The University of the State of New York

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

No. 21-026

**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 Thomas W. MacLeod, Esq.

## DECISION

### I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request that respondent (the district) fund the costs 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 ordered it to fund the costs of the student's SETSS at the district standard rate 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

The hearing record is sparse with respect to the student's educational history. The only IESP entered into evidence during the impartial hearing was developed at a CSE meeting held on June 19, 2015 (Parent Ex. B at p. 1). The June 2015 IESP recommended that the student receive 10 periods per week of direct/group SETSS, as well as related services of two 30-minutes sessions per week of individual speech-language therapy, two 30-minute sessions per week of individual occupational therapy (OT), and two 30-minute sessions per week of individual physical therapy (PT) (id. at p. 10).

During the 2019-20 school year, the student was in the eighth grade and was parentally placed in a private school (Tr. pp. 17, 60).

On September 1, 2019, the district issued a form to the parent described as an "Authorization for Independent Special Education Teacher Support Services for Parentally-Placed Student" (Parent Ex. C). The form indicated the student was authorized by the district to receive 10 hours of SETSS per week to begin on September 1, 2019 "from an eligible independent provider at no cost to [the parent]" (id.). The form further indicated that the parent could "select a SETSS provider other than those listed, but the provider must register with the DOE before being authorized to begin service" (id.). The form also stated to the parent "[i]f you need assistance locating a provider, or if you have any questions, please contact the [district] person listed in Section 1 of this form" (id.). The form did not specify a pay rate(s) for a SETSS teacher (id.). According to a log kept by the parent, she attempted to contact 20 providers to obtain SETSS for the student but was unable to find a teacher with availability (Parent Ex. D).

For the 2019-20 school year, the student received SETSS from the Diamond Achieving Corp., a private agency, which charged $125 per hour for such services (Tr. p. 56; Parent Ex. E at pp. 1-2).

A district special education teacher testified that, on October 18, 2019, she spoke with the parent regarding an upcoming IESP meeting but that the parent notified her that the student "no longer needed services" (Tr. p. 17; Dist. Ex. 4 at p. 1). The special education teacher further testified that she proceeded to declassify the student and explained to the parent what a declassification would entail and that the parent agreed (Tr. pp. 17-18). The district mailed a document reflecting the student's declassification to the parent on October 18, 2019 (Tr. p. 19; Dist. Exs. 1; 4). The parent testified that she did not indicate to the special education teacher that the student no longer needed services (Tr. p. 45). The parent further testified that she did not receive a declassification letter from the district (Tr. pp. 46-47).

### A. Due Process Complaint Notice

By due process complaint notice dated March 24, 2020, the parent alleged that the district failed to arrange for a teacher to implement the student's SETSS for the 2019-20 school year (Parent Ex. A at p. 1). The parent further alleged that the student was authorized to receive 10 hours of SETSS per week but the district failed to provide the student with these services (id.). The parent noted that she was not able to obtain a SETSS provider for the student at the district's

standard rate but that she was able to obtain a SETSS provider for the student at a rate higher than the standard district's rate (id.).

As relief, the parent requested a finding that the student was entitled to 10 hours of SETSS per week for the 2019-20 school year "at an enhanced rate" at district expense (Parent Ex. A at p. 2). The parent also requested an award of related services for the 2019-20 school year, consisting of those services set forth on the student's last IESP, in the form of related services authorizations (RSAs) "if required by the Parent" (id.).

**B. Impartial Hearing Officer Decision**

The parties participated in a prehearing conference on September 3, 2020 and proceeded to a one-day impartial hearing on October 20, 2020 (see Tr. pp. 1-80; IHO Ex. I). In a decision dated November 3, 2020, the IHO found that the district failed to offer or provide the student with services on an equitable basis for the 2019-20 school year (IHO Decision at p. 12). Specifically, the IHO determined that the district's failure to conduct a reevaluation of the student which led to the student being declassified and no longer eligible for special education services and related services, was a procedural violation that rose to the level of a denial of equitable services (id. at p. 15). The IHO also found that, based on the district's failure to follow the procedural requirements necessary for the district to declassify the student, the declassification was a "nullity" and the student's last IESP should remain in effect and the student continue to be classified as "a child with a disability" until the student is reevaluated by the district (id. at pp. 16, 21). Finally, the IHO also acknowledged "that the District's system for providing SETSS services that requires the parent to seek out and arrange for a student's instruction by a special education teacher based on information the Parent acquired online is a violation of State law" (id. at pp. 18-19).

The IHO noted that it had been held that the type of relief sought by the parent should be examined using the Burlington/Carter unilateral placement framework (IHO Decision at p. 17). Regarding the SETSS delivered by the private agency, the IHO acknowledged that "little evidence was proffered" in this regard but found that the evidence sufficiently showed that the student needed the services, they were delivered, and the student benefited therefrom (id.). With respect to the district's challenge to the credentials of the SETSS provider, the IHO found that he was unable to make a finding based on the hearing record that, even though the SETSS provider was not certified, he was also not qualified to provide SETSS to the student during the 2019-20 school year (id.).

As relief for the district's failure to offer the student services on an equitable basis for the 2019-20 school year, the IHO found that the district was obligated to pay for the student's SETSS for the 2019-20 school year but not at the rate of $125.00 charged by the private agency (IHO Decision at p. 20). In support of his determination, the IHO found that the parent and the parent's witnesses failed to present any evidence to confirm the parent's obligation to pay for the SETSS provided to the student (id. at p. 19). Furthermore, the IHO found that there was no proof, either written or oral between the parent and the agency delivering the SETSS that the parent was responsible for the costs of the SETSS for the 2019-20 school year (id. at p. 20). However, the IHO determined that, since the district "was nevertheless obligated to pay for SETSS for the 2019-2020 school year," the district should fund the services the student received at the "[d]istrict's usual or standard rate" (id.). The IHO opined that, to hold otherwise "would be to countenance the

[d]istrict's actions in denying the [s]tudent a FAPE and permit the [d]istrict to benefit financially from its conduct" (id.).

Based on the above, the IHO ordered that the district fund the student's SETSS for the 2019-20 school year at the district's standard rate by issuing payment directly to the agency providing the SETSS upon submission of invoices for the SETSS delivered during the school year up to a maximum of 360 hours (IHO Decision at p. 21).

## IV. Appeal for State-Level Review

The parent appeals and argues that the IHO erred in denying her request for district funding of the student's SETSS at the rate of $125.00 per hour for the 2019-20 school year. The parent argues that the IHO erred in finding no evidence in the hearing record of the parent's obligation to pay for the SETSS provided to the student. Moreover, the parent argues that because the district did not raise the argument regarding the parent's obligation to pay an enhanced rate for SETSS, it was incorrect for the IHO to take that position on behalf of the district. Consequently, the parent requests that the IHO's decision be reversed and that the district be required to fund the cost of 361 hours of SETSS provided to the student for the 2019-20 school year at the rate of $125 per hour, totaling $41,125.[1]

In an answer with cross-appeal, the district argues that the IHO's decision should be affirmed to the extent it denied the parent's request for district funding of the student's SETSS at an enhanced rate. The district asserts that the parent's argument that she had no burden of proof to demonstrate that she had an obligation to pay for the SETSS has been rejected by SROs in previous decisions. The district cross-appeals the IHO's decision to the extent it required the district to fund the student's SETSS for the 2019-20 school year at the district's standard rate. The district argues that SROs have repeatedly found that insufficient evidence of a parent's legal obligation or inability to pay can preclude an award of payment for SETSS and that, here, the parent did not produce such evidence.

## V. Applicable Standards

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

[1] Although the parent's request for review was served upon the district late, the parent provided good cause in her request for review for the late service of her request for review of the IHO decision in accordance with the terms of the "Thirteenth Revised General Order Regarding Coronavirus 2019 and Recommencement of Timeliness under 8 NYCRR Part 279."

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]).[2] This is commonly known in New York as the "dual enrollment" statute. "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.).[3] 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. Scope of Review

As an initial matter, it is necessary to identify which of the parties' arguments are properly before me on appeal. State regulations governing practice before the Office of State Review require 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

[2] 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]).

[3] 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.).

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, the district has not appealed the IHO's adverse determination that it failed to offer the student a FAPE for the 2019-20 school year based on the district's improper declassification of the student or the IHO's finding that the district's process of requiring parents to locate private providers to implement SETSS was illegal (IHO Decision at pp. 12, 18-19). In addition, the district does not appeal the IHO's determination that the student's last IESP would be deemed to have remained in effect (id. at p. 21). Nor does the district appeal the IHO's finding that the evidence in the hearing record was sufficient to demonstrate the appropriateness of the SETSS delivered by the private agency during the 2019-20 school year despite the teacher's lack of certification (id. at p. 17). Therefore, the IHO's determinations on these issues have become final and binding and they 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]).

Also, the parent requested relief in the form of related services as set forth on the student's last IESP; however, the parent has not requested such relief in her request for review (compare Parent Ex. A at p. 2, with Req. for Rev.). Thus, to the extent the parent does not request related services and/or RSAs as relief on appeal, relief in this form is deemed abandoned and will not be further addressed (8 NYCRR 279.8[c][2], [4]).

**B. Rate Dispute—Unilateral Services**

Turning to the crux of this matter, as the IHO's determination that the student's last IESP should remain in effect is final and binding, there is no dispute that the student was entitled to receive ten hours of SETSS per week for the 2019-20 school year. Therefore, the matter now presents itself as a dispute solely as to whether the parent is entitled to district funding of the student's SETSS delivered by a private agency, Diamond Achieving Corp., for the 2019-20 school year and, if so, whether the district is required to fund the services at the "enhanced rate" sought by the parent.

As the IHO acknowledged, 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 (see Application of a Student with a Disability, Appeal No. 20-087; 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]), they can be made to pay for a privately obtained parental placement, a process that is essentially the same as the federal process under IDEA. "Parents who are dissatisfied with their child's education can unilaterally change their child's placement during the pendency of review proceedings and can, for example, pay for private services, including private schooling. They do so, however, at their own financial risk. They can obtain retroactive reimbursement from the school district after the [IESP] dispute is resolved, if they satisfy a three-

part test that has come to be known as the Burlington-Carter test" (Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 526 [2d Cir. 2020] [internal quotations and citations omitted]; see Florence Cty. Sch. Dist. Four v. Carter, 510 U.S. 7, 14 [1993] ["Parents' failure to select a program known to be approved by the State in favor of an unapproved option is not itself a bar to reimbursement."]).

Similar to the situation in several recent appeals (see, e.g., Application of a Student with a Disability, Appeal No. 21-029; Application of a Student with a Disability, Appeal No. 21-028; Application of a Student with a Disability, Appeal No. 21-025; 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 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), because the parent has not demonstrated that she expended any funds toward the SETTS at issue here for which she must be reimbursed (see Parent Ex. E at p. 2), 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, as the district correctly argues in this case, unlike the E.M. case, the hearing record contains no written contract between the parent and the agency providing the student the SETSS (or the SETSS providers themselves) that indicates that the parent was responsible for the costs of the SETSS services for the 2019-20 school year.

In the instant case, the controller of Diamond Achieving Corp. testified that the agency charged $125 per hour for the cost of the student's SETSS; however, the parent did not pay for any of the services (Parent Ex. E at pp. 1-2). The controller indicated that the agency delivered 361 hours of services to the student; however, there is no evidence in the hearing record that indicates that the parent is financially responsible for the cost of the SETSS (id. at p. 2). As there is no other evidence in the hearing record, such as a written contract between the parent and the agency or an invoice directed to the parent, it is difficult to find that the parent incurred a financial obligation for the SETSS delivered to the student.

As there is inadequate proof that the parent has expended any funds to pay for the SETSS delivered to the student by Diamond Achieving Corp. during the 2019-20 school 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 the SETSS or directly fund the SETSS under the relevant legal standards discussed above. Accordingly, the district is correct that the IHO erred in awarding the parent the costs of the SETSS at the purported district standard rate.

While the IHO's concern about the district's ability to benefit financially from its failures to the student is understandable, absent some evidence that the parent paid for the SETSS or was obligated to do so, there is no apparent harm to the parent. Thus, as noted above, reimbursement or direct funding relief is not warranted. Instead, it appears that the entity with a potentially colorable claim for relief in this instance would be Diamond Achieving Corp. (or its teachers) who has provided services, as yet unpaid, to the parent's child without a clear agreement that the parent would be legally obligated to pay for the services if the district did not. Moreover, 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, 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 delivered by Diamond Achieving Corp. during the 2019-20 school year, the parent is not entitled to an award of direct funding of those services. Accordingly, the IHO's decision, which required the district to fund SETSS for the 2019-20 school year up to a maximum of 360 hours at the district's usual or standard rate must be vacated.

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 3, 2020, is modified by reversing that portion which ordered the district to fund SETSS for the 2019-20 school year up to a maximum of 360 hours at the district's usual or standard rate upon submission of invoices.

**Dated:** **Albany, New York**
**May 19, 2021**

**CAROL H. HAUGE**
**STATE REVIEW OFFICER**