The University of the State of New York

The State Education Department
State Review Officer
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No. 23-097

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

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

Liz Vladeck, General Counsel, attorneys for respondent, by Ezra Zonana, 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, in part, her request that respondent (the district) fund the costs of special education teacher support services (SETSS) delivered by Special Edge Support, LLC (Special Edge) at an enhanced rate for the 2022-23 school year. The district cross-appeals from that portion of the IHO's decision that ordered the district to directly fund the costs of the student's SETSS at a capped rate. 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, incorporated among the procedural protections 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

Given the limited scope of this appeal, a recitation of the student's educational history is not necessary. Briefly, however, the evidence in the hearing record indicates that, for the 2017-18 school year, the student was parentally placed in a parochial school, and, on September 11, 2017,

a CSE convened and develop an IESP for the student providing for the delivery of public school services to the student during the 10-month school year while she attended the nonpublic school (see Parent Ex. B at pp. 1, 6, 8). Finding the student eligible for special education as a student with a learning disability, the September 2017 CSE recommended that the student receive the following services on a weekly basis: five periods of SETSS in a group, two 30-minute sessions of individual speech-language therapy, two 30-minute sessions of individual occupational therapy (OT), two 30-minute sessions of individual physical therapy (PT), and two 30-minute sessions per week of counseling in a group (id. at pp. 1, 6).

According to the parent, the student continued to be parentally placed at a parochial school for the 2022-23 school year (twelfth grade) (see Tr. p. 64).

In a contract between the parent and Special Edge, dated July 1, 2022, the parent agreed to the agency's provision of "SEIT/SETSS services at enhanced market rates" to be "reflected in the invoices" for the 2022-23 school year (Parent Ex. D).

In a letter to the district dated August 18, 2022, the parent indicated that the district had "failed to assign a provider" to deliver the services mandated in the student's "CSE/IESP for the 2022-2023 school year" and that, if the district did not assign a provider, the parent intended to unilaterally obtain the services "through a private agency at an enhanced market rate" (Parent Ex. C).

A. Due Process Complaint Notice

By due process complaint notice dated September 6, 2022, the parent alleged that the district denied the student a free appropriate public education (FAPE) and equitable services for the 2022-23 school year (see Parent Ex. A at pp. 1-2). The parent alleged that a CSE had last convened in September 2017 to develop an IESP for the student and, at that time, recommended five periods per week of SETSS and related services (id. at p. 1). For the 2022-23 school year, the parent contended that the district "did not supply providers for the services it recommended" or otherwise inform the parent how the IESP would be implemented and improperly placed the responsibility on the parent to find providers and ensure delivery of services to the student (id. at pp. 1-2). According to the parent, she could not find a provider to deliver SETSS to the student at the district's "published rates" and, therefore, obtained the services from a private agency at an "enhanced rate" (id. at p. 1).

The parent requested a pendency (stay-put) placement for the student consisting of the special education and related services set forth in the September 2017 IESP (Parent Ex. A at p. 2). For relief, the parent requested that the district be required to fund the provision of five hours of SETSS at an enhanced rate (id.). The parent also requested all related services set forth on the student's "last IESP for the 2022-2023 school year" (id.).

B. Impartial Hearing Officer Decisions and Intervening Events

On October 19, 2022, the matter proceeded before an IHO, which concluded on March 30, 2023, after six total days of proceedings, inclusive of the prehearing conference (see Tr. pp. 1-108). The district did not appear at the prehearing conference on October 19, 2022 or any of the scheduled hearing dates (Tr. pp. 1-2, 7, 9, 17, 19, 25, 30-31, 52, 55).

In an interim decision dated November 7, 2022, the IHO noted that the district had not appeared at the prehearing conference or the hearing date devoted to addressing the student's stay-put placement during the pendency of the proceedings, had not implemented the student's pendency services, and had not agreed with the parent to a stay-put placement in "a Pendency Implementation Form" (Interim IHO Decision at pp. 2-3). Absent any contrary position by the district on the pendency placement, the IHO found that, as requested by the parent, the student's pendency lay in the September 2017 IESP and consisted of five periods of SETSS per week and related services (id. at pp. 4-5).

In or around November 2022, the student began receiving between four and five hours of 1:1 SETSS per week from Special Edge (Tr. pp. 75, 83). The agency did not deliver the student's related services (see Tr. p. 76).[1]

In a final decision dated April 19, 2023, the IHO initially examined the legal standard to apply given that the student was parentally placed and alleged an entitlement to public special education services pursuant to Education Law § 3602-c (IHO Decision at pp. 9-10). The IHO concluded that the Burlington/Carter style of analysis was the standard to be applied for purposes of assessing the parent's entitlement to district funding of privately obtained services delivered in the private school (id. at p. 10).

Applying that standard, the IHO found that, because the district failed to appear at the impartial hearing, it had "elected to forego its opportunity to present testimony and other evidence to defend its actions" (IHO Decision at p. 10). Therefore, the IHO found it undisputed that the district did not deliver special education services to the student during the 2022-23 school year (id.). Next, the IHO found that, based on the evidence in the hearing record, the SETSS provided by Special Edge was specially designed to meet the student's unique needs (id. at p. 11). As to equitable considerations, the IHO concluded that the parent cooperated with the CSE and provided the district with notice of her intent to obtain private services (id. at p. 12). However, the IHO went on to further consider if the cost of the SETSS delivered by Special Edge was excessive (id. at pp. 12-13).

Taking into account evidence that Special Edge billed the district $195 per hour but paid the teacher delivering the services $90 per hour and that the district paid teachers delivering SETSS approximately $90 per hour and given the lack of evidence of invoices billed to the parent, the IHO found the rate charged by Special Edge to be excessive (IHO Decision at pp. 12-13). Invoking her "equitable authority," the IHO found that a rate of $125 per hour to be appropriate (id. at p. 13).

Regarding the parent's legal obligation to pay Special Edge, the IHO noted that the contract was "poorly worded" and "missing important terms (such as the cost of the services, the services to be provided, and the number of hours of services)" (IHO Decision at p. 13). Nevertheless, the IHO found that the contract required the parent to "pay something for the services" delivered to the student (id. [emphasis in the original]). Finally, citing recent case law, the IHO found it was

[1] During the impartial hearing, the parent did not seek district funding of private related services and, instead, sought only the costs of the SESTSS delivered by Special Edge during the 2022-23 school year (see Tr. pp. 60-61, 76; IHO Decision at p. 3).

not necessary for the parent to offer proof of her inability to pay Special Edge for the services (id. at pp. 13-14).

Based on the foregoing, the IHO ordered the district to pay Special Edge for the costs of up to five hours per week of SETSS delivered to the student between November 1, 2022 through June 2023 at a rate of $125 per hour (IHO Decision at p. 14). The IHO also required that the district convene a CSE to review the student's IESP (id.).

IV. Appeal for State-Level Review

The parent appeals. With respect to the parent's request for funding relief, the parent argues that the IHO erred by failing to order the district to fund SETSS delivered to the student during the 2022-23 school year at the rate of $195.00 per hour. The parent asserts that the IHO's reduction of the rate to $125 per hour was not supported by the law or the evidence in the hearing record. Regarding the difference in the rate charged and the rate paid the provider, the parent argues that the agency incurred expenses and that, in any event, the question of the agency's profit was not relevant. Instead, the parent contends that the reasonableness of Special Edge's rate was not challenged by evidence of a different market rate (i.e., by evidence of what other agencies charge for the same services).

As relief, the parent requests that the IHO's decision be modified and that the district be required to fund the costs of the student's SETSS for the 2022-23 school year at the rate of $195.00 per hour.

In an answer and cross-appeal, the district responds to the parent's allegations and argues that the IHO did not err in finding the rate charged by Special Edge for SETSS to be excessive. As for a cross-appeal, the district alleges that the IHO should have denied the parent's relief because the parent failed to demonstrate a financial obligation to pay for SETSS given that the contract with Special Edge lacked essential terms. In addition, the district argues that the IHO erred in ordering the district to directly fund the SETSS delivered by Special Edge absent evidence of the parent's inability to front the costs of the services. The district argues that district court authority cited by the IHO to support his conclusion is not controlling and is factually distinguishable.[2]

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

[2] The parent did not submit an answer to the district's cross-appeal.

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 public school 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]).[3] "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.).[4] 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, that is dually enrolled, for the purpose of receiving special education programming under Education Law § 3602-c, dual enrollment 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. v. New York City Dep't of Educ., 694 F.3d 167, 184-85 [2d Cir. 2012]).

VI. Discussion

In this matter, the student has been parentally placed in a nonpublic school and the parent does not seek tuition reimbursement for the cost of the student's attendance there. The parent alleged that the district did not develop an appropriate IESP for the 2022-23 school year and as a

[3] 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]).

[4] 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.).

self-help remedy she unilaterally obtained private services from Special Edge for the student without the consent of the school district officials, and then commenced due process to obtain remuneration for the costs thereof. Accordingly, the issue in this matter is whether the parent is entitled to public funding of the costs of the private services. "Parents who are dissatisfied with their child's education can unilaterally change their child's placement . . . 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 County Sch. Dist. Four v. Carter, 510 U.S. 7, 14 [1993] [finding that the "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."]).

As the IHO found, the parent's request for district funding of privately-obtained services must be assessed under this framework. Thus, a board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Carter, 510 U.S. 7; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 252 [2d Cir. 2009]). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

Neither party appeals the IHO's determinations that the district failed to meet its burden to prove that it offered and provided the student appropriate special education services for the 2022-23 school year or that the SETSS delivered by Special Edge were appropriate (see IHO Decision at pp. 10-11). Accordingly, these determinations 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]). The crux of the issue on appeal is whether the parent contracted for the SETSS at the rate requested and, if so, whether the rate requested was excessive.

The district argues that the contract between the parent and Special Edge did not obligate the parent because it was not specific about the services to be delivered or the rate to be charged for the services. The Second Circuit has held that some blanks that the parties did not fill in in a written agreement would not render an entire contract void and indicated that in the case before it that "the contract's essential terms—namely, the educational services to be provided and the amount of tuition—were plainly set out in the written agreement, and we cannot agree that the contract, read as a whole, is so vague or indefinite as to make it unenforceable as a matter of law" (E.M. v. New York City Dep't of Educ., 758 F.3d 442, 458 [2d Cir. 2014]).

Here, the June 2022 agreement between the parent and Special Edge for the 2022-23 school year indicated that Special Edge would match the student "to a qualified provider," provide "support structure for all staff, including . . . supervision and coordination of services with [the private] school," as well as participate in meetings with the district and impartial hearings (Parent Ex. D at p. 1). The contract further provided that the parent agreed that hours and rates for "SEIT/SETSS" services delivered to the student would be "reflected in the invoices being processed" (id. at p. 2). According to the contract, if the student was entitled to pendency services, Special Edge would bill the district directly but the parent would be responsible for any "difference between Special Edge's Pendency Rate and the [district] rate if Special Education d[id] not receive full payment from the [district] for these services" (id. at pp. 2-3).

During the impartial hearing, an administrator in the financial department at Special Edge (administrator), who signed the contract between Special Edge and the parent, testified that he did not know why the contract did not state the rate charged by the agency for the services and initially could not offer an explanation of terms in the contract such as "pendency rate" and "[district] rate" (Tr. pp. 92-94; see Tr. p. 96; Parent Ex. D at p. 3). The administrator then indicated that the "[district] rates" referred to the set rate paid by the district to providers with which the district contracted directly (Tr. p. 94). Based on the "last time [he had] researched the number," the administrator indicated he believed the district rate was around $80 or $90 per hour but he was "not sure" (Tr. pp. 93-94, 95).[5] However, the administrator indicated that Special Edge did not contract with the district (Tr. p. 94).

The administrator testified that the agency developed a budget and, based on the budget and "market rates," determined the appropriate rate of services for the student was $195 per hour (Parent Ex. E ¶¶ 7-8; see Tr. p. 92).[6] The administrator indicated that the student was "entitled to 5 hours per week of SETSS" (Parent Ex. E ¶ 3; see Tr. p. 87). He further testified that the providers submitted invoices at the end of each month with "the date and times of the sessions they provided" but that, in this case, invoices for the student's services had not been billed to the parent because "there [wa]s a pendency, and the invoices [we]re being submitted to the [district]" (Tr. p. 91; Parent Ex. E ¶ 4). According to the administrator, if the parent did not prevail at the impartial hearing, the agency would send her an invoice (Tr. pp. 98-99). The hearing record does not include any invoices for services. Moreover, contrary to the term of the contract, which was for the 2022-23

[5] It is not clear what the administrator's research would be based upon because 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), and the Commissioner of Education has made it abundantly clear and has "repeatedly held that a board of education lacks authority to provide instructional services through an independent contractor" (Appeal of Sweeney, 44 Ed Dept Rep 176, Decision No. 15,139; Appeal of Woodarek, 46 Ed Dept Rep 1, Decision No. 15,422).

[6] The administrator indicated that the rate charged by Special Edge for the student's SETSS included the $90 per hour plus "fringe benefits" paid to the provider as well as agency costs for expenses such as additional staffing expenses and benefits, case management, instructional materials, assessment tools, professional development, office spaces, and "other administrative costs" (Tr. p. 89; Parent Ex. E ¶¶ 7-8).

school year, the agency did not deliver services to the student until November 2022, apparently as implementation of the IHO's interim decision on pendency in this matter (Tr. pp. 83, 98-99; Interim IHO Decision).

In New York, while there may be instances where a party may agree to be bound to a contract even where a material term is left open, "there must be sufficient evidence that both parties intended that arrangement" and an objective means for supplying the missing terms (Express Indus. & Terminal Corp. v. N.Y. State Dep't of Transp., 93 N.Y.2d 584, 590 [1999]; 166 Mamaroneck Ave. Corp. v. 151 E. Post Rd. Corp., 78 N.Y.2d 88, 91 [1991]). Here, there is no way to tell from the face of the contract the amount of services the agency would provide to the student or the cost thereof, and the invoices that the contract references as the extrinsic source for these terms were not offered into evidence (see Tr. p. 91; Parent Exs. D; E ¶ 4). Moreover, while performance of the terms of the contract may have constituted an objective means for identifying the missing terms (see E.M., 758 F.3d at 458 n.21), here the agency did not deliver the student services under the contract, and, instead, only began delivering services in November 2022 pursuant to pendency, invoicing the district, not the parent (Tr. pp. 75, 91; Parent Ex. E ¶ 4; see Interim IHO Decision). While the district is responsible to fund or provide the services described in the 2017 IESP as a means of meeting its statutory obligation to maintain the student's placement during the pendency of the proceedings it would not create the essential terms of a contractual obligation between the parent and Special Edge.[7]

Therefore, there is insufficient evidence in the hearing record to support a finding that the parent incurred a financial obligation for the SETSS delivered to the student that would support an award of reimbursement or direct funding relief for the 2022-23 school year. However, as there has been no challenge to the IHO's interim decision on stay-put in this matter, I remind the district of its obligation to provide the student with the services set forth in the September 2017 IESP pursuant to pendency for the duration of proceedings in accordance with Education Law 4404(4)(a) (see Interim IHO Decision; Parent Ex. B).

VII. Conclusion

This is a dispute in which a parent has sought retroactive payment for privately selected services, which places it in a Burlington/Carter framework. However, there is no reliable evidence that the parent has paid or is liable to Special Edge for services provided to the student, and in the absence of such evidence, the dispute over rates and the degree of the district's responsibility to pay Special Edge for services that the district should have provided must be resolved in another forum with appropriate jurisdiction over both of those entities. It may well be that Special Edge is owed something by someone if it can document in that forum that the sessions that were actually provided. The point where I disagree with the viewpoint of the IHO is in providing a substituted essential term that becomes binding on the district. Having determined that the evidence in the hearing record does not support the IHO's award of funding for the SETSS provided to the student

[7] The district is obligated to satisfy stay put, but there is no evidence that the district agreed to fund special education teacher services delivered by the private provider selected by the parent as the student's pendency placement (Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 533 [2d Cir. 2020] [noting that the district, not the parents, "is authorized to decide how (and where) the Students' pendency services are to be provided"]).

for the 2022-23 school year, the IHO's finding on that point must be reversed and 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.

THE CROSS-APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision, dated April 19, 2023, is modified by reversing that portion which ordered the district to directly pay Special Edge for up to five hours per week of SETSS delivered to the student between November 1, 2022 through June 2023 at a rate of $125 per hour.

Dated: **Albany, New York**
July 13, 2023

JUSTYN P. BATES
STATE REVIEW OFFICER