The University of the State of New York

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

No. 20-115

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

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

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Nathaniel R. Luken, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request to be reimbursed for the cost of her son's special education services at an enhanced rate for the 2018-19 school year. The district cross-appeals the IHO's determination that it failed to offer the student a free appropriate public education (FAPE) and ordered it to fund the costs of the student's special education services at the district rate for the 2018-19 school year. The appeal must be sustained in part. The cross-appeal must be sustained in part.

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 parties' familiarity with the detailed facts and procedural history of the case and the IHO's decision is presumed and will not be recited in detail here. In any event, the hearing record is sparse with respect to the student's educational history. This is most likely due to the limited scope of the parties' dispute and the largely uncontested facts in this proceeding, at least with regard to the student's need for special education services.

Briefly, the parent placed the student in a nonpublic school (NPS) for the 2018-19 school year, and the CSE convened on July 31, 2018, to create an IESP for the student (see Parent Ex. B at p. 10). The July 2018 IESP provided that the student would receive three periods of direct special education teacher support services (SETSS) instruction per week in a group in a "[s]eparate [l]ocation" (id. at p. 7). According to the parent, the district provided her with a list of SETSS providers to call to arrange for those services, but the parent was not able to find a provider (see Tr. p. 14; Parent Ex. E). The parent testified that she arranged for the student to receive SETSS through Succeed, a private agency (see Tr. pp. 12-13; see also Parent Ex. C).

The parent filed a due process complaint notice, dated May 31, 2019, asserting that the district failed to "find a provider" to deliver the SETSS mandated on the July 2018 IESP to the student (Parent Ex. A at p. 3). The parent requested that the district be required to fund the SETSS obtained by the parent for the 2018-19 school year at an "enhanced rate" (id.).

An impartial hearing was held on December 4, 2019, at which the district did not contest that it failed to deliver SETSS to the student for the 2018-19 school year (see Tr. pp. 4-5, 10-11). The impartial hearing, therefore, centered on "the amount that the [SETSS] provider [wa]s charging for the services" (Tr. p. 5). In a decision dated May 7, 2020, the IHO determined that the district failed to provide the student with a FAPE for the 2018-19 school year (see IHO Decision at pp. 10, 14-15); however, the IHO denied the parent's request for the costs of the privately-obtained SETSS at an enhanced rate (id. at p. 15).[1] In denying the parent's request for an enhanced rate, the IHO noted the lack of "evidence in the hearing record to establish that the Parent has incurred any financial obligation to pay the difference between the enhanced rate and the [district] rate" (id. at p. 14).[2] The IHO ordered the district to reimburse the parent or directly pay the cost of the SETSS delivered to the student for the 2018-19 school year "at the recognized [district] rate" (id. at p. 15).

IV. Appeal for State-Level Review

The parent appeals, asserting that the IHO erred in denying her request for the costs of the SETSS delivered to the student at an enhanced rate. Specifically, the parent asserts that the IHO

[1] The IHO's decision was not paginated. For ease of reference in this decision, citations to the IHO's decision will reflect pages numbered "1" through "18" with the cover page identified as page "1."

[2] However, the IHO also went on to find that the evidence in the hearing record did not support a finding that the district failed to make special education services available to the student on an equitable basis, noting issues with the parent's evidence that she attempted to contact district providers to deliver SETSS to the student (IHO Decision at p. 14).

erred in finding that the hearing record lacked evidence of the parent's financial obligation to the SETSS provider.

In its cross-appeal, the district asserts that the IHO erred in utilizing the FAPE standard to review the parent's claims. That is, the district indicates that, since the student was parentally placed, the district was obligated to offer the student equitable services, rather than a FAPE.[3] Further, the district asserts that the IHO erred in ordering the district to fund the parentally-obtained SETSS at the district rate, arguing that the parent did not prove a legal obligation to pay any amount for the SETSS.

V. Applicable Standards

A board of education must offer a FAPE to each student with a disability residing in the school district who requires special education services or programs (20 U.S.C. § 1412[a][1][A]; Educ. Law § 4402[2][a], [b][2]). However, the IDEA confers no individual entitlement to special education or related services upon students who are enrolled by their parents in nonpublic schools (see 34 CFR 300.137[a]). Although districts are required by the IDEA to participate in a consultation process for making special education services available to students who are enrolled privately by their parents in nonpublic schools, such students are not individually entitled under the IDEA to receive some or all of the special education and related services they would receive if enrolled in a public school (see 34 CFR 300.134, 300.137[a], [c], 300.138[b]).

However, under State law, parents of a student with a disability who have privately enrolled their child in a nonpublic school may seek to obtain educational "services" for their child by filing a request for such services in the district of location where the nonpublic school is located on or before the first day of June preceding the school year for which the request for services is made (Educ. Law § 3602-c[2]).[4] "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

[3] It is undisputed that the district did not meet its obligations to the student; however, regarding the district's contention that the IHO erred in applying the FAPE standard, the district does not convincingly explain how the "equitable services standard" under the State's dual enrollment statute would result in a different outcome when analyzing the relevant facts of this matter, especially where the dual enrollment statute has been routinely treated by the New York Court of Appeals as providing eligible students with an individual right to special education services that must be tailored to the student's particular needs by the CSE as well as the right to seek redress through the due process hearing system called for by the IDEA (see Bd. of Educ. of Bay Shore Union Free Sch. Dist. v. Thomas K., 14 N.Y.3d 289 [2010] [reviewing due process hearing determinations and noting that the pertinent question is what the educational needs of the particular student require]; Bd. of Educ. of Monroe-Woodbury Cent. Sch. Dist. v. Wieder, 72 N.Y.2d 174, 188 [1988] [noting that services under the dual enrollment statute must take into account the individual educational needs of the student in the least restrictive environment]). Accordingly, the district has pointed to a distinction without a difference in this case and I decline to further discuss this argument.

[4] 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]).

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.).[5]

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85).

VI. Discussion

This case is remarkably similar to Application of a Student with a Disability, Appeal No. 20-087, in which the undersigned noted an alarming level of dysfunction regarding the provision of special education services and the procedural safeguards that are supposed to protect students. The undersigned further noted that "[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).

At the outset of the impartial hearing, the IHO captured the essence of one aspect of the problem, which is that the district is simply not meaningfully engaged at all in either the provision of special education services or the impartial hearing process:

> It is my understanding that the Department of Education will not be calling any witnesses, not submitting any documents and evidence, not presenting a case-in-chief. The [district] has a statutory burden of persuasion and [pro]duction in these cases and must go first and show that it's provided [a FAPE][6]. . . . If the Department of Education is not in a position to do that, then it is defaulting on its statutory burden.

(Tr. p. 4).

[5] 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.).

[6] It was transcribed as "the faith" but its most likely that was an error and that the transcription should have read "a FAPE."

During the impartial hearing, the IHO also indicated that it did not appear that the parties had participated in a resolution session and emphasized the preference that cases reach settlement "in light of the dire circumstances here in New York" (Tr. pp. 5-6).[7]

The difficulty with the parties' arguments regarding the provision of the student's services is that they do not reach the foundation of the problem that manifests as a rate dispute. Here, the student was dually enrolled in the district for the purposes of receiving special education services for the 2018-19 school year (Tr. p. 17; Parent Ex. B). However, there is no evidence that the district provided the student with the SETSS recommended in his July 2018 IESP (see Tr. pp. 4-5, 7; see also Tr. pp. 10-11). First the evidence shows that the district did not refute that it failed to assign a special education teacher to provide the student with SETSS services in accordance with the student's IESP (see Tr. pp. 4-5, 7, 10-11), nor did the district refute that it pushed that responsibility off onto the parents to locate a teacher by providing the parent with a list of SETSS providers for the parent to contact and find a provider for the student (see Tr. p. 14). The problem with the district's system for providing SETSS services as it applies to this student is that creating a list of "independent" special education teachers is also a violation of State law.

The Commissioner of Education has made it abundantly clear and has "repeatedly held that a board of education lacks authority to provide instructional services through an independent contractor" (Appeal of Sweeney, 44 Ed Dept Rep 176, Decision No. 15,139; Appeal of Woodarek, 46 Ed Dept Rep 1, Decision No. 15,422) and this application of State law requiring that core instruction provided by a school district must be performed either by teachers who are employees of the district or pursuant to a contract for special education services that a district is specifically authorized by law to enter into has been upheld in the courts (see Bd. of Co-op. Educ. Servs. for Second Supervisory Dist. of Erie, Chautauqua & Cattaraugus Ctys. v. Univ. of State Educ. Dep't, 40 A.D.3d 1349, 1350 [3d Dep't 2007] [noting 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]).[8]

[7] I cannot disagree with the IHO's statements—it is immensely wasteful of scarce public resources to continue to congest the due process system dockets with litigated cases, especially when it is blatantly obvious from the outset of a case that that the district is simply not delivering the required special education services to a student. At the time of the hearing in early December 2019, the IHO was almost certainly referring to a now well-documented problem in the district in which it has been noted that "New York exceeds by 63 percent the next most active state (California) with due process complaint filings. Additionally, within New York State, the overwhelming majority of due process complaints are filed in New York City. In the 2018-2019 school year, 10,189 special education due process complaints were filed in New York State; of these, 9,694 filings, or 95 percent, were in New York City. That amount is expected to increase during the 2019-2020 school year. This unprecedented volume of special education due process complaints is overwhelming the New York City due process system" (N.Y. Reg., July 29, 2020, at p. 15).

[8] 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

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).[9] The State explained the statutory instances in which school districts were authorized to contract for the instruction of students including Education Law § 305(33) (for supplemental educational services, which section has since been repealed); Education Law § 3202(6) (students that are hospitalized or institutionalized); Education Law §3602-e (approved prekindergarten programs); Education Law §§4401(2) and 4402(2)(b) (special education services with other school districts, BOCES, State-operated and State-supported schools, approved private schools and the State University at Binghamton which are approved by the Commissioner of Education); Education Law § 4401(2)(n) (transition services for students with disabilities in programs such as vocational training programs approved by certain state agencies) (id.). Moreover, the district is required by State law to locate and assign the student's publicly-provided teachers for a dually enrolled student (Educ Law § 3602-c[2][a]).

In this case, the available evidence indicates that the district has engaged in an illegal practice by attempting to contract out for the delivery of instruction by a special education teacher and has encouraged the parents to participate in that process by creating a list of independent SETSS teachers that are not employees of the district (see Tr. p. 14). The district certainly did not deny any of the assertions the list of independent providers, and instead only questioned if the parent followed the procedures for parents who have trouble with finding someone on the list (Tr. pp. 14). There is no evidence of what representations, if any, the district has made to those teachers who appear on its list of independent SETSS teachers and the full list utilized by the parent was not included in the hearing record. Instead, the district chose not to present evidence (Tr. pp. 4, 7), but the parents offered a one-page handwritten list of individuals from the list that they contacted to no avail (Parent Ex. E).

Within this context, any notion of a public 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

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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."

[9] The questions and answers guidance draws a distinction between core instruction and instruction that represents a supplemental or additional resource, providing that a district may not contract with private entitles for the former ("Questions and Answers Related to Contracts for Instruction," Office of Special Educ. [June 2010], available at http://www.p12.nysed.gov/resources/contractsforinstruction/qa.html).

upon by either party, because the district was not authorized to contract for the provision of an independent special education teacher.[10] Furthermore, the available evidence in this case shows that the process, even if it wasn't illegal, does not appear to work anyway. As far as this case is concerned, the process only appears to thrust the parent into a quagmire of trying to figure out how much the public services for her son should cost, which is manifestly unreasonable because it is the district's responsibility to ensure that services are delivered, whether in accordance with an IESP, an IEP, or pursuant to the stay put rule, and cost is not a permissible reason to defer or avoid the obligation to implement a student's services (Educ. Law § 3602-c[2][a]; [7][a]-[b] [providing that "[b]oards of education of all school districts of the state shall furnish services to students who are residents of this state and who attend nonpublic schools located in such school districts" and that the cost for services is recoverable from the district of residence, either directly with the consent of the parent for a district of location to share information or through the Commissioner of Education and the State Comptroller]).[11]

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, they can be made to pay for a privately obtained parental placement, a process that is essentially the same as the federal process under IDEA. "Parents who are dissatisfied with their child's education can unilaterally change their child's placement during the pendency of review proceedings and can, for example, pay for private services, including private schooling. They do so, however, at their own financial risk. They can obtain retroactive reimbursement from the school district after the [IESP] dispute is resolved, if they satisfy a three-part test that has come to be known as the Burlington-Carter test" (Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 526 [2d Cir. 2020] [internal quotations and citations omitted]; see Florence Cty. Sch. Dist. Four v. Carter, 510 U.S. 7, 14 [1993] ["Parents' failure to select a program known to be approved by the State in favor of an unapproved option is not itself a bar to reimbursement."]).

Here, because the parent has not actually paid any money for which they must be reimbursed (see Tr. p. 15), this matter is in a subset of more complicated cases in which the financial injury to the parent and the appropriate remedy are less clear. The IHO in fact identified the convoluted mishmash of principles thrown around in the case in which the parent was sent to identify SETSS provider for the student's services rather than implementing the services with an employee of the district as envisioned under state law:

> I'll note this is an enhanced rate case, not a tuition reimbursement case. A study in the case law kind of indicates that it's almost the same. In fact, where the Department of Education has approved services in the past, there

[10] 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.

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

> is case law, I believe that says that the Parent[] doesn't even have to show the appropriateness of the services because they actually approved

(Tr. p. 5). This ill-defined idea of "an enhanced rate case" is unworkable to the extent that the SETSS services can be construed as a state approved option. But as further described below, the caselaw supports a reimbursement and direct payment remedies in a unilateral placement case, which forecloses any complete disavowal of the parents burden of production and persuasion related to the private, unilateral services obtained by the parent.[12, 13]

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, here, unlike the E.M. case, the parent testified that there was no written contract between the parent and Succeed (or the SETSS teacher herself) providing that the parent was responsible for the costs of the SETSS services for the 2018-19 school year (Tr. pp. 13, 15). In E.M., the court faulted the IHO and the SRO for going beyond the written contract and relying on extrinsic documentary evidence that suggested that the parent was not obligated to pay the private school, but the question in E.M. was not whether oral contracts obligating the parents will suffice to be enforceable (E.M., 758 F.3d at 456–57). Instead E.M. held that some blanks that the parties did not fill in in the written agreement would not render the entire contract void and that indicated that "the contract's essential terms—namely, the educational services to be provided and the amount of tuition—were plainly set out in the written agreement, and we cannot agree that the contract, read as a whole, is so vague or indefinite as to make it unenforceable as a matter of law" (E.M., 758 F.3d at 458).[14]

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[12] As a practical matter this kind of dispute can really can only be effective examined using a Burlington/Carter unilateral placement framework because the administrative due process system was not designed to broad 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. The attempts that I have seen thus far that do not use a Burlington/Carter analysis have tended to lead to chaos. This case is a prime example, in which the IHO ordered the district to "either reimburse the Parent and/or directly pay the cost of the student's receipt of SETSS services for the entirety of the student's 2018-2019 school year at the recognized DOE rate" (IHO Decision at p. 15), but there is no evidence at all of what that rate even is, let alone what an "enhanced" rate that the IHO was referring to during the hearing (Tr. at p 5).

[13] Unlike many Carter reimbursement cases in which the parents reject the special education plan proposed by the district, it would be harder for a district to assert that the private services unilaterally obtained by the parent are inappropriate if the services are obtained merely to implement the IESP or IEP that was designed by the CSE. But if the unilateral services are not being provided in alignment with the IESP or IEP, its possible that the district may have more viable defenses.

[14] Courts have differed with the determinations of administrative hearing officers, especially on issues involving the terms of a contract, a point with which the courts have made abundantly clear that no deference is owed such

While the parent testified that the agency, Succeed, charged $175 per hour for the services and that, if she was not successful at the impartial hearing, she would be financially responsible for the cost of the SETSS (Tr. p. 13), the IHO held, there was no evidence in the hearing record of an "enforceable agreement" or that "the Parent has incurred any financial obligation" in this matter (IHO Decision at p. 14).[15] While the parent asserts that there is no legal requirement to have a written contract, the evidence really only demonstrates how difficult it can be to prove an oral contract (even if one is permissible in this context) that shows the "contract's essential terms—namely, the educational services to be provided and the amount" in accordance with E.M. (758 F.3d at 458). Here, the IHO was in the best position to assess the credibility of the parent's testimony regarding her financial obligation, and there is insufficient basis in the hearing record to depart from that finding.[16] Obviously, a written contract with the price that the parents were responsible for, signed in advance or contemporaneously with the initiation of the unilaterally obtained services would have been much more convincing, at least under the scant case law available on this topic.

As there is inadequate proof that the parent is legally obligated to pay the costs of the SETSS services delivered through Succeed, it is not appropriate equitable relief in these circumstances to require the district directly pay the cost of the services as requested by the parent. To that extent I find that the IHO erred in ordering a direct payment remedy. With that said, contrary to the district's cross-appeal, I find that during the impartial hearing, the district for all intents and purposes conceded that it was obligated to pay the costs of the SETSS services, with only the amount in question. In particular, the district did not "object[] to the services for [the student]" and conceded that the services were "required to help him with his academics," but merely indicated that it "object[ed] to the agency, the Succeed Agency's rate of $175"and "just fe[lt] that that rate is too high" (Tr. p. 17). The district did not even go as far as to identify a dollar amount that it believed would be a reasonable cost for privately obtained instruction by a special education teacher within the geographic region of the district, much less provide actual evidence regarding other similarly situated private special education teacher costs. Instead, it is for the first time on appeal that the district urges that it should not be required to fund any amount at all for the privately obtained SETSS. Given the position taken by the district during the impartial hearing, there is insufficient basis to reverse that part of the IHO's order for the district to reimburse the parent for the costs of the SETSS delivered to the student. However, in light of the lack of evidence of the parent's financial obligation to the Succeed, I will not require direct payment remedy to Succeed. Accordingly, I will modify the IHO's order, to provide that the district shall, upon receipt

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determinations (see, e.g., E.M., 758 F.3d at 45; A.R. v. New York City Dep't of Educ., 2013 WL 5312537, at *7 [S.D.N.Y. Sept. 23, 2013]).

[15] The parent initially sought to introduce an affidavit from the SETSS teacher, in lieu of direct testimony, regarding her hourly rate; however, after the district stated that it wished to cross-examine the teacher as to those rates, the IHO returned the affidavit to the parent, presumably until the teacher was contacted for testimony for purposes of cross-examination (Tr. pp. 9-10). The parent did not attempt to reintroduce the document and rested her case without calling the teacher as a witness (Tr. p. 16).

[16] The IHO stated at one point in his decision that "I find the documentary and testamentary evidence submitted by the Parent in this case to be credible" (IHO Decision at p. 9), however he refused to find that there was contract, which appears to indicate that he did not find that particular aspect of the parent's testimony persuasive.

of proof of payment from the parent, reimburse the parent for any out-of-pocket costs that the parent pays for the unilaterally obtained SETSS services for the 2018-19 school year up to but not exceeding the requested amount of $175 per hour.

VII. Conclusion

Having found insufficient basis in the hearing record to reverse that portion of the IHO's decision ordering the district to reimburse the parent for out of pocket expenses for the privately obtained SETSS for the 2018-19 school year, the necessary inquiry is at an end.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that that part of the IHO's decision dated May 7, 2020, which ordered the district to fund the costs of SETSS services delivered to the student for the 2018-19 school year "at the recognized [district] rate" is modified to provide that the district shall, upon receipt of proof of payment, reimburse the parent such services in an amount not to exceed $175 per hour.

Dated: **Albany, New York**
September 3, 2020

JUSTYN P. BATES
STATE REVIEW OFFICER