The University of the State of New York

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

No. 20-141

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

Appearances:
Law Offices of Bonnie Spiro Schinagle, attorneys for petitioner, by Bonnie Spiro Schinagle, Esq.

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Thomas W. MacLeod, 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 be reimbursed for the cost of her daughter'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 order that it fund the costs of the student's special education services at the district rate for the 2018-19 school year. The appeal must be dismissed. The cross-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 § 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

According to the evidence in the hearing record, the student was parentally placed in a nonpublic school (NPS) and received special education services funded by the district for the 2016-17 and 2017-18 school years (see Parent Exs. B at p. 4; C at p. 1; see also Parent Ex. A at p. 2). The student was the subject of a prior impartial hearing relating to the 2017-18 school year, after which an IHO rendered a decision, dated February 21, 2019, that granted the parent's request for public funding at an enhanced rate for special education teacher support services (SETSS) instruction from July 6, 2017 through June 30, 2018 as no district teacher was available at the district rate and the enhanced rate requested by the parent was warranted in order for the student "to receive a FAPE" and "was supported by the documentary evidence" (Parent Ex. B at pp. 3-4).[1] The IHO in that matter ordered the district to retroactively fund the SETSS services at the "enhanced rate" of $100 per hour for 10 hours of SETSS instruction per week (id. at p. 4).[2]

According to the parent, "[u]pon information and belief," no CSE convened to develop an individualized education program (IEP) or an IESP for the student for the 2018-19 school year (Parent Ex. A at p. 3). The district provided the parent with a form dated September 1, 2018, which indicated that the student had been recommended to receive 10 hours per week of SETSS and that the parent could locate a provider to deliver such services from a "list of eligible providers" which was purportedly available at a website listed on the document (Parent Ex. D at p. 1).[3] The form indicated that, if the parent "need[ed] assistance locating a provider," she should contact the district person whose contact information was included on the form (id.).

The evidence in the hearing record indicates that, as of early September 2018, the teacher chosen by the parent began delivering SETSS to the student (see Parent Exs. F; H at p. 1).

A. Due Process Complaint Notice

In a May 24, 2019 due process complaint notice, the parent alleged that the district failed to provide the student with a FAPE for the 2018-19 school year (Parent Ex. A). Specifically, the parent asserted that the district failed to send a SETSS teacher to deliver the student's services and the parent was unable to locate an available district-approved SETSS teacher who would accept the district's standard rate to deliver services by the beginning of the 2018-19 school year (id. at pp. 2-3). Therefore, the parent indicated that she continued to utilize the services of the student's then-current SETSS teacher who charged an "enhanced rate" of $120 per hour (id. at pp. 2-3).

The parent requested that an IHO find that the district failed to provide the student with a FAPE for the 2018-19 school year and order the district to fund the SETSS delivered by the teacher

[1] The copy of the February 2019 IHO decision that was before the IHO and included in the hearing record on appeal appears to be missing a page or pages (see Parent Ex. B).

[2] The IHO in that matter also ordered that if the district had not implemented the related services found in the June 29, 2017 IESP, the district was to authorize and provide the related services through related services authorizations (RSAs) (Parent Ex. B at p. 4).

[3] The form indicated that the services obtained via the authorization could begin September 1, 2018 but could not continue beyond June 30, 2018 (see Parent Ex. D). It is assumed that the latter date was a typographical error.

chosen by the parent at the enhanced rate of $120 per hour for 10 hours per week during the 10-month school year, and that those services should be awarded under pendency (Parent Ex. A at p. 3).

B. Impartial Hearing Officer Decision

An impartial hearing was held on April 22, 2020 (Tr. pp. 1-54). During the hearing, the district agreed that 10 periods of SETSS instruction per week was appropriate for the student but objected to the enhanced rate of $120 per hour (Tr. pp. 11-12, 49). The district did not call any witnesses, nor did it introduce any documents into evidence (Tr. pp. 7-8, 14-15).

In a decision dated July 18, 2020, the IHO found that the district failed to meet its burden of proof, and therefore denied the student a FAPE for the 2018-19 school year (see IHO Decision at pp. 6-11, 19).[4] However, the IHO ultimately denied the parent's request for public funding of the services delivered by the SETSS teacher or agency at the requested rate of $120 per hour for the 2018-19 school year (id. at p. 19). In doing so, the IHO found, among other things, that the record did not evidence the parent's cooperation with the district when, after receiving a list of approved SETSS teachers and not finding one who was either available or willing to accept the district's rate, the parent failed to contact the district for assistance as directed on the authorization form (id. at pp. 15, 18). In denying the parent's request for an enhanced rate, the IHO also noted the lack of evidence in the hearing record to establish that the parent "has actually incurred any financial obligation to pay the difference between the enhanced rate and the [district] rate" (id. at pp. 17-18). The IHO ordered the district to fund the SETSS instruction "at a rate not to exceed the established [district] rate for such services" (id. at p. 19).

IV. Appeal for State-Level Review

The parent appeals, asserting that the IHO erred in limiting the rate at which the district is responsible for funding the SETSS instruction that the student received during the 2018-19 school year. Specifically, the parent asserts that the IHO erred "by giving legal weight" to language in the SETSS authorization form asking the parent to contact the district if she was unable to locate a teacher from the district's list to deliver the student's SETSS. Further, the parent asserts that the IHO cited no legal authority for his conclusion that the parent was not entitled to her requested relief absent a showing of a contractual obligation to pay the SETSS teacher or the agency. The parent also asserts that the IHO deprived her of due process by rendering a determination in an untimely manner. As relief, the parent requested that the district be required to fund the SETSS services received by the student at the "enhanced rate of $120 an hour" or, in the alternative, "at the pendent rate of $100 an hour."

In its answer, the district generally responds to the parent's allegations with admissions and denials and argues that the IHO properly denied the parent's request for enhanced rate funding for the SETSS instruction. In a 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 in a nonpublic school, the district was obligated to offer the student equitable

[4] The IHO's decision is not paginated. For ease of reference in this decision, citations to the IHO's decision will reflect pages numbered "1" through "21" with the cover page identified as page "1."

services, rather than a FAPE.[5] The district, while acknowledging that the student was entitled to receive 10 hours per week of SETSS for the 2018-19 school year, argues that the issue of whether the IHO erred in failing to issue a pendency order (which could have entitled the parent to a higher hourly SETSS rate) need not be addressed, as the parent waived the issue of pendency because she did not make a clear argument in the request for review.[6] The parent responded to the district's arguments in an answer to the 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];

[5] 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.

[6] The district notes that, although the parent requested, in the alternative, the relief of the SETSS at the rate of $100 pursuant to pendency, she did not include further elaboration in her request for review as to the basis for this alternative relief. In the parent's memorandum of law, she indicated that the IHO failed to make specific findings regarding pendency; however, it has long been held that a party is required to set forth the issues for review in a pleading and that a memorandum of law is not a substitute for a pleading (see 8 NYCRR 279.4, 279.6; see, e.g., Application of a Student with a Disability, Appeal No. 19-060). In any event, the parent indicated in her due process complaint notice that the district should fund the student's SETSS at the rate of $120.00 per hour pursuant to pendency (see Parent Ex. A at pp. 3-4) but, on appeal, seems to adopt the view that the rate for pendency services is $100, consistent with the February 2019 IHO decision (see Req. for Rev. at p. 2; Parent Ex. C). To that extent, the parties may generally be in agreement that the student is entitled to "SETSS at an hourly rate of $100.00 per hour as of May 24, 2019, when the Parent filed her [due process complaint notice]" (Answer & Cross-Appeal ¶ 12; see Parent Mem. of Law at p. 11), and, therefore, the district should implement the pendency without the need for input or an order from an IHO or an SRO (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]; see, e.g., Application of a Student with a Disability, Appeal No. 18-058). However, the parent would not be entitled to the costs of the services prior to the date of her due process complaint notice pursuant to pendency (see 20 U.S.C. § 1415[j]; M.R. v. Ridley Sch. Dist., 744 F.3d 112, 124 [3d Cir. 2014] [holding that a student's entitlement to a stay-put placement comes into existence when "proceedings conducted pursuant to the IDEA begin"]; A.D. v. Hawaii Dep't of Educ., 727 F.3d 911, 915 [9th Cir. 2013] ["a stay-put placement is effective from the date a student requests an administrative due process hearing"]; Weaver v. Millbrook Cent. Sch. Dist., 812 F. Supp. 2d 514, 526-27 [S.D.N.Y. 2011] [finding that the "plain language of the statute . . . suggests that the provision only applies 'during the pendency of any proceedings,' and not . . . before such a proceeding has begun"]; J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F. Supp. 2d 606, 643 [S.D.N.Y. 2011] [finding that a student's pendency entitlement was "triggered . . . when [the parents] filed the due process demand notice"]; Child's Status During Proceedings, 47 Fed. Reg. 46710 ["a child's right to remain in the current educational placement attaches when a due process complaint is filed"]).

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]).[7] "Boards of education of all school districts of the state shall furnish services to students who are residents of this state and who attend nonpublic schools located in such school districts, upon the written request of the parent" (Educ. Law § 3602-c[2][a]). In such circumstances, the district of location's CSE must review the request for services and "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an [IEP]" (Educ. Law § 3602-c[2][b][1]). The CSE must "assure that special education programs and services are made available to students with disabilities attending nonpublic schools located within the school district on an equitable basis, as compared to special education programs and services provided to other students with disabilities attending public or nonpublic schools located within the school district" (id.).[8]

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 184-85 [2d Cir. 2012]; T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 252 [2d Cir. 2009]). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d

[7] 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]).

[8] 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.).

186, 192 [2d Cir. 2005]). Generally, a remedy for a deficiency in equitable services under State law should be similar to a remedy for deficient services under the IDEA.

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

VI. Discussion

A. Timeliness of the IHO's Decision

The parent argues that the IHO deprived the parent of due process by failing to comply with State regulations relating to deadlines. An IHO is required to render a decision not later than 45 days after the expiration of the resolution period (34 CFR 300.510[b], [c]; 300.515[a]; 8 NYCRR 200.5[j][5]), unless an extension has been granted at the request of either party (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5][i]). Extensions may be granted consistent within regulatory constraints, the IHO must ensure that the hearing record includes documentation setting forth the reason for each extension, and each extension "shall be for no more than 30 days" (8 NYCRR 200.5[j][5][i]).[9] Absent a compelling reason or a specific showing of substantial hardship, "a request for an extension shall not be granted because of school vacations, a lack of availability resulting from the parties' and/or representatives' scheduling conflicts, avoidable witness scheduling conflicts or other similar reasons" (8 NYCRR 200.5[j][5][iii]). Moreover, an IHO "shall not rely on the agreement of the parties as a basis for granting an extension" (id.). If an IHO has granted an extension to the regulatory timelines, State regulation requires that the IHO issue a decision within 14 days of the date the IHO closes the hearing record (8 NYCRR 200.5[j][5]). Pursuant to State regulation, an IHO shall determine when the record is closed and notify the parties of the date the record is closed (8 NYCRR 200.5[j][5][v]).

Here, after the impartial hearing concluded on April 22, 2020, the hearing record reflects that the IHO granted three extensions to the timelines at the request of both parties.[10] According to the IHO's orders of extension, the extensions requested on May 3, 2020 and June 2, 2020 were for "[a]vailability of [w]itness(es)" and the extension requested on July 2, 2020 was for "[p]ost [h]earing [b]riefs." However, at the April 22, 2020 impartial hearing, both parties had rested, no further witnesses were anticipated, and the parties opted to present closing statements during the impartial hearing rather than post-hearing briefs (Tr. pp. 14-15, 45-47). Accordingly, the reasons stated for the extensions appear to be unrelated to the actual circumstances of this matter. Further, the IHO did not indicate on the orders whether he considered the cumulative impact of the factors set forth in State regulation (i.e., effect on student's "educational interest or well-being," the parties' opportunity to present their cases, "any adverse financial or other detrimental consequences" to a party, and any delay in the proceeding thus far) (8 NCYRR 200.5[j][5][ii]).

[9] However, State regulation does allow for extensions beyond 30 days but for no more than 60 days during the time that schools are closed pursuant to an Executive order issued by the Governor pursuant to a State of emergency for the COVID-19 crisis (8 NYCRR 200.5[j][5][i]).

[10] Leading up to the impartial hearing, the IHO granted nine extensions all based on the availability of witnesses.

Notwithstanding the problems with the extensions granted by the IHO, the parent does not offer a persuasive argument in this instance as to how any failure of the IHO to comply with the timelines would, on its own, warrant overturning the IHO's findings. Courts have found that as long as the student's substantive right to a FAPE is not compromised because of the late decision, an untimely administrative decision, by itself, does not deny the student a FAPE (Jusino v. New York City Dep't of Educ., 2016 WL 9649880, at *6 [E.D.N.Y. Aug. 8, 2016] ["Case law's emphasis on substantial vindication of substantive rights and ensuring a fair opportunity to participate is equally present in resolving disputes arising out of the decision deadline date. With respect to the 45-day deadline, 'relief is warranted only if. . . [a] forty-five-day rule violation affected [the student's] right to a free appropriate public education'"] [alterations in the original], quoting J.D. v. Pawlet Sch. Dist., 224 F.3d 60, 69 [2d Cir. 2000]; see A.M. v. N.Y.C. Dep't of Educ., 840 F. Supp. 2d 660, 689 n.15 [E.D.N.Y. 2012] [same], aff'd, 513 Fed. App'x 95 [2d Cir. Mar. 12, 2013]). According to the courts, the substance of an administrative decision is not flawed just because it is issued late (J.C. v. New York City Dep't of Educ., 2015 WL 1499389, at *14 n.12 [S.D.N.Y. Mar. 31, 2015], [noting that "[t]he untimeliness of the SRO's decision does not suggest a flaw in its logic and reasoning"], aff'd, 643 Fed. App'x 31 [2d Cir. Mar. 16, 2016]; M.L. v. New York City Dept. of Educ., 2014 WL 1301957, at *13 [S.D.N.Y. Mar. 31, 2014] ["Although the Court agrees with Plaintiffs that the State Review Office's routine delays in issuing decisions is problematic, it has found no authority in IDEA cases that allows it to declare the SRO's decision a nullity"]).

Here, the parent concedes in her memorandum of law that "[a]djournments were consented to" but takes issue with the "scant and poor analysis" in the IHO's decision after such a delay (Parent Mem. of Law at p. 12). Having stated no other basis for a finding that the parent or student was harmed by the delay other than the parent's disagreement with the outcome of the decision, the parent's remedy is the present appeal. While the timing of the IHO's decision in this instance did not result in a denial of a FAPE, the IHO is nevertheless reminded that a student may be prejudiced by delays in decision issuance and that he must comply with the applicable State regulations for granting extensions and rendering a decision in a timely manner.

B. Implementation of SETSS

While the district's underlying violations in this matter are not directly in dispute, it is necessary to address them briefly to provide context for the parent's requested relief. This case is analogous to several recent appeals, in which the SROs have noted an alarming level of dysfunction regarding the provision of SETSS to dually-enrolled students and the procedural safeguards that are supposed to protect students (see e.g., Application of a Student with a Disability, Appeal No. 20-140; Application of a Student with a Disability, Appeal No. 20-115; Application of a Student with a Disability, Appeal No. 20-099; Application of a Student with a Disability, Appeal No. 20-094; Application of a Student with a Disability, Appeal No. 20-087). Notably, one SRO stated "[t]hat dysfunction has twisted itself into a murky dispute that the parents should not even be involved in, but for their efforts to locate services that the district was responsible to plan and provide for" (Application of a Student with a Disability, Appeal No. 20-087).

Here, there is no dispute that the student was dually enrolled in the district for the purpose of receiving special education services for the 2018-19 school year and that she required 10 hours

per week of SETSS (see Tr. p. 11; Parent Exs. A; D).[11] However, in terms of delivering the SETSS to the student, the district offered no position during the impartial hearing regarding its obligation to secure a teacher to implement SETSS (see Tr. pp. 11-13). Instead, the district appears to rely on a process that involves providing parents with a list of SETSS teachers who, if available, may accept the district's published rate of payment for those services, and expecting the parents to seek out and secure the services from the teachers on the list (see Parent Ex. D at p. 1). Pursuant to this process, the district provided the parent with a SETSS authorization form which contained a web address from which the parent could purportedly locate a district-approved SETSS teacher (Tr. p. 12; Parent Ex. D). The problem with the district's system of providing a list of "independent" special education teachers for providing SETSS, as it applies to this student, is that it 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]).[12]

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,"

[11] In her due process complaint notice, the parent alleged that the district failed to create an IESP for the 2018-19 school year (Parent Ex. A at p. 2). No IESP was entered into evidence; however, as described above, the district provided an authorization form to the parent, dated September 1, 2018, which indicated that the student had been recommended to receive 10 hours per week of SETSS (Parent Ex. D at p. 1). At no time during the impartial hearing did the district deny its obligation to provide the student with SETSS.

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

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).[13] 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§ 440 l (2)(n) (transition services for students with disabilities in programs such as vocational training programs approved by certain state agencies) ("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). 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.[14] Furthermore, the available evidence in this matter shows that even if it was appropriate for the district to utilize this process, it did not result in the student receiving services. This appears to be another case where the district's initial failure to provide SETSS has compelled a parent to engage in self-help and undertake the untenable task of determining how much services mandated by the IESP should cost. This de facto delegation from the district to the parent of the obligation to find a SETSS provider to implement the IESP at an acceptable rate is manifestly unreasonable because it is the district's 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

[13] 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).

[14] 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.

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]).[15]

In the present matter, given the inherent problems with the district's method of relying on parents to obtain the services of independent providers to implement mandated SETSS, the IHO erred in relying on the lack of evidence of the parent's efforts to contact the district to seek help locating a provider to deny the parent's requested relief (see IHO Decision at p. 15).

C. Relief

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] [emphasis added] [internal quotations and citations omitted]; see Carter, 510 U.S. at 14 ["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."]). Accordingly, the parent's request for 10 hours per week of SETSS must be assessed under this framework, namely whether the 10 hours of SETSS obtained by the parent was an appropriate unilateral placement of the student such that the cost of the SETSS is reimbursable to the parent upon proof that the parent has paid for the services or, alternatively, should be directly paid by the district to the provider upon proof that the parent is legally obligated to pay but does not have adequate funds to do so.[16]

Here, there is no dispute about the appropriateness of the 10 hours per week of SETSS delivered to the student during the 2019-20 school year. However, there is no basis in the hearing record to reverse the IHO's determination that the evidence was insufficient to establish that the parent "ha[d] actually incurred any financial obligation" to the private teacher or agency (IHO Decision at pp. 17-18). The SETSS teacher testified that a contract did not exist between herself and the parent (Tr. p. 24) and that she was paid by the agency with which she had a verbal contract to provide SETSS instruction to students in nonpublic schools (Tr. p. 33). Similarly, the hearing

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

[16] 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]).

record does not contain any documentary evidence of a contract between the parent and the teacher or the agency or of any financial obligation on the part of the parent for payment of SETSS costs.[17]

Therefore, having found no basis in the hearing record to reverse the IHO's determination regarding the parent's legal obligation to pay the costs of the SETSS services delivered to the student by the private teacher, it is not appropriate equitable relief in these circumstances to require the district to either reimburse the parent for the costs of SETSS or to directly fund the costs of SETSS under the relevant legal standards discussed above. However, as the district has not cross-appealed from the IHO's order for the district to pay the costs of SETSS delivered to the student for the 2018-19 school year "at a rate not to exceed the established [district] rate for such services," that order has become final and binding on the parties and will not be disturbed (IHO Decision at p. 19; see 34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see also M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).[18]

VII. Conclusion

While the evidence in the hearing record does not support the IHO's determination that the parent was not entitled to the relief sought due to the lack of evidence that the parent contacted the district for help locating a SETSS teacher, there is insufficient basis to reverse the IHO's determination that the parent had no financial obligation to the private SETSS teacher or agency and, therefore, was not entitled to the requested relief. I have considered the remaining contentions and find it is unnecessary to address them in light of my determinations above.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

Dated: **Albany, New York**
October 9, 2020

SARAH L. HARRINGTON
STATE REVIEW OFFICER

[17] The parent points to the "vendor month services invoice form[s]" as proof that the SETSS teacher's charged rate was $120 per hour (Parent Ex. H). However, the forms do not support a finding that the parent incurred any financial obligation in this matter since the forms appear to reflect services for which invoices were to be submitted to the district's "[i]mplementation [u]nit" for payment (see id.) Further, the invoice forms are accorded little weight since they are undated, do not appear to have been submitted, and are largely incomplete as pertinent information was left blank (see id.). Moreover, there was no testimony offered during the impartial hearing to explain the purpose of the forms or the import of the information reflected thereon.

[18] I recognize that to leave the IHO's order standing countenances a legal anomaly since, as discussed above, any concept of a district rate is a fiction. However, absent the district's cross-appeal of the order, I will not reverse that portion of the IHO's decision which was adverse to the district.