



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 23-110

**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:**

Law Office of Philippe Gerschel, attorneys for petitioner, by Philippe Gerschel, Esq.

Liz Vladeck, 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, in part, her request for respondent (the district) to fund private special education teacher support services (SETSS) delivered to her son during the 2022-23 school year and a bank of compensatory educational services for services not delivered during the 2022-23 school year. The 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 programming 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 §§ 3602-c; 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[a]). 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 unnecessary. Briefly, however, the student in this case was parentally placed at a religious nonpublic school, and on April 12, 2022, a CSE convened to conduct the student's annual review and develop an IESP for the 2022-23 school year (see Parent Ex. B at pp. 1, 16). The April 2022 CSE recommended that the student receive five periods per week of SETSS as a group service in a separate location, and related services consisting of two 30-minute sessions per week of individual speech-language therapy, one 30-minute session per week of speech-language therapy in a group, and two 30-minute sessions per week of individual occupational therapy (OT) (id. at p. 13).

On August 19, 2022, the parent executed a contract with AIM Educational Support Services (AIM), a private agency, to provide the student with five hours per week of SETSS at a rate of \$195.00 per hour (see Parent Ex. I).<sup>1</sup>

In a letter to the district dated September 6, 2022, the parent notified the district of her intention to implement the SETSS and related services recommended in the student's April 2022 IESP and to seek reimbursement or direct payment from the district (see Parent Ex. C at p. 2). The parent indicated in the letter that she had been "unable to locate providers for the SETSS and related services at the [district's] standard rate" (id.).

#### **A. Due Process Complaint Notice**

By due process complaint notice dated September 6, 2022, the parent alleged that the district failed to implement the SETSS and related services recommended in the April 2022 IESP for the 2022-23 school year, which constituted a failure to offer the student a free appropriate public education (FAPE) (see Parent Ex. A at pp. 1-2). The parent also noted that she had "located appropriate services providers independently for the 2022-23 school year at their prevailing rate" (id. at p. 2). The parent requested that an IHO issue an order implementing the April 2022 IESP as the student's pendency services, and, as relief, the parent initially reserved her right to seek compensatory educational services for any SETSS or related services not provided to the student for any period during the 2022-23 school year (id. at pp. 2-3). In addition, the parent requested an order directing the district to fund the providers selected by the parent at their prevailing rate and to fund a "bank of compensatory periods of SETSS and related services for the entire 2022-23 school year—or the parts of which were not serviced" (id. at p. 3).

#### **B. Impartial Hearing Officer Decision and Intervening Events**

On November 10, 2022, the parties proceeded to an impartial hearing, which concluded on May 8, 2023, after three total days of proceedings (see Tr. pp. 1-27). At the first two dates scheduled for the impartial hearing, the district did not appear (see Tr. pp. 1-2, 6-8). Nevertheless, the IHO issued an interim decision on pendency, dated November 10, 2022, which determined that the student's pendency placement lay in the April 2022 IESP and consisted of: five periods per

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<sup>1</sup> In addition to being referenced as AIM in the hearing record, the agency was also at times referred to as "Aim Further, Inc." (see, e.g., Parent Exs. E ¶ 4; F ¶ 2).

week of SETSS as a group service, two 30-minute sessions per week of individual speech-language therapy, one 30-minute session per week of speech-language therapy in a group, and two 30-minute sessions per week of individual OT (see Nov. 10, 2022 Interim IHO Decision at pp. 1-2). According to the interim decision on pendency, the order was effective as of the date of the parent's due process complaint notice, September 6, 2022 (id. at p. 2).

Notwithstanding the execution date of the contract with AIM in August 2022, the evidence in the hearing record reflects that the student began receiving five hours of individual SETSS per week during the week of January 24, 2023 (see Parent Exs. D ¶ 7; E ¶¶ 8, 10; F ¶ 3).

On the final day of the impartial hearing, May 8, 2023, the parent's attorney summarized the following as the relief sought: a continuation of the SETSS provided from January 24, 2023 (five periods per week), the issuance of related services authorizations (RSAs) for the student's related services of speech-language therapy and OT, and a bank of compensatory educational services consisting of 100 periods of "makeup SETSS for the 20 weeks missed between the beginning of the school year and January 23rd" (Tr. pp. 14-15). At that time, the district's attorney stated that the district did not dispute the services sought by the parent, and more specifically, the district's attorney agreed that the "programming and services" in the student's April 2022 IESP had not been implemented (Tr. pp. 15-16). The district's attorney also confirmed that the district was not contesting the providers' credentials, as set forth in parent exhibit G (see Tr. p. 16; Parent Ex. G). Next, the IHO turned to the issue of rates, and the IHO explained how he calculated the "market rate" in similar cases, to wit, by "ask[ing] Implementation to work together with the agency, the provider, and/or the [p]arents to determine the market rate at the time that the services were provided—the time and locale, [he] believe[d] [wa]s the language [he] use[d]" (Tr. pp. 16-17).<sup>2</sup> The district's attorney confirmed that the district did not take any issue with the IHO's method of calculating the rate (see Tr. p. 17).

Next, the IHO asked the parties about the parent's request for a bank of compensatory educational services (see Tr. p. 17). The IHO noted that the parent's attorney requested the compensatory educational services based on a "40-week school year, and further the fact that the [p]arent didn't secure active providers until . . . somewhere in January" (Tr. p. 17). According to the parent's attorney, the request for 100 periods of SETSS corresponded to the 20 weeks of missed services prior to January 24, 2023, when the student began receiving SETSS (see Tr. p. 18). The district's attorney expressed concern about any time that school was not in session for the first half of the school year, and, in response, the parent's attorney argued that the "program mandates services on a per-week basis without stating per week less any holidays" and, therefore, the parent continued to seek 100 periods of SETSS as compensatory educational services calculated by five periods of SETSS per week for 20 weeks that were not provided to the student (Tr. pp. 18-20). The district's attorney argued its position that the school year was 36 weeks long, and thus, would be amenable to an order for 18 weeks of services (see Tr. p. 20). However, the parent's attorney remained steadfast in its position for 20 weeks of missed SETSS but acknowledged that, regardless

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<sup>2</sup> It is altogether unclear why the IHO engaged in this discussion when the evidence in the hearing record reflects that the parent's contract with AIM reflected an agreed-upon rate of \$195.00 per hour for SETSS (see Parent Ex. I).

of whether the school year was 36 or 40 weeks, the actual amount of missed services—from September 2022 through January 23, 2023—was 20 weeks total (see Tr. pp. 20-22).<sup>3</sup>

As a final point, the IHO questioned the parties about the parent's request for RSAs to obtain the student's related services (see Tr. p. 22). The parent's attorney confirmed that the parent continued to seek RSAs for the related services for the entire school year and, similar to the requested compensatory educational services, on a 40-week school year basis (see Tr. pp. 22-25). The district did not assert any position with respect to the parent's request for RSAs (id.).

In a decision dated May 10, 2023, the IHO found that the district failed to offer the student a FAPE for the 2022-23 school year by failing to implement the student's IESP (see IHO Decision at pp. 4-5). The IHO also found that the district "acquiesced to a finding that the [parent's selected] providers were an appropriate fit for the student" (id. at pp. 5-6). As a result, the IHO concluded that the parent "secured educational instruction specially designed to meet the unique needs of their child, supported by such services as [we]re necessary to permit said child to benefit from instruction" (id. at p. 7). With regard to equitable considerations, the IHO found that the hearing record did not include any evidence upon which to "reduce or deny payments" (id. at pp. 7-8).

Next, the IHO addressed the issue of the hourly rate for SETSS, and concluded that the district's "'Implementation Unit,' when given the opportunity to execute interim orders and pendency decisions, [wa]s adept at identifying providers without issue," and thus, effectively set the "'market' for enhanced rate services" (IHO Decision at pp. 8-9).

As relief, the IHO ordered the district to pay for the following program and services "upon presentation of invoicing for [the] same": "SETSS, Direct Service, Group Service, Yiddish, 4 periods per week"; and a "bank of 32 hours of SETSS to be delivered over the following two years," noting that the bank of services would be forfeited if not used within that timeframe and that the district's payment of such services would be at the "market rate upon invoice for [the] same" (IHO Decision at p. 9).

#### **IV. Appeal for State-Level Review**

The parent appeals, arguing that the orders in the IHO's decision requiring the district to fund four periods of SETSS per week and a bank of 32 hours of compensatory educational services were "obvious, simple mistake[s]." The parent asserts that these errors in the decision were "simple drafting error[s]," which the IHO attested to in an affidavit and which the parent submits as additional documentary evidence in support of her request to correct the errors in the decision. The parent contends that the student is entitled to missed pendency services from September 2022 through January 23, 2023, in the amount of 90 periods of SETSS for 18 weeks of missed services. As relief, the parent seeks to nullify and void the IHO's decision and to order the district to fund the student's five periods of SETSS per week "at a reasonable market rate," continue to fund the student's related services of OT and speech-language therapy, and to fund a bank of compensatory

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<sup>3</sup> To be clear, the 10-month school year consists of 36 weeks (180 school days divided by 5 days per week), not 40 weeks, as argued by the parent's attorney; if a student attended 12-month programming, then the school year would consist of 42 weeks (i.e., 36 weeks plus 6 weeks during summer) (see Educ. Law § 3604[7]; 8 NYCRR 175.5[a], [c]; 200.1[eee]).

educational services "corresponding to [five] periods per week of missed services for the time between the beginning of the 2022-2023 school year and January 23, 2023."

In an answer, the district responds to the parent's allegations, and generally agrees with the parent's request to annul the IHO's so-ordered portion of the decision due to the IHO's inadvertent errors. Overall, the district asserts that the parent's appeal should be granted and that the relief ordered should be aligned with the relief agreed upon and the hearing record in this proceeding.

## V. Discussion

Here, neither party challenges the IHO's findings that the district failed to offer the student a FAPE for the 2022-23 school year, that the parent's selected SETSS provider(s) was appropriate to meet the student's needs, and that the parent was entitled to funding of SETSS and a bank of compensatory educational services. 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]).

The parent's appeal and the district's answer thereto focus on what the parties agree to be drafting errors in the IHO's decision with respect to the relief ordered (see generally Req. for Rev.; Answer). To be sure, the IHO's decision is riddled with errors. For example, the IHO indicated that the parent's due process complaint notice was dated October 23, 2022 when it was actually dated September 6, 2022; the IHO indicated in a footnote that the parties stipulated on a bank of compensatory educational services that were not delivered between "September and October, 2022" consisting of "32 hours of SETSS to be delivered over the following two years" and that the district was to pay for such services "at market rate upon invoice for [the] same," when the parties, at a minimum, agreed to 90 periods of SETSS for services not delivered between September 2022 through January 23, 2023; and the IHO also mistakenly noted that the student's "February 24, 2021" IESP mandated the provision of "SETSS, Direct Service, Group Service, Yiddish, 4 periods per week," when the student's April 2022 IESP mandated the provision of five periods per week of SETSS as a group service in English (compare IHO Decision at pp. 1-4, with Parent Ex. A at p. 1, and Tr. pp. 17-22, and Parent Ex. B at pp. 1, 13).

In addition, as noted by the parties, when compared to the transcripts of the impartial hearing, it also appears that the IHO's decision included errors with respect to the relief ordered, which directed the district to pay for "SETSS, Direct Service, Group Service, Yiddish, 4 periods per week"; and to fund a bank of compensatory educational services consisting of "32 hours of SETSS to be delivered over the following two years" with payment to be made by the district at "market rate upon invoice for [the] same" (compare IHO Decision at p. 9, with Tr. pp. 14-22).

A review of the allegations in the parent's appeal, together with the district's answer reveal that the parties generally agree that the IHO's decision contained errors with respect to the relief ordered (see Req. for Rev. ¶ 1; Answer ¶¶ 4-5). The parent seeks to nullify the IHO's decision and, as relief, seeks an order directing the district to: fund the student's five periods per week of SETSS at a "reasonable market rate," continue to fund the student's related services, and to establish a bank of compensatory educational services "corresponding to [five] periods per week of missed services for the time between the beginning of the 2022-2023 school year and January

23, 2023" (Req. for Rev. at pp. 4-5). In further support, the parent submits an affidavit by the IHO, which states that his "intention was to order the [d]istrict to fund the [five] periods per week of SETSS with direct payment to the provider at the reasonable market rate, and to continue funding the [s]peech-[l]anguage therapy and [OT] via RSA"; and "to additionally fund a bank of compensatory educational hours of 90 SETSS periods for use over the next two calendar years, funded at [the] reasonable market rate with a provider of [the p]arent's choosing" (Req. for Rev. Ex. 1 ¶ 4). The IHO also acknowledged that the decision was "processed in error" (*id.*).<sup>4</sup>

In its answer, the district agrees with the parent that the IHO mistakenly ordered the district to fund "[four] sessions per week of SETSS and did not include all of the Agree Upon Relief" in the IHO's decision (Answer ¶ 4). The district also asserts that the "so-ordered portion" of the IHO's decision should be annulled, and affirmatively asserts that the parent is entitled to the agreed-upon relief (*id.* ¶ 5). Overall, the district requests that the parent's appeal be granted and that the IHO's decision "be corrected pursuant to the [hearing] record in this case" (*id.*).<sup>5</sup>

Based on the parties' assertions on appeal, neither party disputes that the IHO's decision should have included an order directing the district to fund the requested five periods per week of SETSS at reasonable market rate and 90 hours of compensatory SETSS. As there was no dispute before the IHO concerning these aspects of the relief sought, aspects of the IHO's orders inconsistent therewith appear to have been typographical errors, and on appeal the parties agree that the IHO's decision should be modified, the IHO's decision will be modified accordingly.

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<sup>4</sup> An IHO's jurisdiction is limited by statute and regulations and there is no authority for an IHO to reopen an impartial hearing, reconsider a prior decision, or retain jurisdiction to resolve future disputes between the parties (see, e.g., Application of a Student with a Disability, Appeal No. 17-021; Application of the Dep't of Educ., Appeal No. 16-065; Application of a Student with a Disability, Appeal No. 16-035; Application of the Dep't of Educ., Appeal No. 15-073; Application of a Student with a Disability, Appeal No. 15-026; Application of the Dep't of Educ., Appeal No. 12-096; Application of a Student with a Disability, Appeal No. 11-046; Application of the Dep't of Educ., Appeal No. 11-014; Application of the Dep't of Educ., Appeal No. 08-024; Application of the Bd. of Educ., Appeal No. 07-081; Application of the Dep't of Educ., Appeal No. 06-133; Application of a Child with a Disability, Appeal No. 06-021; Application of a Child with a Disability, Appeal No. 05-056; Application of the Bd. of Educ., Appeal No. 02-043; Application of the Bd. of Educ., Appeal No. 98-16; see also J.T. v. Dep't of Educ., Hawaii, 2014 WL 1213911, at \*10 [D. Haw. Mar. 24, 2014]; Application of the Dep't of Educ., Appeal No. 08-041). Rather, the IDEA, the New York State Education Law, and federal and State regulations provide that an IHO's decision is final unless appealed to an SRO (20 U.S.C. § 1415[i][1][A]; Educ. Law § 4404[1][c]; 34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]). While the IHO did not have authority to retain jurisdiction over the matter, it is entirely unclear why the parties had to pursue an appeal rather than settle the matter in accordance with their apparent agreement.

<sup>5</sup> The district does not speak to the parent's request for an order concerning related services. The parent requests that IHO's decision be modified to order the district to "continue to fund" speech-language therapy and OT services (Req. for Rev. at p. 4). As noted above, the IHO indicated his intent to order the district to fund related services "via RSA," which is consistent with the parties' agreement during the impartial hearing (Tr. pp. 14-16; Req. for Rev. Ex. 1 ¶ 4). However, the 2022-23 school year at issue has ended and the parent has not sought compensatory related services for any services that the student did not receive. As there does not appear to be any material dispute between the parties regarding the funding of related services delivered during the 2022-23 school year, and the hearing record is not developed regarding what the student received and what the district has or has not funded, there is no basis to order the district to "continue to fund" related services beyond the 2022-23 school year.

**VI. Conclusion**

Given the parties' respective positions, the necessary inquiry is at an end and no further analysis of issues is required.

**THE APPEAL IS SUSTAINED.**

**IT IS ORDERED** that the IHO's decision, dated May 10, 2023, is modified according to the parties' agreement set forth in their respective pleadings on appeal, by vacating that portion which ordered the district to fund four periods per week of SETSS and a bank of 32 hours of compensatory SETSS; and

**IT IS FURTHER ORDERED** that, consistent with the parties' agreement, the district shall fund five periods per week of SETSS delivered to the student during the 2022-23 school year at a reasonable market rate; and

**IT IS FURTHER ORDERED** that, consistent with the parties' agreement, the district shall establish a bank of compensatory educational services corresponding to five periods per week of missed SETSS for the time between the beginning of the 2022-2023 school year and January 23, 2023, for a total of 90 periods of SETSS, to be used within two years of the date of this decision.

**Dated:**            **Albany, New York**  
                         **August 7, 2023**

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**SARAH L. HARRINGTON**  
**STATE REVIEW OFFICER**