2018 resolution meeting (see Dist. Ex. 10 at p. 2). Both the parent and her attorney attended the resolution meeting via telephone (id.).

out to her" (Dist. Ex. 10 at p. 1).[15] The parent did, however, acknowledge that she had spoken to "another SETSS teacher referred by [the district SETSS coordinator]," but that SETSS provider told her "she was no longer available to provide SETSS" (id.).[16] At that point, the district SETSS coordinator indicated that "there was a regular rate SETSS teacher at [the student's] school . . . who could schedule [the student's] services" (id.).[17] According to the summary, the SETSS coordinator asked the parent to give the "SETSS Authorization Form" to this particular SETSS provider, but the parent and her attorney indicated that this provider "had no space on her schedule" (id. at p. 2). The SETSS coordinator indicated that he had "met with [this particular SETSS provider just a few days earlier and she informed him that she had plenty of space on her schedule for more students at [the nonpublic school]" (id.). As noted in the summary, this SETSS provider "told [the SETSS coordinator] that the parents at the [nonpublic school] seemed reluctant to give her the SETSS Authorization Form" enabling her to provide services at the nonpublic school (id.). The parent's attorney noted, however, that the parent was "willing to consider [this particular SETSS provider]" but reserved her right to proceed with the impartial hearing for the "approval for [the] enhanced rate SETSS teacher" (id.). The SETSS coordinator also provided the parent with contact information for yet "another SETSS teacher who was available to provide SETSS services to [the student] and other students at the school" (id.).[18]

B. Impartial Hearing Officer Decision

On December 20, 2018, the parties proceeded to an impartial hearing, and on that date, presented their respective positions with regard to the student's pendency (stay-put) placement during the administrative proceedings (see Tr. pp. 1-15). At that time, the parties agreed that the following special education and related services recommended in the student's November 2017 IESP, together with an unappealed IHO decision dated April 2018, formed the basis for the student's pendency placement: seven hours per week of SETSS, one 30-minute session per week of individual speech-language therapy, two 30-minute sessions per week of speech-language therapy in a group, one 30-minute session per week of individual PT, one 30-minute session per week of individual OT, and one 30-minute session per week of OT in a group (see Tr. pp. 1, 4-7; Parent Exs. B at p. 10; E at p. 2-4). The parties agreed that the previous, unappealed April 2018

[15] The SETSS provider referred to in this exchange between the district SETSS coordinator and the parent was not the same SETSS provider offered to the parent in summer 2018 to provide SETSS to the student (compare Dist. Ex. 10 at p. 1, with Dist. Ex. 7, and Dist. Ex. 8, and Dist. Ex. 9).

[16] The SETSS provider referred to by the parent in this exchange was the same SETSS provider identified by the district in summer 2018 and who was the subject of the email exchanges between the parent, district staff, and the nonpublic school principal in July 2018 (compare Dist. Ex. 10 at p. 1, with Dist. Ex. 7, and Dist. Ex. 8, and Dist. Ex. 9).

[17] The SETSS provider referred to in this exchange between the district SETSS coordinator and the parent was not the same SETSS provider offered to the parent in summer 2018 to provide SETSS to the student (compare Dist. Ex. 10 at p. 1, with Dist. Ex. 7, and Dist. Ex. 8, and Dist. Ex. 9).

[18] The SETSS provider referred to in this exchange between the district SETSS coordinator and the parent was not the same SETSS provider offered to the parent in summer 2018 to provide SETSS to the student (compare Dist. Ex. 10 at p. 1, with Dist. Ex. 7, and Dist. Ex. 8, and Dist. Ex. 9).

IHO decision—which ordered the district to provide the student with SETSS at "an enhanced rate"—established the rate for the pendency SETSS to be ordered in the present matter (see Tr. pp. 4-6; Parent Ex. E at p. 3). The parent confirmed that she had secured the same SETSS provider to deliver services to the student who had delivered SETSS to the student in the 2017-18 school year during the prior impartial hearing (see Tr. pp. 6-7; Parent Exs. B at p. 14; E at p. 3).

As the pendency placement discussion continued, the parent's attorney asked whether the district would agree to make the student's pendency placement "retroactive to the beginning of the school year," and with regard to the rate to be paid for this particular SETSS provider, whether the district would agree to "raise the rate at least to the 'standard' enhanced rate . . . of $110 an hour" that would also be retroactive to the "beginning" of the school year "even though this complaint was not filed until October" (Tr. pp. 7-8).[19] The parent's attorney noted that "last year's order was for $90 per hour" (Tr. p. 7).

In response, the IHO indicated that the district representative would most likely require more time to investigate his requests, and further, "under pendency, the law require[d] the rate to be sufficient to obtain services" (Tr. p. 8). The IHO then asked the parent's attorney what rate the current SETSS provider was receiving (see Tr. pp. 8-9). According to the parent's attorney, the SETSS provider was being paid "$90" per hour "[p]ursuant to the [IHO's previous] order" (Tr. p. 9). The parent's attorney offered to provide the IHO with a "supplementary statement or affidavit from the provider" attesting that $90.00 per hour was her "current rate" (Tr. p. 9).

The district representative asked the parent's attorney to clarify what information would be provided in the proffered affidavit—and in particular, whether the SETSS provider would attest that she was "no longer receiving $90" per hour and instead, was "receiving $110" per hour (Tr. p. 9). At that point, the parent's attorney stated that the affidavit could reflect "that that's her billing rate," acknowledging that he did not "know if [the SETSS provider was] being paid" (Tr. p. 9). However, the parent's attorney confirmed that the present matter was not a "reimbursement case, . . . where the parent would be seeking reimbursements for any funds laid out"; rather, it was "just a case of compensation for the provider going forward" (Tr. pp. 9-10).

The IHO advised the parent's attorney that it would be "sufficient" if he provided an "affidavit from the provider, saying that that's the rate she need[ed] to continue providing the services" (Tr. p. 10).[20] The IHO further advised, however, that the student's pendency placement could not be "retroactive to the first day of school" unless the district agreed (Tr. p. 10).[21]

[19] The parent's attorney indicated that, during the resolution meeting, the district inquired whether the "provider and the parent would be agreeable with consent to the rate of $110 an hour" (Tr. p. 8). The summary of the resolution meeting does not reflect any discussion about the rate to be paid for SETSS (see generally Dist. Ex. 10).

[20] Neither the parent nor her attorney submitted an affidavit from the SETSS provider (see generally Tr. pp. 1-102; Parent Exs. A-E; Dist. Exs. 1-10; IHO Exs. I-II).

[21] The district did not agree to this request (see generally Tr. pp. 1-102; Parent Exs. A-E; Dist. Exs. 1-10; IHO Exs. I-II).

In an interim decision dated December 20, 2018, the IHO ordered the district to provide, in part, the following as the student's pendency placement: "seven hours per week of SETSS by the student's current provider at the regular rate the provider charge[d] for SETSS" (IHO Ex. I at p. 5). The IHO also ordered that the pendency placement services "shall be effective as of the date of the Impartial Hearing Request, October 10, 2018, and shall continue until this matter [was] completed or as otherwise agreed to by the parties" (id.). In addition, the IHO ordered the district to "provide the student with compensatory services or provide the parent with authorization to obtain pendency services that [were] ordered herein but not provided to the student for the period of time from October 10, 2018 until such time as the services [were] commenced" (id.).

On January 10, 2019, the parties returned to the impartial hearing, which concluded on June 18, 2019 after six total days of proceedings (see Tr. pp. 16-102; IHO Ex. II at pp. 1-7 [granting requests to extend the applicable timeframe from December 11, 2018 until July 11, 2019 due to the "Availability of Witnesses"]). In a decision dated February 8, 2020, the IHO found that the district properly arranged to provide the student with SETSS at his nonpublic school by the start of the 2018-19 school year (see IHO Decision at pp. 3-4; IHO Ex. II at pp. 8-15 [granting requests to extend the applicable timeframe from July 10, 2019 until February 28, 2020 to allow for receipt of transcripts and to "Review submissions/record for decision"]). The IHO also concluded that, based upon the evidence in the hearing record, the nonpublic school principal "prevent[ed] [the district] SETSS providers from serving students in the school in favor of 'enhanced rate' (non-[district] approved) SETSS providers" (id. at p. 4). The IHO found that the nonpublic school's actions led the parent to "obtaining SETSS at an enhanced rate from the privately obtained pendency provider," and that legal authority required the parent "to cooperate with the school district to be afforded [a] remedy" under the IDEA (id.). Consequently, the IHO ordered the district to "fund SETSS for [the student] at the approved [district] rate for SETSS for the period from the start of school in the 2018/19 school year until pendency SETSS services commenced on or about October 10, 2018" (IHO Decision at p. 4).

IV. Appeal for State-Level Review

The parent appeals, arguing that the IHO's decision was not consistent with the "uncontradicted evidence offered by the parent"—which demonstrated that the district SETSS provider "refused to render SETSS services to the student." As relief, the parent seeks funding for the SETSS provider she obtained for the student at the rate of $125.00 per hour, "as this was the rate awarded by the IHO for pendency."

In an answer, the district responds to the parent's allegations and argues to uphold the IHO's decision in its entirety. In addition, the district contends that the request for review must be dismissed for failure to comply with practice regulations.[22, 23]

V. Applicable Standards—Equitable Considerations

Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 185, 194 (2d Cir. 2012); M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 [noting that "[c]ourts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education

[22] More specifically, the district argues that the request for review fails to include a parent verification, which violates State regulation requiring that all pleadings must be verified (see 8 NYCRR 279.7[b]). Generally, the failure to comply with the practice requirements of Part 279 of the State regulations may result in the rejection of the submitted documents or the dismissal of a request for review by an SRO (8 NYCRR 279.8[a]; 279.13; see M.C. v. Mamaroneck Union Free Sch. Dist., 2018 WL 4997516, at *23 [S.D.N.Y. Sept. 28, 2018] [upholding dismissal of allegations set forth in an appeal to an SRO for "failure to identify the precise rulings presented for review and [failure] to cite to the pertinent portions of the record on appeal, as required in order to raise an issue" for review on appeal]; T.W. v. Spencerport Cent. Sch. Dist., 891 F. Supp. 2d 438, 440-41 [W.D.N.Y. 2012] [upholding dismissal of a petition for review that was untimely and exceeded page limitations]). However, "judgments rendered solely on the basis of easily corrected procedural errors or 'mere technicalities,' are generally disfavored" (J.E. v. Chappaqua Cent. Sch. Dist., 2015 WL 4934535, at *4-*6 [S.D.N.Y. Aug. 17, 2015], quoting Foman v. Davis, 371 U.S. 178 [1962]). The parent's attorney is specifically cautioned that, "while a singular failure to comply with the practice requirements of Part 279 may not warrant an SRO exercising his or her discretion to dismiss a request for review or reject a memorandum of law (8 NYCRR 279.8[a]; 279.13; see Application of a Student with a Disability, Appeal No. 16-040), an SRO may be more inclined to do so after a party's or a particular attorney's repeated failure to comply with the practice requirements" (Application of a Student with a Disability, Appeal No. 19-060; Application of a Student with a Disability, Appeal No. 19-058; Application of a Student with a Disability, Appeal No. 18-110; Application of a Student with a Disability, Appeal No. 17-079; Application of a Student with a Disability, Appeal No. 17-015; Application of a Student with a Disability, Appeal No. 16-040). Consequently, at this juncture, taking into account that neither the parent nor her attorney have engaged in a pattern of noncompliance in proceedings before this Office, the lack of compliance in the instant appeal will not result in a dismissal of the parent's appeal.

[23] On or about April 6, 2020, the parent filed a "Petitioners' Memorandum in Support of Appeal" with the Office of State Review, which had been served by mail upon the district on April 2, 2020 (Parent Mem. of Law Aff. of Service). While captioned as a memorandum, the pleading more closely resembles a reply prepared in response to the district's answer (see generally Parent Mem. of Law). The parent also submitted additional documentary evidence with the memorandum/reply for consideration on appeal (see Parent Mem. of Law Exs. G-H; J-K). State regulations require that such reply "shall be served upon the opposing party within three days after service of the answer is complete," and if the answer was "served by mail upon petitioner or petitioner's counsel, three days shall be added to the period in which . . . a reply may be served and filed pursuant to this Part" (8 NYCRR 279.6[a]; 279.11[b]). The district completed service of the answer on March 16, 2020 (see Answer Dec. of Service); therefore, the parent and her attorney were required to serve the memorandum/reply no later than March 23, 2020 (see 8 NYCRR 279.6[a]; 279.11[b]). Having served the memorandum/reply upon the district on April 2, 2020, the parent's memorandum/reply—together with the additional documentary evidence—was not timely served in accordance with State regulations and will not be considered herein. In addition, the parent's memorandum/reply fails to include a parent verification, also required by State regulation (see 8 NYCRR 279.7[b]; Parent Mem. of Law).

was unreasonable"]). The IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014] [identifying factors relevant to equitable considerations, including whether the withdrawal of the student from public school was justified, whether the parent provided adequate notice, whether the amount of the private school tuition was reasonable, possible scholarships or other financial aid from the private school, and any fraud or collusion on the part of the parent or private school]; C.L., 744 F.3d at 840 [noting that "[i]mportant to the equitable consideration is whether the parents obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA"]).[24]

VI. Discussion—SETSS Rate

The parent contends on appeal that the IHO ignored evidence in an email from the SETSS provider demonstrating that she "refused to render SETSS services to the student" (Req. for Rev. at p. 2). As a result, the parent asserts that the SETSS provider should be compensated at the rate of $125.00 per hour, as awarded in the IHO's interim order on pendency.[25]

In response, the district argues that it had four SETSS providers available to deliver services to the student at the start of the school year, but the parent's failure to cooperate in locating and securing a SETSS provider, as an equitable consideration, must result in a dismissal of the parent's appeal. Relatedly, the district asserts that the same conclusion results regardless of whether the parent challenged the SETSS provider's qualifications or whether the SETSS provider later indicated she would not provide services at the nonpublic school. The district also argues that the IHO found the district SETSS coordinator's testimony about the nonpublic school's "preference for their enhanced-rate SETSS teachers" credible, and the IHO properly considered that, as an equitable consideration, the parent's refusal to accept the SETSS providers offered did not weigh in favor of the parent's request for an enhanced rate for the SETSS provider.

Upon review of the evidence in the hearing record, there is insufficient reason provided by the parent to disturb the IHO's decision denying the parent's request to have the district compensate the SETSS provider at a rate of $125.00 per hour from the start of the 2018-19 school year until the time pendency SETSS began on or about October 10, 2018.

Initially, assuming for the sake of argument that, as the district contends, it only had to establish that the district had a SETSS provider available at the start of the school year in order to meet its obligation to deliver the IESP services under section 3602-c, the evidence in the hearing

[24] To be clear, this is not a case where the parent was required to provide the district with a 10-day notice of unilateral placement because the student was enrolled at the nonpublic school at parent expense pursuant to the dual enrollment statute. Consequently, it is not necessary to consider whether, as in a more typical tuition reimbursement scheme, the parent's compliance, or lack thereof, with the 10-day notice requirement warrants a denial or reduction of reimbursement.

[25] The IHO's December 20, 2018 pendency decision did not specify a specific rate, but awarded "seven hours per week of SETSS by the student's current provider at the regular rate the provider charges for SETSS" (IHO Ex. I at p. 5).

record does not support the district's argument. Contrary to the district's assertions, the evidence in the hearing record demonstrates that, at best, only one SETSS provider may have been available at the start of the school year, namely, the SETSS provider who was the subject of the July 2018 email exchanges in the hearing record (see generally Dist. Exs. 7-10). Based upon the email exchanges, no other SETSS provider was identified or offered prior to the start of the school year to deliver services to the student (see generally Dist. Ex. 7-9). Moreover, other than the district SETSS coordinator's testimony, the hearing record does not contain any evidence that the three additional SETSS providers identified at the November 2018 resolution meeting were available at the start of the school year (see Tr. pp. 68, 70-71, 75-77, 80-81; Dist. Exs. 7-9; see generally Dist. Ex. 10).[26] Further, the summary of the resolution session does not establish whether any of the additional three named SETSS providers were available at the start of the school year to provide services to the student (see generally Dist. Ex. 10). Far more problematic for the district's position is that the district SETSS coordinator's testimony indicated that he was aware that the SETSS provider offered in the July 2018 emails to deliver the services had declined to provide services at the student's nonpublic school (see Tr. pp. 80-82). Accordingly, the hearing record does not support finding that the district met its obligation to provide services to the student in conformity with her IESP (Educ. Law § 3602-c[2][a], [b][1]; see 20 U.S.C. § 1401[9][D]; 34 CFR 300.17[d]; see also 20 U.S.C. § 1414[d]; 34 CFR 300.320).

Nonetheless, even though the evidence in the hearing record does not support a finding that the district had a SETSS provider available at the start of the school year, that conclusion does not automatically result in awarding the requested rate of $125.00 as compensation for the SETSS provider the parent obtained to deliver services to the student. That is especially true, where, as here, the hearing record is devoid of evidence regarding the rate charged by the SETSS provider secured by the parent even though the IHO, at the impartial hearing, gave the parent and her attorney the opportunity to supplement the hearing record with an affidavit regarding the SETSS provider's rate (see Tr. pp. 7-10; see generally Tr. pp. 1-6, 11-102; Parent Exs. A-E; Dist. Exs. 1-10; IHO Exs. I-II). The hearing record is equally devoid of evidence regarding any contract between the SETSS provider and the parent that financially obligates her to pay the SETSS provider and what services the SETSS provider delivered to the student from September 2018 through October 10, 2018 (see generally Tr. pp. 1-102; Parent Exs. A-E; Dist. Exs. 1-10; IHO Exs. I-II). Notably, the rate requested for the SETSS provider changed over the course of the impartial hearing and on appeal, from $90.00 per hour, to seeking $110.00 per hour, and now on appeal, $125.00 per hour as relief (see Tr. pp. 7-10; Req. for Rev. at p. 2). Due to this lack of evidence regarding the most basic of information as to the relief that the parent is requesting, there is no basis for overturning the IHO's decision.

VII. Conclusion

In light of the foregoing evidence, and given that the district has not challenged the IHO's decision directing it to fund the SETSS provider obtained by the parent at the approved district

[26] Although, the Second Circuit has described the resolution period as the timeframe within which the district has to remedy any deficiencies in a challenged IEP without penalty (R.E., 694 F.3d at 187), this appeal involves implementation of the IESP for the portion of the 2018-19 school year that occurred prior to the filing of the due process complaint notice. Accordingly, any attempt to remedy the problem by arranging for a provider during the resolution session would be insufficient to correct the period for which the IESP was not implemented.

rate for services rendered from the start of the 2018-19 school year until October 10, 2018 when pendency SETSS services commenced, the IHO's decision will remain undisturbed and the parent's request to compensate the SETSS provider at the rate of $125.00 per hour is denied.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
April 16, 2020

STEVEN KROLAK
STATE REVIEW OFFICER