The University of the State of New York

The State Education Department
State Review Officer
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No. 20-140

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

Howard Friedman, General Counsel, attorneys for respondent, by Thomas W. MacLeod, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request for direct payment of special education teacher support services (SETSS) at an enhanced rate for the period of February 26, 2020 to June 30, 2020. Respondent (the district) cross-appeals from the IHO's determination that it denied an appropriate educational program to the student for the 2019-20 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

A brief history of the facts and procedural history is recited herein.

As part of a prior administrative proceeding, the parent challenged the district's provision of a free appropriate public education (FAPE) to the student for the 2018-19 school year (Parent Ex. B at p. 3). As part of that proceeding, the parent had requested five hours of SETSS per week for the student at a rate of $175.00 per hour (id.). On November 14, 2018, the IHO assign to that proceeding issued a decision on consent based upon an agreement of the parties (id.). Pursuant to the agreement, the district agreed to pay for the student to receive five hours of SETSS per week at a rate of $110.00 per hour for the 2018-19 school year (id.).

The CSE convened on January 29, 2019, to formulate the student's IESP for the 2019-20 school year (see generally Parent Ex. D). The projected implementation of the January 2019 IESP was February 8, 2019 and the projected annual review was January 30, 2020 (Parent Ex. D at p. 1). The student was found eligible for special education as a student with a speech or language impairment and enrolled in a nonpublic school (NPS) for the 2019-20 school year (Parent Ex. D at pp. 1, 12). As reported by the student's SETSS provider and teacher, the student was reading at a second-grade level, and she had weaknesses in reading comprehension, vocabulary, writing, and math skills, particularly word problems (id. at pp. 2-3). Her identified management needs included, among other things, small group work, redirection, repetition, fine and gross motor activities, positive reinforcements, and use of manipulatives (id. at p. 5). The student "struggle[d] with language gaps due to her significantly reduced auditory comprehension, verbal reasoning, verbal problem solving, significantly reduced expressive vocabulary, and word retrieval difficulties" (id.). Based on the student's present levels of performance, the CSE recommended the following special education programs and services: group SETSS in Yiddish five times per week for one period in a separate location; individual speech-language therapy two times per week for 30 minutes in Yiddish; and individual occupational therapy (OT) two times per week for 30 minutes (id. at p. 10).[1] The January 2019 IESP also provided several testing accommodations for the student (id. at p. 11).

A. Events Pre-Dating the Due Process Complaint Notice

According to the IHO, on September 9, 2019, the parent filed a due process complaint notice alleging that an IESP was not created in time for the 2019-20 school year (Tr. p. 8). Following the filing of the September 2019 due process complaint notice, a pendency order was issued for the payment of SETSS services (id.). On February 24, 2020, two days prior to the hearing in that matter, the parent withdrew the September 2019 due process complaint notice (id.).[2]

[1]The term "SETSS" is not specifically identified on New York State's continuum of special education services, a problem within this district that has been discussed in numerous State level review decisions (Application of a Student with a Disability, Appeal No. 17-034; Student with a Disability, Appeal No. 16-056).

[2] Pursuant to State regulation, a party may withdraw a due process complaint notice or request for an impartial hearing prior to the commencement of the impartial hearing, and such voluntary withdrawal "shall be without prejudice unless the parties otherwise agree" (8 NYCRR 200.5[j][6][i]).

B. Due Process Complaint Notice

On the day following the withdrawal of the parents claims for the 2019-20 school year, the parent filed a second due process complaint notice dated February 25, 2020, again alleging a denial of FAPE by the district and a failure to provide the student with equitable services for the 2019-20 school year (see Parent Ex. A). At the outset, the parent requested pendency based on the services in the Statement of Agreement and Order dated November 14, 2018 (Parent Ex. A at p. 1; see Parent Ex. B at p. 3). As already discussed, the November 2018 Statement of Agreement and Order directed the district to pay $110.00 per hour for five hours per week of SETSS (Parent Ex. B at p. 3).

Next, the parent argued that the district did not schedule a CSE meeting or develop an IESP for the 2019-20 school year (Parent Ex. A at p. 2). Conversely, the parent argued that the district failed to develop an appropriate IESP for the 2019-20 school year (id.). More specifically, the parent contended that: the district did not conduct necessary evaluations; the goals were not appropriate, vague, and not measurable; and the CSE did not recommend 12-month services or individual SETSS (id. at pp. 2-3). The parent also argued that the parent disagreed with the findings of the last evaluation administered to the student and sought an individual educational evaluation (IEE) (id.).

Ultimately, the gravamen of the parent's complaint is that the parent was unable to locate a SETSS teacher from the district's list or at the district's rate and, consequently, the parent was required to locate her own SETSS teacher at a higher rate (Parent Ex. A at p. 3). As a proposed resolution, the parent wanted the district to agree to provide 12-month services to the student and to continue to pay for the student's SETSS (id.). As to the rate requested for SETSS, the due process complaint notice was silent and read only: "at the rate of $ per hour of service" (id.).

C. Impartial Hearing Officer Decision

An impartial hearing was held on July 8, 2020 (Tr. pp. 1-51). The IHO issued a decision dated July 9, 2020 (IHO Decision).[3] According to the IHO, as the parent already received relief for part of the 2019-20 school year (from September 9, 2019 through February 24, 2020), the present matter only involved a request for funding of SETSS from February 25, 2020 through June 30, 2020 (IHO Decision at p. 5). The IHO determined that the district denied the student a FAPE for the 2019-20 school year; however, the IHO held that the hearing "record fail[ed] to establish that the services secured by [p]arent were delivered by a qualified provider, were appropriate to meet [s]tudent's needs, or were delivered appropriately to meet [s]tudent's needs" (id. at pp. 4-6).

Additionally, the IHO held that the testimony of the SETSS teacher "was of very limited value" and "not entirely credible" (IHO Decision at p. 5). The IHO found that the teacher conceded that she was not certified to teach students at the student's grade level and that she did not conduct any formal testing of the student (id.). The IHO noted that the parent attempted to supplement the

[3] The IHO decision is not paginated (see generally Findings of Fact and Decision). For purposes of this decision, citations to the Findings of Fact and Decision will reflect pages "1" through "7" with the cover page as page "1."

hearing record by submitting an affidavit from the private agency, but the affiant was not available for cross-examination so the IHO did not accept the affidavit into evidence (id.).

Although the IHO recognized the district's failure to implement the student's recommended SETSS, the IHO held that the hearing record failed to "establish that the enhanced rate requested by [p]arent was warranted and reasonable" (id. at p. 6). The IHO declined to order the district to "pay an enhanced rate" for "services not established to be appropriate" (id.). As relief, the IHO ordered the district to fund five hours per week of SETSS from February 26, 2020 through the end of the 2019-20 school year, at the district's current rate with reasonable proof of service to be required prior to payment (id.).

IV. Appeal for State-Level Review

The parent appeals. As an initial matter, the parent argues that the IHO failed to issue a pendency decision. The parent contends that the student already received the requested SETSS for the 2019-20 school year up to February 24, 2020 under pendency from the prior administrative proceeding. The parent asserts that pendency in this proceeding should consist of five hours per week of SETSS at a rate of $150.00 per hour from February 26, 2020 through the end of the 2019-20 school year.

Next, the parent contends that the parent is also entitled to the relief requested on the merits. More specifically, the parent alleges that the IHO's decision not to award $150.00 per hour for SETSS must be reversed. The parent argues that the lack of evidence pertaining to the requested rate was because the IHO refused to allow the agency affidavit into evidence. The parent contends that the IHO should have scheduled another hearing date for the testimony as there was no harm to the student (the 2019-20 school year was completed), nor prejudice to the district (the district agreed to an extension of the compliance date). The parent urges that the IHO "was required to give the [p]arent the opportunity to fully and fairly present her case."

Finally, the parent argues that there was no basis for the IHO to deny the requested rate for SETSS based upon the SETSS teacher's certification to teach at a different grade level than the student's current grade.

Ultimately, the parent seeks an award for the cost of five hours per week of SETSS at the rate of $150.00 per hour for the period from February 26, 2020 through June 30, 2020.

In its answer and cross-appeal, the district generally denies the allegations in the parent's request for review. 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.[4] The district agreed that the student's pendency placement arose from the

[4] The undersigned saw this exact same argument by the district in Application of a Student with a Disability, Appeal No. 20-115 and it is equally immaterial here. 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

November 2018 Statement of Agreement and Order. However, the district asserts that pursuant to the agreement, the district agreed to pay for five hours per week of SETSS at a rate of $110.00 per hour and that the same rate should control for pendency in this proceeding (Parent Ex. B at p. 3). Finally, the district argues that there is insufficient evidence in the hearing record to support a rate other than the district's current rate, and the IHO's decision should be upheld. The parent did not submit an answer to the district's cross-appeal.

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]).[5] "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

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.

[5] 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]).

nonpublic schools located within the school district (id.).[6] Thus, under State law an eligible New York State resident student may be voluntarily enrolled by a parent in a nonpublic school, but at the same time the student is also enrolled in the public school district for the purpose of receiving special education programming under Education Law § 3602-c, services for which a public school district may be held accountable through an impartial hearing.

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

VI. Discussion

The dispute in this case is similar to a growing number of recent matters in which the undersigned has addressed the district's objections to paying the amount of remuneration that parents have sought for special education services (see Application of a Student with a Disability, Appeal No. 20-125; Application of a Student with a Disability, Appeal No. 20-115; Application of a Student with a Disability, Appeal No. 20-087). As a practical matter this kind of dispute can really only be effectively examined using a Burlington/Carter unilateral placement framework because the administrative due process system was not designed to set rate making policies for what has grown into a completely unregulated cottage industry of independent special education teachers that parents within the New York City Department of Education are increasingly reliant upon, an industry that is not authorized by the State in the first place. The attempts that I have seen thus far that do not use a Burlington/Carter analysis have tended to lead to chaos.

"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 IEP dispute is resolved, if they satisfy a three-part test that has come to be known as the Burlington-Carter test. A parent can obtain such reimbursement if: '(1) the school district's proposed placement violated the IDEA' by, for example, denying a FAPE to the student because the IEP was inadequate; (2) 'the parents' alternative private placement was appropriate'; and (3) 'equitable considerations favor reimbursement.'" (Ventura de Paulino v New York City Dept. of Educ., 959 F3d 519, 526-27 [2d Cir 2020] [citations omitted]).

[6] 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.).

Notwithstanding that the merits of this matter must be decided under a Burlington/Carter analysis, an initial review of the student's placement for the pendency of the proceedings is necessary to frame the discussion.

A. Pendency

The parent asserts that the IHO erred in failing to issue a pendency order defining the student's placement during the impartial hearing. Initially, in the due process complaint notice, the parent sought a pendency determination for the services set forth in the November 2018 Statement of Agreement and Order, which provided that the district would pay for five hours per week of SETSS at a rate of $110 per hour for the 2018-19 school year (see Parent Exs. A; B). On appeal, however, the parent argues that the student was entitled to receive SETSS under pendency at a rate of $150.00 per hour.

During the pendency of any proceedings relating to the identification, evaluation or placement of the student, the IDEA and the New York State Education Law require that a student remain in his or her then-current educational placement, unless the student's parents and the board of education otherwise agree (20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; see Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 531 [2d Cir. 2020]; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 170-71 [2d Cir. 2014]; Mackey v. Bd. of Educ. of the Arlington Cent. Sch. Dist., 386 F.3d 158, 163 [2d Cir. 2004], citing Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]; M.G. v. New York City Dep't of Educ., 982 F. Supp. 2d 240, 246-47 [S.D.N.Y. 2013]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *20 [E.D.N.Y. Oct. 30, 2008]; Bd. of Educ. of Poughkeepsie City Sch. Dist. v. O'Shea, 353 F. Supp. 2d 449, 455-56 [S.D.N.Y. 2005]). Pendency has the effect of an automatic injunction, and the party requesting it need not meet the requirements for injunctive relief such as irreparable harm, likelihood of success on the merits, and a balancing of the hardships (Zvi D., 694 F.2d at 906; see Wagner v. Bd. of Educ. of Montgomery County, 335 F.3d 297, 301 [4th Cir. 2003]; Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 [3d Cir. 1996]).

The district concedes that pendency arises from the November 2018 Statement of Agreement and Order; however, the district asserts that pendency only requires the district to fund five hours per week of SETSS at a rate of $110.00 per hour for the 2019-20 school year (see Parent Ex. B).

Additionally, the SETSS teacher testified that she had already provided the student with SETSS for the entire 2019-20 school year (Tr. pp. 40-41). However, it was unclear from the hearing record how that services was being paid for. For example, the parent testified that the student was recommended for SETSS and that after attempting to contact SETSS teachers off the district list, the parent contacted the student's school and was referred to the agency that eventually provided the student's SETSS (Tr. pp. 29-31). However, the student received SETSS during the 2018-19 school year pursuant to the November 2018 Statement of Agreement and Order (see Parent Ex. B), but the hearing record does not identify whether the student's SETSS teacher was the same agency or individual for the 2019-20 school year and the 2018-19 school year (Tr. pp. 1-

50; Parent Exs. A-B; D-G). Further, at the outset of the hearing in this matter, the IHO and parent advocate held a discussion indicating that the student received SETSS in the beginning of the 2019-20 school year through pendency (Tr. pp. 13-16). However, it was not clear what services were provided or paid for through pendency and whether the parent was merely seeking the difference between the rate for services paid under pendency and the requested $150.00 per hour. For instance, the parent advocate initially indicated that pendency had not been paid in full and that "there is an outstanding balance, and that's why we are here today. The Parent is seeking to have whatever outstanding balance covered that is not covered under the pendency to be covered" (Tr. p. 13). During questioning by the IHO, the IHO told the parent advocate that the request for SETSS for the entire 2019-20 school year was duplicative of the pendency relief ordered in the prior proceeding and the parent advocate then agreed that the parent was only "looking for enhanced rate SETSS from February 25th til the end of the year" (Tr. p. 16).

Some of the confusion regarding the provision of SETSS could have been resolved by testimony from the agency that provided the service and the taking of such testimony was discussed during the hearing.

More specifically, on appeal, the parent claims she was denied the opportunity to present her case regarding the SETSS rate.[7] At the beginning of the hearing, the parent sought to introduce as Parent Exhibit "C"—an affidavit dated June 30, 2020 from the agency that provided SETSS to the student (Tr. pp. 11, 18). The IHO inquired if the district representative objected to the affidavit being admitted into evidence, and there being no objection, the affidavit was admitted (Tr. p. 11). Thereafter, there was a discussion that Parent Exhibit "C" required revisions (Tr. p. 20). According to the discussions, as presented, the affidavit was for the entire 2019-20 school year—40 weeks at 5 hours per week for a total of $30,000.00 (id.).[8] Since the parent already received some relief through an earlier pendency order (September 2019), the IHO directed the parent advocate to contact the agency and have the affidavit revised to reflect the onl the amount of services that were not covered under pendency (Tr. pp. 23-24). Additionally, the district representative sought to cross-examine the affiant (Tr. pp. 21, 25). However, the witness was not available and consequently, the IHO removed Parent Exhibit "C" from evidence (Tr. p. 47). The parent advocate requested the opportunity to resubmit the affidavit and return another day to allow for cross-examination of the witness (Tr. p. 48). In response, the IHO responded in the negative stating: "This case was filed in September. It was withdrawn two days before the previous hearing, and then it was refiled a day beforehand and all kinds of games were played, and it was rescheduled for today, and I contacted your office three times yesterday to make sure the witnesses were lined

[7] Federal and State regulations set forth the procedures for conducting an impartial hearing and address the minimum due process requirements that shall be afforded to both parties (34 CFR 300.512; 8 NYCRR 200.5[j]). Among other rights, each party "shall have an opportunity to present evidence, compel the attendance of witnesses, and to confront and question all witnesses" (8 NYCRR 200.5[j][3][xii]; see 34 CFR 300.512[a][2]). Furthermore, State regulation provides that each party "shall have up to one day to present its case unless the impartial hearing officer determines that additional time is necessary for a full, fair disclosure of the facts required to arrive at a decision" (8 NYCRR 200.5[j][3][xiii]).

[8] Based upon this computation for the 2019-20 school year, it can be assumed that the hourly rate identified in the affidavit was $150.00 per hour.

up for today. So absolutely the answer is no. You had due notice. You had absolutely fair opportunity to present everything you wanted to present today." (id.).

Initially, while the information in the affidavit presented by the parent appears to have been relevant to determining how the student received SETSS, the IHO's decision not to accept it into evidence was within her discretion. Unless specifically prohibited by regulations, IHOs are provided with broad discretion, subject to administrative and judicial review procedures, with how they conduct an impartial hearing in order that they may "accord each party a meaningful opportunity" to exercise their rights during the impartial hearing (Letter to Anonymous, 23 IDELR 1073 [OSEP 1995]; see Impartial Due Process Hearing, 71 Fed. Reg. 46704 [Aug. 14, 2006] [indicating that IHOs should be granted discretion to conduct hearings in accordance with standard legal practice]). In this instance, the parent knew the matter was set for a hearing and should have known that she needed to present the witness for cross-examination in order to have the affidavit accepted into evidence as State regulations permit an IHO to "take direct testimony by affidavit in lieu of in-hearing testimony, provided that the witness giving such testimony shall be made available for cross-examination" (8 NYCRR 200.5[j][3][xii][f]). Additionally, the information that would have been presented by the witness from the agency that provided SETSS—such as the rate the agency charged for SETSS, who was paying for the service and how much, how long the student had been receiving services from the agency—could have been presented by the parent.

Accordingly, without any information in the hearing record to the contrary it must be assumed that the student received SETSS paid for by the district at a rate of $110 per hour as part of pendency in the prior proceeding based on the November 2018 Statement of Order and Agreement, up to February 24, 2020 when the prior due process complaint notice was withdrawn (see Tr. pp. 8-23; Parent Ex. B). Since pendency was invoked at the time of the filing of the due process complaint notice in this matter on February 25, 2020, pendency again derived from the November 2018 Statement of Order and Agreement, which obligated the district to fund five hours per week of SETSS at a rate of $110.00 per hour (see Parent Ex. B).[9]

[9] Because pendency operates as an automatic injunction that arises as a result of the filing of a due process complaint notice, it is not necessary for a party to assert or "invoke" the right to pendency in the due process complaint notice under the pendency provision (20 U.S.C. § 1415[j]). In other words, pendency dispute cannot occur until after a due process complaint has been filed and, consequently, the student's right to the stay put placement is not waived because a party fails to address it the due process complaint notice. Instead it is the district's responsibility upon filing to implement the "then current educational placement" in accordance with 20 U.S.C. § 1415(j), and the parties should thereafter notify the IHO if there is a dispute over which services constitute that educational placement so that the IHO can ensure that arrangements are made for the submission of any necessary evidence on the issue and the matter is decided. On the other hand, if there is no dispute, no order is required, and the district is obligated to implement the stay put placement without the need for input from the IHO (see Letter to Goldstein, 60 IDELR 200 [OSEP 2012] [indicating that a district may not wait for a formal order from a hearing officer before implementing a student's stay-put placement where the stay put placement is uncontested]; Application of a Student with a Disability, Appeal No. 18-058).

B. Rate

As the parent is entitled to have the student's SETSS paid for at a rate of $110.00 per hour under pendency as discussed above, the remaining dispute in this matter concerns the parent's request that the student's SETSS be paid for at a rate of $150.00 rather than the $110.00 per hour.

Initially, assessing this matter under a under a Burlington/Carter analysis, there is no dispute that the district failed to offer the student a FAPE.

Here, the student was dually enrolled in the district for the purposes of receiving special education services for the 2019-20 school year (Parent Ex. D). However, the district did not present any evidence during the hearing and accordingly there is no evidence that the district provided, or even attempted to provide, the student with the SETSS recommended in his January 2019 IESP. At the outset of the hearing the district representative stated the district would not present any evidence or witnesses, explaining that the district's "understanding is that there's not a disagreement about services. The question is on the enhanced rate" (Tr. pp. 12-13). The parent testified that she attempted to locate a district teacher for SETSS by finding numbers online and making some phone calls (Tr. pp. 29-30). None of the teachers the parent called were available to deliver SETSS and the parent then arranged for services with an agency recommended by the student's nonpublic school (Tr. pp. 30-31).

As noted in prior decisions, the problem with the district's system for providing SETSS services is that requiring the parent to seek out and arrange for the student's instruction by a special education teacher based on information the parent acquired online is also a violation of State law (see Application of a Student with a Disability, Appeal No. 20-115; Application of a Student with a Disability, Appeal No. 20-087).

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]).[10]

[10] 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

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).[11] 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]).

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 upon by either party, because the district was not authorized to contract for the provision of an independent special education teacher.[12] 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

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authority to contract with an independent contractor to provide core instructional services through employees of that independent contractor" (Appeal of McKenna, et al., 42 Ed Dept Rep 54, Decision No. 14,774), such as social work services (Appeal of Barker and Pitcher, 45 Ed Dept Rep 430, Decision No. 15,375), psychological services (Appeal of Friedman, 19 Ed Dept Rep 522, Decision No. 10,236), or to hire substitute teachers (Appeal of Woodarek, 46 Ed Dept Rep 1, Decision No. 15,422; pet. to review disms'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."

[11] 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).

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

the 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]).[13]

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."]).

The IHO raised one issue with the appropriateness of the SETSS obtained by the parent. In particular, the IHO addressed the credibility of the SETSS teacher as there was a question regarding her certification to teach sixth grade, and therefore, her ability to deliver appropriate services to the student (IHO Decision at p. 5). Generally, teachers at a unilateral placement need not be State-certified (Carter, 510 U.S. 7, 14 [noting that unilateral placements need not meet state standards such as state certification for teachers]); however, there must be objective evidence of special education instruction or supports that are specially designed by the student's providers at the private school who have reasonable qualifications that are specifically related to the student's deficits. In this instance, the district recommended the student for SETSS (Parent Ex. D), and the student received SETSS from the teacher (Tr. p. 40). Additionally, the teacher who delivered the student's SETSS worked with the student for the entire 2019-20 school year and the district did not raise the issue of certification when it previously paid for pendency (Tr. p. 41). Further, the district in its answer and cross-appeal, did not seek to disqualify this SETSS teacher from delivering services to the student when it agreed to pay for SETSS pursuant to its pendency obligations. Finally, the SETSS teacher was certified in special education for birth to grade 2 (Tr. p. 37; Parent Ex. F at p. 1). She recently completed her Master's degree in special education (Tr. pp. 36, 38). She testified that she took the New York State examination for the special education certification extension for grades 1-6 (Tr. pp. 36-37). The SETSS teacher was under the belief that she was certified in special education grades 1-6; however, the evidence in the hearing record did not reflect that she was currently certified in special education grades 1-6 and she could not

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

explain why the evidence did not show her certification in special education grades 1-6 (Tr. pp. 37-39; Parent Ex. F at p. 1). Under these circumstances, the hearing record supports finding that although the SETSS teacher was not certified for the particular grade the student was in, she was a certified special education teacher and was qualified, if not certified, to provide SETSS.

Turning to the specific rate being requested by the parent for the provision of SETSS, the IHO found that the hearing record failed to establish that the rate of $150.00 was reasonable or appropriate in this matter (IHO Decision at p. 6). There is some conflicting information in the hearing record as to the rate requested by the parent. Going back to the 2018-19 school year, the parent had requested a rate of $175.00 per hour for SETSS (Parent Ex. B at p. 3). The agreement involving that school year, which formed the basis for pendency in this matter, set the rate for SETSS at $110.00 per hour (id.). In the due process complaint notice in this matter, the parent did not identify a specific rate for SETSS—specifying only "an enhanced rate of $ per hour of service" (Parent Ex. A at p. 3). The only instance in the hearing record where a specific rate was discussed was during the discussion of the affidavit produced by the agency that delivered SETSS, which, as discussed above, was not admitted into evidence (Tr. p. 20). Although the parent repeatedly references a rate of $150.00 per hour in the request for review, the parent does not point to any evidence in the hearing record to support that the agency charged the parent this rate for SETSS (Req. for Rev. ¶¶ 5, 10).

Additionally, although not raised by the parties or IHO the parent failed to present any evidence of an obligation to pay for the SETSS provided to the student (Tr. pp. 27-34; Parent Exs. A-B, D-G). [B]ecause the parent has not actually paid any money for which she must be reimbursed, this matter is in a subset of more complicated cases in which the financial injury to the parent and the appropriate remedy are less clear.

The Second Circuit Court of Appeals has held that a direct payment remedy is an appropriate form of relief in some circumstances, and that "[i]ndeed, where the equities call for it, direct payment fits comfortably within the Burlington–Carter framework" (E.M. v. New York City Dep't of Educ., 758 F.3d 442, 453 [2d Cir. 2014]; see also Mr. and Mrs. A. v. New York City Dep't of Educ., 769 F. Supp. 2d 403, 430 [S.D.N.Y. 2011] [finding it appropriate to order a school district to make retroactive tuition payment directly to a private school where equitable considerations favor an award of the costs of private school tuition but the parents, although legally obligated to make tuition payments, have not done so due to a lack of financial resources]). However, here, unlike the E.M. case, there is no proof of any agreement, either written or oral, between the parent and the agency that delivered SETSS providing that the parent was responsible for the costs of the SETSS services for the 2019-20 school year.

Under the circumstances of this matter, the parent's request for an explicit determination that the services should be funded at the rate of $150.00 must be denied.

VII. Conclusion

Having identified the student's placement under pendency and determined that the evidence in the hearing record does not include sufficient information to support a finding that the parent is

entitled to have the district fund SETSS at the requested rate of $150.00 per hour, the necessary inquiry is at an end.

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

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the July 9, 2020 IHO decision shall be modified by reversing that portion that directed the district to fund five hours of SETSS per week at the district's current rate, and the district shall instead fund five hours of SETSS per week at the rate established under pendency of $110.00 per hour.

Dated: **Albany, New York**
September 23, 2020

JUSTYN P. BATES
STATE REVIEW OFFICER