The University of the State of New York

The State Education Department
State Review Officer
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No. 21-119

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

Appearances:
Judy Nathan, Interim Acting General Counsel, attorneys for respondent, by Gail Eckstein, 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 2020-21 school year. The appeal must be dismissed.

II. Overview—Administrative Procedures

When a student who resides in New York is eligible for special education services and attends a nonpublic school, Article 73 of the New York State Education Law allows for the creation of an individualized education services program (IESP) under the State's so-called "dual enrollment" statute (see Educ. Law § 3602-c). The task of creating an IESP is assigned to the same committee that designs educational programing for students with disabilities under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482), namely a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts related to IESPs, State law provides that "[r]eview of the recommendation of the committee on special education may be obtained by the parent or person in parental relation of the pupil pursuant to the provisions of [Education Law § 4404]," which effectuates the due process

provisions called for by the IDEA (Educ. Law § 3602-c[2][b][1]). Incorporated among the procedural protections of the IDEA and the analogous State law provisions is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 300.507[a][1]). First, after an opportunity to engage in a resolution process, the parties appear at an impartial hearing conducted at the local level before an IHO (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j]). An IHO typically conducts a trial-type hearing regarding the matters in dispute in which the parties have the right to be accompanied and advised by counsel and certain other individuals with special knowledge or training; present evidence and confront, cross-examine, and compel the attendance of witnesses; prohibit the introduction of any evidence at the hearing that has not been disclosed five business days before the hearing; and obtain a verbatim record of the proceeding (20 U.S.C. § 1415[f][2][A], [h][1]-[3]; 34 CFR 300.512[a][1]-[4]; 8 NYCRR 200.5[j][3][v], [vii], [xii]). The IHO must render and transmit a final written decision in the matter to the parties not later than 45 days after the expiration period or adjusted period for the resolution process (34 CFR 300.510[b][2], [c], 300.515[a]; 8 NYCRR 200.5[j][5]). A party may seek a specific extension of time of the 45-day timeline, which the IHO may grant in accordance with State and federal regulations (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5]). The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]).

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts, Procedural History and Events Pre-Dating the Due Process Complaint Notice

The hearing record is scant in this proceeding, but it appears the parties' linked their current dispute related to the 2020-21 school year to events as far back as the student's preschool services that were delivered several years ago. On September 13, 2018, a Committee on Preschool Special Education (CPSE) convened to develop an individualized education program (IEP) for the student

for the 2018-19 school year which recommended four one-hour sessions of group Special Education Itinerant Teacher Services (SEIT) with an implementation date of October 11, 2018 (Dist. Ex. 2 at pp. 1, 2, 3, 12).

An IESP for the student was entered into evidence during the impartial hearing that was developed at a CSE meeting held on April 4, 2019 (see Dist. Ex. 3). The April 2019 IESP reflected that the student was parentally placed in a non-public school and recommended that the district provide the student with five periods per week of direct SETSS in a group, as well as one 30-minute session per week of counseling in the student's nonpublic school kindergarten classroom (id. at pp. 5, 8, 10, see also Dist. Exs. 4, 5). The parent challenged the April 2019 IESP in a prior due process complaint notice dated September 9, 2019 and contended that because it inappropriately removed SEIT for the 2019-20 school year, and that the last program that the district developed for the student with which the parent agreed was the September 13, 2018 preschool IEP recommending four hours of SEIT (Tr. pp. 10-11; Dist. Ex. 6). During the pendency of that administrative proceeding, the parent sought continuation of the student's SEIT services for four periods per week as the student's stay-put placement (Dist. Ex. 6 at p. 2). The parent had also alleged in the prior proceeding that she was not able to locate a special education teacher who would work with the student at the district's "standard rates" for the 2019-20 school year, that the district did not furnish a provider, and that the parent found a provider willing to provide the student with SEIT services, however at a higher rate than the standard rate (Dist. Ex. 6). The parties did not provide evidence or further information regarding the disposition or status of that administrative due process proceeding involving the April 2019 IESP.

While there is scant information in the hearing record regarding the student's 2019-20 school year, the record indicates that "the parent did not parentally place the student in a private school in New York City rather, [] chose to place [the student] in a school [o]n Long Island, [a]nd thus the IESP was not in effect," however, the district advised the parent to contact the CSE if she did decide to parentally place the student at a nonpublic school within the district the following school year (Tr. p. 28; see Dist. Ex. 1 at p. 1). There is no indication that the parent contacted the district again until after the 2020-21 school year began. Accordingly, no annual review was conducted for the 2020-21 school year and no new IESP developed prior to the start of the school year (Tr. p. 29; Dist. Exs. 1 at p. 1; 7).

However, it appears that the parent contacted the district in August 2020 and in September 2020-21 school year the parent enrolled the student in "preschool Kindergarten" in a nonpublic school within the district for the 2020-21 school year as a parentally-selected placement (Parent Ex. B). In another prior due process complaint notice dated September 8, 2020, the parent contended that the last program the district developed for the student with which the parent agreed was the September 13, 2018 preschool IEP providing for four hours of SEIT and related services and that for the "full" 2020-21 school, the student required the same level of program and services as set forth in the September 2018 IESP (Dist. Ex. 8 at p. 1). The parent indicated that she was unable to locate a provider to work with the student at the district's standard rates for the 2020-21 school year and that the parent found a provider willing to provide the student with SETSS for the 2020-21 school year, however at a higher rate (id.). The parties did not provide information regarding the disposition of the second due process proceeding in the record.

A. Due Process Complaint Notice

In a third due process complaint notice dated December 2, 2020, the parent alleged that the district failed to offer or provide the student with an appropriate program and services on an equitable basis for the 2020-21 school year (Parent Ex. A). This is the due process proceeding underlying this appeal. Initially, the parent requested a finding that the student's stay-put placement during the pendency of the proceedings lay in the April 2019 IESP and consisted of five periods per week of SETSS "at an enhanced rate" (id. at p. 1).

The parent alleged that the last program that the district developed for the student "that the parent agreed with" was the April 2019 IESP which awarded five periods per week of group SETSS, as well as counseling (Parent Ex. A at p. 1). The parent stated that "[f]or the full 2020-2021 school year," the student required the same services as set forth on the IESP (id.).

The parent also alleged that she had not been able to locate a provider to "work with the [s]tudent at the [district's] standard rates" for the 2020-21 school year, which was "due in part to the significant help that the student need[ed], and due in part to the unavailability of providers" (Parent Ex. A at p. 1). The parent asserted that she found a provider who was willing to deliver the student's SETSS, however "at a rate higher than standard [district] rate" (id.).

For relief, the parent requested that the district be required to fund the costs of the privately-obtained "SETSS at an enhanced rate for the entire 2020-21 school year" (Parent Ex. A at p. 2). In addition, the parent requested an award of "all related services on the IESP" and that the district issue related services authorizations (RSAs) for the student's related services if required by the parent (id.).

B. Impartial Hearing Officer Decision

An impartial hearing convened on January 7, 2021, on which date the issue of the student's pendency placement was addressed (see Tr. pp. 1-21). During the impartial hearing, the district argued that while there was an IESP meeting held and an IESP created on April 4, 2019, the parent had in fact challenged that IESP in the due process complaint notice dated September 9, 2019 in which proceeding the parent contended that the last program that the district developed for the student that the parent agreed with was the September 13, 2018 IEP recommending four hours of SEIT for the 2018-19 school year. (Tr. pp. 10-11; see Dist. Exs. 2, 3, 6). The district also contended that the parent filed another due process complaint notice dated September 8, 2020 again confirming her position that the last agreed upon IEP was the September 13, 2018 IEP which recommended four hours of SEIT and that the April 4, 2019 IESP "ha[d] not to date been implemented or agreed upon by the parent (Tr. p. 11; see Dist. Exs. 2, 3, 8). The parent stated that she now agreed with the April 4, 2019 IESP, however conceded that the program actually received by the student and implemented for the 2019-20 school year was the services in the September 13, 2018 IEP which recommended four hours of SEIT (Tr. pp. 11-16). In an interim decision dated January 7, 2021, the IHO found that the student's pendency placement consisted of "four hours per week of 1:1 SEIT services" retroactive to the filing date of the due process complaint notice. (Interim IHO Decision).

The impartial hearing continued on February 11, 2021 (see Tr. pp. 22-46). During the impartial hearing, the parents' attorney indicated that the parents intended to present evidence that would confirm that the services were being provided and to describe and explain the SETSS provider's rate being charged of $150 per hour (Tr. pp. 30-31). The district's representative stated that the district agreed that the student was entitled to five periods per week of SETSS but disagreed with "the enhanced rate" sought by the parents (Tr. pp 28-29).

In a decision dated April 18, 2021, the IHO determined that there was "no dispute about the student's entitlement to receive five periods per week of SETSS services, or about the [district's] failure to make arrangements for a SETSS provider" and thus, the "sole issue" to be addressed was the parent's request that the SETSS services be funded at a rate of $150 per hour (IHO Decision at p. 4).

Regarding the services obtained by the parent during the 2020-21 school year from the private agency, Special Edge, the IHO noted the administrator's testimony that the student received SETSS services from two different individuals over the course of the 2020-21 school year; including fringe benefits, one SETSS provider was compensated at a rate of approximately $83 and one was compensated at a rate of approximately $88 (IHO Decision at p. 4; see Tr. pp. 33-34). The IHO also noted that the administrator testified that "the overall rate changed" by the agency of $150 per hour was intended to "cover a wide variety of other services and agency expenses" including "five full time supervisors, a behavioral analyst, a reading specialist, professional development for all providers, supplies and materials, devices for students to access remote services, administrative expenses, software, and interest/investment fees incurred to pay provider while waiting for DOE funding" (id. at p. 5). The IHO found that several of these SETSS agency expenditures were for indirect services that "go significantly beyond the scope of direct SETSS services that are provided to the [s]tudent and beyond the direct services that the [s]tudent is entitled to receive pursuant to her IESP," and that the only services the student is entitled to receive and the district should be required to fund, are the "five sessions per week of direct SETSS services" (id.) As such, based on the evidence in the hearing record, the IHO found that the $150 hourly rate was excessive, but that the district "must still fund the cost of the actual SETSS services provided" to the student (id.).

The IHO went on to find that no contract between the parent and the agency Special Edge was included in the hearing record and that, other than testimony about the hourly rates paid to the student's SETSS providers, the record did "not provide a sufficient basis for determining the appropriate hourly rate for the services" (IHO Decision at p. 5). Therefore, the IHO ordered the district to fund the student's receipt of five periods per week of SETSS at the rate of $88 per hour, which was the actual cost of one of the student's providers, for the 2020-21 school year.

IV. Appeal for State-Level Review

The parent appeals, arguing that the IHO erred in reducing the parent's request for district funding of the costs of SETSS from the agency Special Edge at an enhanced rate for the 2020-21 school year, by finding that: (1) the record did not evidence a contract between the parent and the agency; and (2) the rate sought was excessive. First, the parent argues that no contract was entered into evidence as such a contract would not be relevant to the proceedings and would be outside the scope of the hearing because the parent's requested relief—five periods of SETSS at an enhanced

rate for the 2020-21 school year—was "prospective relief for the remainder of the student's 2020-21 school year" (rather than retrospective payment of the student's SETSS services), as the student had received a pendency order in these proceedings dated January 7, 2021 directing the district "to implement 4 periods of SETSS" per week retroactive to December 2, 2021, the filing date of the due process complaint notice. The parent contends that if the parent "sought to remove her daughter from the pendency program offered to her by the [d]istrict, and pay for private services, she would have needed to enter into a contractual agreement with the agency" or "pay for the services by herself." However, the parent further contends that she "sought to adjudicate the matter of enhanced rate services for the remainder of the school year and remaining relief of the fifth hour of SETSS before signing the necessary contracts for such services to commence" and as such, a contract evidencing an agreement for prospective services that were dependent on the outcome of this appeal was outside the scope of the due process complaint notice. Therefore, the parent argues that the IHO erred in reducing the requested relief based on the absence of a contract.

Second, regarding the appropriateness of the rate, the parent argues that the district acknowledged that it failed to provide the student with her IESP program of services and that once the district conceded that it failed to furnish the student with a provider and left the parent to search for a provider on her own, the district could not then object to the provision of the services as too costly. The parent further argues that although the IHO acknowledged the districts responsibility to pay for the cost of the services, she erred in reducing the award based on factors such as the agency's "internal overhead [and] paradigm of services," and that the only consideration of whether the relief requested is appropriate is whether the district presented evidence that it was able to locate a provider at a lower rate. In addition, the parent argues that the IHO erred in "discounting and dismissing" the support services offered by the agency to its instructors as unrelated to the direct service mandated on the student's IESP and should have found the enhanced rate justified. Finally, the parent argues that the IHO should have based her decision on the "market costs" for services by gathering data from the district departments designated with implementation of such services and should have found the $150 rate appropriate. As relief, the parent requests an order directing the district to fund the student's five periods of SETSS per week for the 2020-21 school year at the rate of $150 per hour.

In an answer, the district responds to the parent's allegations and argues to uphold the IHO's decision reducing the parents' request for funding of the SETSS services delivered by Special Edge during the 2020-21 school year. The district alleges that the parent's requested relief should be denied because there was no evidence in the hearing record of a written contract between the parent and Special Edge that indicates that the parent was financially responsible for the costs of the SETSS services for the 2020-21 school year, at least at any point in time contemporaneous with the initiation of services in September 2020. The district further argues that the existence of a contract is highly relevant and legally necessary for the parent to obtain the relief sought. Further, the district notes that pendency is entirely separate and apart from the direct funding of SETSS services sought by the parent as substantive relief, and only "[c]oincidental[]" that "Special Edge providers are fulfilling the pendency services." The district argues that the IHO properly concluded that the $150 hourly rate was excessive and that the hourly rate should be limited to $88 for the reasons stated in the IHO's decision, the only issue on appeal is the rate as the district conceded that it did not provide equitable services to the student and agreed that the student is entitled to five sessions per week of SETSS, and that the IHO, rather than being required to have gathered data on the market costs of services, must base her decision solely on the hearing record,

and was well within her discretion to award the lower rate. Finally, the district argues that as the parent has not demonstrated a legal obligation to pay the cost of the SETSS delivered to the student and there is inadequate proof that the parent expended any funds to pay for SETSS for the 2020-21 school year, it would not be appropriate to require the district to directly fund the cost of the student's SETSS, rather relief should be awarded on a reimbursement basis.

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]).[1] "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.).[2] Thus, under State law an eligible New

[1] 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]).

[2] 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.).

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

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]). 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 appealed the IHO's findings regarding the student's entitlement to SETSS and that the district failed to provide SETSS for the 2020-21 school year.[3] 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. Privately Obtained SETSS

Turning to the parents' request for district funding of the privately-obtained SETSS, this case is analogous to several recent appeals, in which 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. 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

[3] It appears that all parties were in agreement that no IESP was created for the student after April 2019 and the student's subsequent parental placement in a private school in another district of location on Long Island. What is not clear from the record is why the student was entitled to special education services from the district for the 2021-21 school year under § 3602-c when the parent apparently sought such services from the district months after the June 1, 2020 statutory deadline had passed for the 2020-21 school year (Educ. Law § 3602-c[2][a]). Suffice it to say, the point is moot as the district did not advance any such concerns during the impartial hearing much less appeal the IHO's now final and binding adverse determination. The point is that the parties and the IHO reached a determination regarding the educational services for this student without the parties revealing whether any semblance of a special education planning process was followed at all.

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). In describing the effect of the district's failure to perform its obligation to provide SETSS to dually-enrolled students, one SRO has 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, while the circumstances are not entirely clear, as noted above it appears that the student was treated by the parties as having been dually enrolled in the district for the purposes of receiving special education services for the 2020-21 school year. The district did not present any documentary or testimonial evidence to show that it provided for, or even attempted to provide, the student with SETSS for the 2020-21 school year, although it agrees that the student was entitled to the services (see Tr. pp. 29-30). The limited evidence in the hearing record regarding the provision of SETSS indicates that the parent located a private special education teacher to deliver the student's SETSS (see Tr. p. 34-36; Parent Exs. C; D). While the hearing record is scant regarding the circumstances surrounding the parent's initiation of efforts to locate a teacher, I suspect this case is similar to a large swath of cases in which parents are selecting their own special education teacher and then going back to the district to argue over rates. 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 their own (see e.g., Application of a Student with a Disability, Appeal No. 21-029; Application of a Student with a Disability, Appeal No. 20-087). [4] Assuming without deciding that such a SETSS form or list was exchanged among the parties in this case, as set forth below, the creation of a list of "independent" special education teachers to provide SETSS, as it applies to this student, is deeply problematic as it just sets up another violation of State law and both sides stop following the special education planning process.

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

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

law, boards of education are empowered to agree to terms of employment" of a teacher] [emphasis added]).[5]

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

With the above described seeming impropriety of the district's current reliance on parents to obtain the services of independent providers to implement SETSS services mandated by an IESP as a backdrop, I note that, in this case, as mentioned above, the district did not present any evidence or witnesses to show that it either arranged for or delivered the SETSS, to which it agreed at the time of the impartial hearing that the student should receive, during the 2020-21 school year. Accordingly, there is no longer any dispute that the student is entitled to receive five periods of SETSS per week for the 2020-21 school year and this matter now presents itself as a dispute solely

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

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

as to the rate the district should pay the private provider arranged for by the parent to deliver those services.

The rate for special education services unilaterally obtained could, in theory, be set by contract. However, correctly determined that there was no evidence of a contract. The parent's argument that this fact was made irrelevant by virtue of the contents of her due process complaint notice is without merit. As described above, school districts cannot deliver contracted special education services called for by the CSE's 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. But districts can be made to pay for special education services that a parent paid for or has become legally obligated to pay for, 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."]).

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.[7] The attempts that do not use a Burlington/Carter analysis have tended to lead to chaos.

Accordingly, the parent's request for five hours per week of SETSS must be assessed under this framework; namely, having found that the district failed to provide appropriate equitable services, the issue is whether the five hours of SETSS (four hours of which there is some evidence a provider from Special Edge delivered as SEIT to the student under pendency), 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 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

[7] The State Education Department only permits local educational agencies to use teachers and personnel in private settings that are approved by the Commissioner of Education and 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/).

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.

Here, the appropriateness of the SETSS delivered to the student by Special Edge during the 2020-21 school year is not seriously in dispute in this matter as it is the same type of service which the district agreed during the impartial hearing that it was required to provide. 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 there is no evidence that the 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, unlike the E.M. case, the hearing record in this matter is devoid of any evidence that the parent is legally obligated to pay the agency or the provider for SETSS delivered to the student. In fact the parent argues that no evidence of a contractual obligation is necessary at all.

Here, the Special Edge administrator testified that the rate that the private agency charges for SETSS services for the student was $150 per hour (Tr. p. 40); however there is no indication in the hearing record that the parent paid for the services. Although there is some evidence that a provider from Special Edge delivered four hours per week of SEIT or SETSS services to the student for all or some of the 2020-21 school year (see Tr. pp. 34-36; Parent Exs. C, D), there is nothing in the hearing record to indicate that the parent is legally obligated to pay for such services. As noted by the IHO in her decision, and the district in its answer, no contract between the parent and the agency Special Edge was included in the hearing record and the testimony was "vague as to whether in fact such a contract exist[ed]" (IHO Decision at p. 5). The Special Edge administrator testified that the parents signed a contract "at the beginning of the year" but when asked whether he was "certain that the parent ha[d] a written contract with Special Edge," he stated that the agency's "general policy is that they do sign and I'm assuming that she did. I just don't have it in front of me so I can't confirm one-hundred percent" (Tr. p 40-41). Additionally, in her request for review, the parent "maintain[ed] that no contract was entered into evidence," contending that only if the parent "sought to remove her daughter from the pendency program offered to her by the [d]istrict, and pay for private services", would she "have needed to enter into a contractual agreement with the agency" or "pay for the services by herself." As there is no evidence in the hearing record, such as a written contract between the parent and the agency or an invoice directed to the parent revealing a legal obligation to pay, it is not possible to find that the parent incurred a financial obligation for the SETSS delivered to the student that would support an award of reimbursement relief.

As there is inadequate proof that the parent has expended any funds to pay for SETSS for the 2020-21 school year or is legally obligated to do so, I am not convinced that the dispute regarding the proper amount to be paid to Special Edge for educational services for the student during the 2020-21 school year involves the parent or student's legal interests. Instead, it is far more likely that the rate dispute is a matter to be resolved between the district and Special Edge, but Special Edge, who has the real financial interest in the outcome of the rate dispute, is not a proper party to a due process proceeding (34 CFR 300.507[a][1]). Therefore, the remaining rate dispute must be addressed in a different forum. It is not appropriate equitable relief in this due process proceeding 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. However, as the district has not appealed from the IHO's adverse decision ordering for the district to pay the costs of SETSS delivered to the student for the 2020-21 school year at a rate of $88, that order will not be disturbed by the undersigned.

Going forward, if they have not done so already, both parties should also return to using the appropriate CSE planning process called for by State law and the parent should ensure that she adheres to the June 1 deadline for requesting 3602-c services if she intends to place the student in a nonpublic school and seek dual enrollment services.

VII. Conclusion

Having determined that the evidence in the hearing record does not require reversal of the IHO's decision, the necessary inquiry is at an end.

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

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
August 6, 2021

JUSTYN P. BATES
STATE REVIEW OFFICER