The University of the State of New York

The State Education Department
State Review Officer
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No. 21-025

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

Appearances:
Natan Shmueli, Esq., attorney for petitioner

Judy Nathan, Interim Acting General Counsel, attorneys for respondent, by Nathaniel Luken, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request that respondent (the district) fund the costs of 10 hours per week of privately-obtained special education teacher support services (SETSS) at an enhanced rate for the 2019-20 school year. The district cross-appeals from that portion of the IHO's decision which found that it was required to fund five hours per week of SETSS for the 2019-20 school year. The appeal must be dismissed. The cross-appeal must be sustained.

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

On March 29, 2017, a Committee on Preschool Special Education (CPSE) convened to develop an IEP for the student (Parent Ex. C at p. 1). The student was described as having difficulty staying on task and needed "continuous redirection" (id. at p. 3). He displayed difficulty

with classroom routines and transitions (id.). The student was "self-directed" and when interacting with peers he exhibited anxiety, fighting, and grabbing toys from peers (id.). The CPSE determined that the student was able to participate in all classroom activities "with visual and verbal cues and positive reinforcement" (id. at p. 5). The March 2017 CPSE recommended five two-hour sessions per week of individual special education itinerant teacher (SEIT) services in the student's preschool setting (id. at p. 10).[1] Additionally, the March 2017 CPSE recommended two 30-minute sessions per week of individual occupational therapy (OT); two 30-minute sessions per week of individual physical therapy (PT); two 30-minute sessions per week of individual speech-language therapy; and one 60-minute session per week of individual counseling services (id.).

While there is scant information in the hearing record regarding the student's 2018-19 school year (kindergarten), the evidence indicates that when the student transitioned to school-age special education services the student attended a nonpublic school and received services for all or part of the school year, including 10 hours of services from a special education teacher, one 30-minute session per week of group speech-language therapy, and two 30-minute sessions of individual OT (see Tr. p. 45; Dist. Exs. 2; 3 at p. 1; 4 at p. 1).

On May 14, 2019, a CSE met and developed the student's IESP with an implementation date of May 28, 2019 (see Parent Ex. D at pp. 1, 12).[2] The CSE found the student eligible for special education as a student with an emotional disturbance (id. at p. 1).[3] The IESP reported information from the speech-language therapist that the student exhibited "delays in expressive and pragmatic language" (Parent Ex. D at p. 2; see Dist. Ex. 3 at p. 1). According to the IESP, the student was described by his special education teacher and occupational therapist as self-directed and impulsive, and as demonstrating difficulty coping (Parent Ex. D at pp. 1-2; see Dist. Ex. 2 at p. 3). The special education teacher worked with the student on his social/emotional skills (Parent Ex. D at p. 2). The IESP reflected that the student was on grade level in reading, writing, and math (Parent Ex. D at p. 3; see Dist. Ex. 2 at pp. 1-2). The CSE identified supports for the student's management needs, including small group instruction for part of the school day; "[s]pecially [d]esigned [i]nstruction to address his learning, language, motor, and social needs"; repetition; simplified instruction; redirection; refocusing; and verbal and non-verbal prompts (Parent Ex. D at p. 4).

[1] State law defines SEIT services as "an approved program provided by a certified special education teacher . . . , at a site . . . , including but not limited to an approved or licensed prekindergarten or head start program; the child's home; . . . or a child care location" (Educ. Law § 4410[1][k]; 8 NYCRR 200.16[i][3][ii]; see "Special Education Itinerant Services for Preschool Children with Disabilities," Office of Special Educ. Field Advisory [Oct. 2015], available at http://www.p12.nysed.gov/specialed/publications/2015memos/documents/SpecialEducationItinerantServicesforPreschoolChildrenwithDisabilities.pdf; "Approved Preschool Special Education Programs Providing Special Education Itinerant Teacher Services," Office of Special Educ. [June 2011], available at http://www.p12.nysed.gov/specialed/ publications/SEITjointmemo.pdf). In addition, SEIT services are "for the purpose of providing specialized individual or group instruction and/or indirect services to preschool students with disabilities" (8 NYCRR 200.16[i][3][ii]).

[2] For the 2019-20 school year, the student was parentally placed in a nonpublic school (Parent Ex. D at p. 12).

[3] The student's eligibility for special education as a student with an emotional disturbance is not in dispute (see 34 CFR 300.8[c][4]; 8 NYCRR 200.1[zz][4]).

The May 2019 CSE recommended five period-long sessions per week of group SETSS for the student for the 2019-20 school year (Parent Ex. D at p. 10).[4] In addition, the May 2019 CSE recommended one 30-minute session per week of individual speech-language therapy; one 30-minute sessions per week of group speech-language therapy; one 30-minute session per week of individual counseling; one 30-minute session per week of group counseling; and two 30-minute sessions per week of individual OT (id.).

According to a log kept by the parent, she contacted several special education teachers in an attempt to arrange for delivery of the mandated SETSS for the student but was unable to find a teacher with availability (Parent Ex. E). Ultimately, the parent arranged for the student to receive SETSS through a private agency, Diamond Achieving Corp., beginning on November 27, 2019 (see Parent Exs. F; I).

A. Due Process Complaint Notice

In an amended due process complaint notice, dated June 25, 2020, the parent alleged that the district failed to offer or provide the student appropriate special education services on an equitable basis for the 2019-20 school year (see Parent Ex. B).

The parent alleged that May 2019 CSE reduced the recommended amount of special education teacher support from 10 hours per week (as recommended in the March 2017 CPSE IEP) to five periods per week for the 2019-20 school year, which was not reasonably calculated to enable the student to make meaningful progress (Parent Ex. B at p. 1). The parent contended that the May 2019 CSE should have recommended 10 hours per week of SETSS for the 2019-20 school year to address the student's emotional disturbance which impacted his ability to perform at grade level (id.). In addition, the parent argued that the student's social and behavioral challenges required the development of a behavioral intervention plan (BIP) (id.). Further, the parent argued that the district failed to identify a special education teacher to implement the student's SETSS for 2019-20 school year and, therefore, the parent was forced to locate a special education teacher to deliver the SETSS at a rate higher than the district's standard rate (id. at pp. 1-2).

In the due process complaint notice, the parent requested pendency in the March 2017 IEP as it was the last agreed upon IEP (Parent Ex. B at pp. 1-2). For relief to remedy the district's failure to offer or provide appropriate special education services on an equitable basis, the parent requested that the district be required to fund the delivery of 10 hours per week of individual SETSS from the private "provider/agency" at an "enhanced rate" for the 2019-20 school year (id. at p. 2). To remedy the district's failed to implement the SETSS prior to that time when the parent arranged for the delivery of the services from the private provider, the parent requested "the ability to make-up the missed SETSS periods over the summer months and the 2020-2021 school year" (id.). The parent also requested an award of all of the related services set forth on the May 2019 IESP "and related services authorizations for such services if required by the Parent" (id.). Finally, the parent requested an order directing the district to develop and implement a BIP (id.).

[4] SETSS is not defined in the State continuum of special education services (see 8 NYCRR 200.6).

B. Impartial Hearing Officer Decision

An impartial hearing convened on September 10, 2020 and concluded on October 21, 2020 after two days of proceedings (Tr. pp. 1-111). In a decision dated November 2, 2020, the IHO determined that, although the district failed to implement the SETSS recommended in the May 2019 IESP, the May 2019 IESP was appropriate, and ordered the district to fund five periods per week of SETSS for the 2019-20 school year (IHO Decision at pp. 9, 11).

The IHO found no evidence in the hearing record that the student's special education teacher at the time of the May 2019 CSE meeting recommended that the student should receive 10 hours per week of SETSS for 2019-20 school year (IHO Decision at p. 8). Further, the IHO noted evidence that the student was performing "on grade level" at the time of the CSE meeting (id. at pp. 8, 9). The IHO held that SETSS was not a service to "aid the student in sensory integration or to address his behavior needs" and was, instead, a service "to work with the student on his academic delays if any occur" (id. at p. 9). Given that the student's main area of need was related to behaviors, rather than academics, the IHO found that the SETSS recommendation in the May 2019 IESP was appropriate (id. at pp. 9, 11). In addition, the IHO held that the CSE provided services to help with student's behavior in form of counseling and OT services and that the lack of a functional behavior assessment (FBA) "in itself does not invalidate the IESP" (id. at pp. 8-9). However, the IHO held that district failed to implement the five periods per week of SETSS mandated by the May 2019 IESP (id. at pp. 8, 9, 11).

Turning to the parent's requested relief, the IHO held that the parent's witnesses failed to present credible evidence of the number of hours of SETSS provided to student from November 27, 2019 through June 25, 2020 (IHO Decision at pp. 9-10). Further, the IHO held that there was no evidence presented in the hearing record as to the administrative expenses of Diamond Achieving Corp that would warrant an award of $150.00 per hour for the SETSS (id. at p. 11). The IHO found that an appropriate hourly administrative expense was $34.00, which when added to the average rate of $56 paid by the agency to a special education teacher, totaled an "appropriate fee" of $90.00 per hour for the SETSS (id.). Regarding the parent's request for the costs of SETSS delivered by the private agency between July 1, 2020 and August 28, 2020, the IHO held that such services were related to the 2020-21 school year, which was not a part of the due process complaint notice (id. at p. 8).

Based on the foregoing, the IHO ordered the district to pay $90.00 per hour for five periods per week of SETSS for the 2019-20 school year if delivery of such services could be documented (IHO Decision at pp. 11-12). Further, the IHO directed district to conduct an FBA and ordered the district to provide the student one additional individual OT session for 30 minutes per week on a going-forward basis (id. at p. 12).

IV. Appeal for State-Level Review

The parent appeals. Specifically, the parent seeks a reversal of the IHO's finding that the May 2019 IESP was appropriate and requests an award of district funding of the costs of 10 hours per week of SETSS for the 2019-20 school year at a rate of $150.00.

The parent argues that the IHO failed to address the student's stay-put placement and should have directed the district to fund services from March 13, 2020 through the duration of the proceedings pursuant to pendency. Next, the parent argues that the district failed to provide any

testimony regarding the recommendation of five periods per week of SETSS, which represented a reduction of hours of special education teacher support compared to the 10 hours per week of SEIT services recommended in the March 2017 CPSE IEP. The parent contends she presented uncontradicted evidence that student required 10 hours per week of SETSS, as well as a BIP. The parent also argues that the IHO inconsistently found that May 2019 IESP was appropriate but ordered the district to conduct an FBA and to increase the student's OT services.

The parent further contends that she presented uncontroverted testimony that the rate for privately-obtained SETSS was $150.00 per hour and that the IHO's award of $90.00 per hour was inequitable. Therefore, the parent seeks an award of district funding of 163.5 hours of SETSS delivered to the student for by Diamond Achieving Corp. at a rate of $150.00 per hour for 2019-20 school year. Further, the parent argues that the IHO failed to address her request for "compensatory education" and requests an award of 196.5 hours of compensatory education services at the rate of $150.00 per hour, which represents the number of hours of SETSS that the student was allegedly owed (based on 10 hours per week) which the parent was not able to arrange during the 2019-20 school year and includes 80 hours of SETSS delivered to the student by Diamond Achieving Corp. during summer 2020 as make-up services. Finally, the parent seeks an order directing the district to develop and implement a BIP.

The district answers, generally admitting or denying those allegations contained in the parent's request for review. The district asserts that the documentary evidence in the hearing record showed that five periods of SETSS per week was an appropriate recommendation for the student, as he was on grade level, and that the parent failed to establish the student's need for 10 hours per week of SETSS. In addition, the district argues that the parent's request for a rate of $150.00 per hour was not supported by the evidence and the parent failed to establish a contractual obligation to pay for the SETSS. Further, the district argues that the parent failed to establish entitlement to compensatory education services for the 2019-20 school year. However, the district argues that if the parent is awarded compensatory education services, the student would be entitled only to 60 periods of SETSS, representing five periods per week for a 12-week period (September 2019 to November 2019). Finally, the district cross-appeals, seeking to reverse the IHO's finding that the district was required to fund any SETSS delivered to the student by Diamond Achieving Corp. during the 2019-20 school year.

V. Applicable Standards

A board of education must offer a free appropriate public education (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 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

A. Preliminary Matter – Scope of Review

State regulation governing practice before the Office of State Review requires that the parties set forth in their pleadings "a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately," and further specify that "any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer" (8 NYCRR 279.8[c][2], [4]; see 8 NYCRR 279.4[a]). Further, an IHO's decision is final and binding upon the parties unless appealed to a State Review Officer (34 CFR 300.514[a]; 8 NYCRR200.5[j][5][v]).

Here, neither party appeals the IHO's determination that the district failed to implement the student's SETSS for the 2019-20 school year and, thereby, failed to provide him with appropriate

[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]).

[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.).

special education on an equitable basis (see IHO Decision at pp. 8, 9, 11). In addition, neither party appeals the IHO's findings directing the district to conduct an FBA or to provide the student with an additional 30-minute session per week of individual OT services (see id. at p. 12).[7] As such, those findings have become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

B. May 2019 IESP—SETSS

As discussed below, the district's recommendation in the May 2019 IESP for five periods per week of SETSS for the 2019-20 school year was not supported by the evidence in the hearing record.

Initially, the hearing record does not include a prior written notice from the district describing, among other things, the evaluative information relied upon by the CSE in reaching its recommendations (8 NYCRR 200.5[a]; see 34 CFR 300.503[b]). According to the May 2019 IESP, the CSE relied upon an April 2019 "SETSS Progress Report," a May 2019 "Teacher Report," a May 2019 speech-language progress report, and a May 2019 OT report (Parent Ex. D at pp. 1-3). The evidence in the hearing record includes a copy of a teacher report dated May 13, 2019 , a speech-language progress report dated May 4, 2019, and an OT progress report dated May 21, 2019 (see Dist. Exs. 2-4).[8] There is no other evaluative information about the student included in the hearing record such as a psychoeducational evaluation report, a classroom observation, or a social history. According to the CSE meeting attendance sheet, attendees at the May 2019 CSE meeting included a district related service provider/special education teacher, who also served as the district representative, the parent, and by telephone, an associate director/school psychologist and the assistant principal of the student's nonpublic school (Parent Ex. D at pp. 12-13).[9]

The hearing record does not include an IEP or an IESP for the student's 2018-19 school year. The student's March 2017 CPSE IEP included a recommendation for five two-hour sessions per week of individual SEIT services in the student's preschool setting along with related services, and, while the circumstances are unclear, it appears that the student continued to receive 10 hours per week of support from a special education teacher during the 2018-19 school year (see Tr. p. 45; Parent Ex. C at p. 10; Dist. Ex. 2).

The May 2019 IESP summarized an April 2019 "SETSS Progress Report," which indicated that a special education teacher worked with the student to "improve his classroom functioning"

[7] In her appeal, the parent argues that the IHO failed to direct the district to develop a BIP. However, as the IHO did order the district to conduct an FBA; the CSE should make a determination, based on the FBA once completed, as to whether a BIP is warranted.

[8] The hearing record does not include a teacher progress report with an April 2019 date and, to the extent the May 2019 OT progress report post-dates the CSE meeting, the hearing record is unclear how or if the information contained in the report was before the CSE.

[9] The copy of the attendance sheet included in the hearing record does not include the signatures of the attendees (see Parent Ex. D at pp. 12-13).

and "improve his social/emotional skills" (Parent Ex. D at p. 2). According to the IESP, the special education teacher described the student as "self-directed" and impulsive when "frustrated or angry" (id.). The special education teacher described the student as "controlling or aggressive" when he misunderstood the rules of the classroom and indicated that he lost out "on valuable learning experiences" when unable to cope with a situation (id.). The IESP indicated that the special education teacher taught the student calming techniques for coping skills in both the classroom and in social situations (id.). As set forth in the IESP, the special education teacher described the student as "bright" and "enthusiastic" about reading and reported that he was able to label and sound out "most letters" and was beginning to decode words (id. at p. 2). The student was able to "recognize many numbers" as well as count and sort (id.).

The May 2019 teacher report is a preprinted form on which the teacher made check marks and answered "yes" or "no" to specific questions, and several of the teacher's answers were also summarized in the May 2019 IESP (compare Dist. Ex. 2, with Parent Ex. D at p. 3). For example, the form asked whether the teacher thought the student was performing on grade level in reading, writing and math and the teacher answered "yes" to each question without further explanation (Dist. Ex. 2 at pp. 1-2). The teacher noted that the student's social/emotional development was below average and that he displayed inappropriate behaviors (id. at p. 3). The teacher expanded on this area stating that the student cried and yelled when he was denied an object from a peer (id.). The form also inquired whether the teacher believed that the student was receiving appropriate educational services, and the teacher checked "yes" (id. at p. 4).

Turning to the May 2019 speech-language progress report, which was summarized in the IESP (compare Dist. Ex. 3, with Parent Ex. D at p. 2), the speech-language pathologist stated that the student "demonstrated some progress in his speech and language skills" and his articulation was age appropriate (Dist. Ex. 3 at p. 1). The speech-language pathologist recommended the student continue to receive speech-language therapy services "to address his language delays and help him achieve social and academic success" (id. at pp. 1-2). While as noted above, it is unclear how the information in the post-dated OT progress report was made available to the CSE, the content of the report and the summary of a May 2019 OT progress report are generally consistent (compare Dist. Ex. 4, with Parent Ex. D at p. 1). The occupational therapist reported that the student had "difficulty controlling his emotions" and had "poor impulse control" (Dist. Ex. 4 at p. 1). The student was further described as "very self[-]directed" and the occupational therapist described that the student required "a reward at the end of the session for good behavior" (id.). Despite some letter reversal, the student was able to write all numbers and letters (id.). It was recommended that the student continue OT for focusing skills, "visual motor and bilateral coordination skills," and impulse control (id. at p. 2).

The May 2019 CSE recommended five periods per week of group SETSS, which compared to the student's May 2017 preschool IEP (and the apparent continuation of this level of services during the 2018-19 year) represented a decrease in the frequency and duration of support from a special education teacher from 10 hours per week on an individual basis (compare Parent Ex. C at p. 10, with Parent Ex. D at p. 10). The district did not present a witness at the impartial hearing to articulate the May 2019 CSE's rationale in recommending five periods per week of group SETSS for the student, notwithstanding the information before the CSE that the student was making

progress with 10 hours per week of services from a special education teacher and the special education teacher's recommendation that the student continue to receive his then-current level of services (see Dist. Ex. 2 at p. 4). Nor did the district offer into evidence meeting minutes or a prior written notice that might shed light on the basis for the CSE's recommendations. While the IHO opined that the student was at grade level and, therefore, did not appear to require 10 hours per week of support from a special education teacher in order to address his primary area of need in the behavioral and social/emotional realm (see IHO Decision at pp. 9, 11), there is no testimony or evidence to support the view that SETSS are available only to students with academic delays or to rebut the parent's position that the student was on grade level only because of the services delivered by the special education teacher (see Tr. p. 45). Moreover, the May 2019 IESP itself set forth annual goals for the SETSS targeting the student's ability to demonstrate improved social emotional classroom functioning, improve his classroom functioning and attention skills, as well as his ability to improve his literacy skills and to demonstrate pre-math skills (Parent Ex. D at p. 8). Thus, the proposition that the SETSS for this student were not intended to target non-academic skill areas is belied by the May 2019 IESP itself, so it is unclear on what basis the IHO could reach a determination to the contrary.[10]

What is evident from the teacher progress reports considered by the May 2019 CSE is that the student's social/emotional and behavioral difficulties impeded his ability to function in the classroom. In fact, the CSE concluded that the student's emotional disturbance "affect[ed] his ability to perform at grade-level state standards" (Parent Ex. D at p. 4). Based on the foregoing, the district has failed to establish that the May 2019 CSE's recommendation for five periods per week of SETSS was appropriate for the student, and the IHO's finding that the May 2019 IESP was appropriate cannot be upheld based upon the evidence presented in the hearing record (IHO Decision at pp. 9, 11).

C. Implementation of SETSS

Moving past the parent's challenge to the IHO's decision regarding the design of the IESP, as noted above, the IHO's determination that the district failed to implement the SETSS mandated by the May 2019 IESP is final and binding on the parties. 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. 21-029; Application of a Student with a Disability, Appeal No. 20-141; 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

[10] I have cautioned IHOs previously of the danger of trying to take judicial notice of particular facts attendant to a highly specialized, local term like SETSS" that is not defined by the State and is not used outside this district (Application of a Student with a Disability, Appeal No. 18-112), especially when such facts become a basis of an IHO's decision. I have found that the term is routinely used from hearing to hearing involving this district as a catch all term used to describe numerous different types of services in different settings, subjects, ratios, and locations, and the participants in the hearing are not always talking about the same thing. It is incumbent on an IHO to ascertain from each legal advocate, witness, etc how each such individual understands the nuances of a term like SETSS so that the hearing record contains a factual basis for decision-making.

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). The undersigned has further noted "[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, 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 that it provided, or even attempted to provide, the student with the SETSS recommended in his May 2019 IESP. The parent testified that she attempted to locate a special education teacher to deliver the SETSS, but no one was available at "the regular rate" (Tr. pp. 35-36; Parent Ex. E). Therefore, the parent then arranged for services with Diamond Achieving Corp. (Tr. p. 36; Parent Ex. F at p. 1). While the hearing record is scant regarding the circumstances surrounding the parent's initiation of efforts to locate a teacher, the parent's request in her due process complaint notice for an "enhanced rate" is reminiscent of other cases in which the district has provided parents with a list of independent special education teachers to contact and arrange for services on her own (see e.g., Application of a Student with a Disability, Appeal No. 21-029). Assuming without deciding that such a SETSS form or list was exchanged among the parties in this case, I have indicated that the creation of a list of "independent" special education teachers to provide SETSS, as it applies to this student, is a violation of State law.

This is because the Commissioner of Education has made it abundantly clear, having "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]).[11]

[11] 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 dism's'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

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). 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§ 440l(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 "enhanced" 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 in the first instance (see Application of a Student with a Disability, Appeal No. 20-087). 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 nondelegable responsibility to ensure that services are delivered, whether in accordance with an IESP, an IEP, or pursuant to the stay put rule, and cost is not a permissible reason to defer or avoid the obligation to implement a student's services (Educ. Law § 3602-c[2][a]; [7][a]-[b] [providing that "[b]oards of education of all school districts of the state shall furnish services to students who are residents of this state and who attend nonpublic schools located in such school districts" and that the cost for services is recoverable from the district of residence, either directly with the consent of the parent for a district of location to share information or through the Commissioner of Education and the State Comptroller]).

Here, the IHO held that the district "fail[ed] to provide the services as mandated in an appropriate IESP, here five hours of SETSS" (IHO Decision at p. 9) and that determination is not appealed. Accordingly, in addition to not meeting its burden to show that the May 2019 IESP

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."

offered appropriate special education services, it also failed to deliver the services that the IESP did mandate. Accordingly, the district failed to furnish the student with the equitable services for the 2019-20 school year (see § 3602-c[2][a]; [7][a]-[b]).

D. Relief

1. Unilaterally-Obtained SETSS

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, districts 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], cert. denied sub nom., Paulino v. NYC Dep't of Educ., 2021 WL 78218 [U.S. Jan. 11, 2021], reh'g denied sub nom., De Paulino v. NYC Dep't of Educ., 2021 WL 850719 [U.S. Mar. 8, 2021]; 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."]).[12] Thus, 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.[13] The attempts that I have seen thus far that do not use a Burlington/Carter analysis have tended to lead to chaos.

Accordingly, the parent's request for 10 hours per week of SETSS must be assessed under this framework; namely, having found that the district failed to offer or provide appropriate equitable services, the issue is whether the 10 hours of SETSS obtained by the parent from Diamond Achieving Corp. constituted an appropriate unilateral placement of the student such that the cost of the SETSS is reimbursable to the parent or, alternatively, should be directly paid by the district to the provider upon proof that the parent has paid for the services or is legally obligated to pay but does not have adequate funds to do so. As a result, the question of rate is somewhat

[12] To the extent that the parent argues that the district was required to fund the SETSS delivered to the student during the 2019-20 school year pursuant to pendency, the argument fails as there is no evidence that district funding of SETSS from Diamond Achieving Corp. was agreed upon between the district and the parent (see Araujo v. New York City Dep't of Educ., 2020 WL 5701828, at *3-*4 [S.D.N.Y. Sept. 24, 2020] reconsideration denied, 2020 WL 6392818 [Nov. 2, 2020]; see Ventura de Paulino, 959 F.3d at 526, 536).

[13] The State Education Department only permits local educational agencies to contract for the use of teachers and personnel in private settings that have been approved by the Commissioner of Education, and upon such approval the State's rate setting unit routinely addresses the issue of establishing local rates that districts may pay such private entities (see http://www.oms.nysed.gov/rsu/).

beside the point as the cost of the SETSS, under the Burlington-Carter test, must be fully reimbursed or directly funded by the district unless, as a matter of equitable considerations, the costs sought to be reimbursed are excessive or otherwise should be reduced or, in the case of direct funding, the parent has not demonstrated a legal obligation to pay the costs and an inability to do so.[14]

Here, the appropriateness of the SETSS delivered to the student by Diamond Achieving Corp. during the 2019-20 school year is not seriously in dispute in this matter as it the same type of service recommended on the May 2019 IESP. However, similar to the situation in Application of a Student with a Disability, Appeal No. 20-087 and Application of a Student with a Disability, Appeal No. 20-115, because 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, the hearing record is devoid of any evidence that the parent is legally obligated to pay the agency or the special education teacher for SETSS provided to the student.

According to an affidavit from the controller of Diamond Achieving Corp., the agency charged $150.00 per hour for the SETSS delivered to the student during the 2019-20 school year (163.5 hours), as well as during summer 2020 (80 hours), and had not, as of the date of the affidavit on October 14, 2020, been paid for the services delivered (see Tr. p. 102; Parent Ex. F at p. 1). There is nothing in the affidavit that indicates that the parent is financially responsible for the SETSS (see Parent Ex. F). The controller of Diamond Achieving Corp. testified that the agency "laid out the money to the providers and the supervisors and . . . incur[red] all the expenses" and, therefore, the agency was "going to charge the parent" if the district was not required to fund the services (Tr. p. 103). However, there is no written contract in the hearing record, and the controller's testimony does not reflect that the parent agreed to the terms she described, let alone

[14] Although not raised on appeal, I note that the parent did not provide the district with a 10-day notice letter. Indeed, reimbursement for a unilateral placement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to their removal of the student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). While the parent's request for relief is denied on other grounds, the parent should be advised going forward of the purpose of the required 10-day notice letter and the traditionally equitable context in which such letter is considered (see S.W. v New York City Dep't of Educ., 646 F. Supp. 2d 346, 361-63 [S.D.N.Y. 2009] [finding that parents of students enrolled in private school were not exempted from 10-day notice requirements]).

establish an oral contract (see id.). Absent a contract between the parent and agency, there is no evidence that the parent had a financial obligation to the agency or the special education teacher.

As there is inadequate proof that the parent has expended any funds to pay for SETSS for the 2019-20 school year or is legally obligated to do so, 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 SETSS under the relevant legal standards discussed above.

2. Compensatory Education

The parent also seeks compensatory education to remedy the district's denial of FAPE for the 2019-20 school year in the amount of 196.5 hours of SETSS at the rate of $150.00 per hour. The parent contends that the student "should have received at least 360 hours of SETSS during the 2019-[]20 school year" (Req. for Rev. at p. 9). However, because the parent was only able to obtain 163.5 hours of SETSS for the student during the 2019-20 school year and 80 hours of SETSS during July and August 2020, the parent argues that the student is entitled to compensatory education for the remaining hours of missed SETSS (id.).

Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). The purpose of an award of compensatory education is to provide an appropriate remedy for a denial of a FAPE (see E.M. v. New York City Dep't of Educ., 758 F.3d 442, 451 [2d Cir. 2014] Newington, 546 F.3d at 123 [stating that "[t]he IDEA allows a hearing officer to fashion an appropriate remedy, and . . . compensatory education is an available option under the Act to make up for denial of a [FAPE]"]; see also Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 456 [2d Cir. 2015]; Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005] [holding that, in fashioning an appropriate compensatory education remedy, "the inquiry must be fact-specific, and to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"]; Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1497 [9th Cir. 1994]). Likewise, SROs have awarded compensatory services to students who remain eligible to attend school and have been denied appropriate services, if such deprivation of instruction could be remedied through the provision of additional services before the student becomes ineligible for instruction by reason of age or graduation (Bd. of Educ. of City Sch. Dist. of Buffalo v. Munoz, 16 A.D.3d 1142 [4th Dep't 2005] [finding it proper for an SRO to order a school district to provide "make-up services" to a student upon the school district's failure to provide those educational services to the student during home instruction]). Accordingly, an award of compensatory education should aim to place the student in the position he or she would have been in had the district complied with its obligations under the IDEA (see Newington, 546 F.3d at 123 [holding that compensatory education awards should be designed so as to "appropriately address[] the problems with the IEP"]; see also Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1289 [11th Cir. 2008] [holding that "[c]ompensatory awards should place children in the position they would have been in but for the violation of the Act"]; Bd. of Educ. of Fayette County v. L.M., 478 F.3d 307, 316 [6th Cir. 2007] [holding that "a flexible approach, rather than a rote hour-by-hour compensation award, is more likely to address [the student's] educational problems successfully"]; Reid, 401 F.3d at 518 [holding that compensatory education is a "replacement of educational services the child should have received in the first place" and that

compensatory education awards "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA"]).

As noted above, the parent obtained private SETSS from Diamond Achieving Corp., which amounts to a unilateral placement of the student. Some courts have held that compensatory education is not available as an additional or alternative remedy when reimbursement for the costs of a unilateral placement is also at issue for the same time period (see D.F. v. Collingswood Borough Bd. of Educ., 694 F.3d 488, 498 [3rd Cir. 2012] [holding that "[b]ecause compensatory education is at issue only when tuition reimbursement is not, it is implicated only where parents could not afford to 'front' the costs of a child's education"]; P.P. v. West Chester Area Sch. Dist., 585 F.3d 727, 739 [3rd Cir. 2009] [holding that "compensatory education is not an available remedy when a student has been unilaterally enrolled in private school"]; but see I.T. v. Dep't of Educ., State of Hawaii, 2013 WL 6665459, at *7-*8 [D. Haw. Dec. 17, 2013] [finding that the student was entitled to compensatory education for services the student received at the nonpublic school]). The Second Circuit Court of Appeals has not directly addressed this question and, generally, appears to have adopted a broader reading of the purposes of compensatory education than the Third Circuit (compare P.P., 585 F.3d at 739 [finding that "[t]he right to compensatory education arises not from the denial of an appropriate IEP, but from the denial of appropriate education"], with E. Lyme, 790 F.3d at 456-57 [treating compensatory education as an available equitable remedy for a denial of a FAPE so as to effectuate the purposes of the IDEA and put a student in the same position he or she would have been in had the denial of a FAPE not occurred]). Accordingly, unlike the Third Circuit, the Second Circuit's approach to compensatory education may leave room for unique circumstances where an award of compensatory education may be warranted where, for example, a student is unilaterally placed but the parent's request for tuition reimbursement is denied under a Burlington/Carter analysis (see Application of a Student with a Disability, Appeal No. 16-050). However, if permitted, it would be the rare case where a unilateral placement is deemed to provide instruction specially designed to meet the student's unique needs but the student is also deemed entitled to compensatory education to fill gaps in the services provided by such unilateral placement.

Here, the parent opted to pursue self-help to remedy the district's failure to offer or provide equitable services to the student for the 2019-20 school year, and the parent makes clear in her request for review that she seeks compensatory education relief at a rate of $150 per hour—that is a monetary award for her unilaterally selected services—rather than directing the district provide the compensatory education services. I am not convinced that this monetary compensatory education relief is an appropriate remedy in addition to or instead of district-funding of the private services already delivered. Accordingly, the parent is not entitled to the award of compensatory educational services she seeks.

Instead it appears to me that the entity with the most injury would be Diamond Achieving Corp., or its teacher(s), who provided some services to the student, but without making it clear to the parent that she remained legally obligated to pay for the services if the district did not. Thus, as noted above, reimbursement or direct funding relief is not warranted. But Diamond Achieving Corp. cannot act on its own behalf in this proceeding because it is not a proper party to a due process proceeding—it is not a public agency like the district, and it is not the parent. Although, the parent cannot recover under the Burlington/Carter framework with the lack of evidence presented in this case, I express no opinion regarding whether the provider, Diamond Achieving

Corp., can nevertheless recover some or all of the costs from the district in a different, appropriate legal forum (i.e. quantum meruit, unjust enrichment or any other applicable legal theory).

VII. Conclusion

In summary, the evidence in the hearing record supports a finding that the district did not offer or provide the student with appropriate special education on an equitable basis for the 2019-20 school year. However, as the evidence in the hearing record does not support a finding that the parent paid for or is legally obligated to pay for the SETSS obtained from Diamond Achieving Corp. during the 2019-20 school year or summer 2020, the parent is not entitled to an award of district funding of those services. Accordingly, the IHO's decision, which required the district to fund five periods per week of SETSS at the rate of $90 must be vacated. Finally, as the parent had selected to unilaterally obtain private services, she cannot seek compensatory education as an alternative remedy.

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 SUSTAINED.

IT IS ORDERED that the IHO's decision, dated November 2, 2020, is modified by reversing that portion which ordered the district to fund the five periods per week of SETSS for the 2019-20 school year at a rate of $90 per hour.

Dated: **Albany, New York**
March 22, 2021

JUSTYN P. BATES