The University of the State of New York

The State Education Department
State Review Officer
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No. 23-122

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

Liz Vladeck, General Counsel, attorneys for respondent, by Cynthia Sheps, 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

The parties' familiarity with this matter is presumed and, therefore, the detailed facts and procedural history of the case and the IHO's decision will not be recited here. Briefly, however, the hearing record indicates that a CSE convened on April 12, 2019, to formulate an individualized

educational services plan (IESP) for the student providing for the delivery of dual enrollment special education services to the student by the public school while the student attended a nonpublic school selected by the parents (Parent Ex. B). Finding the student eligible for special education services as a student with a speech or language impairment, the April 2019 CSE recommended that the student receive the following services on a weekly basis: four periods of SETSS in a group, two 30-minute sessions of occupational therapy (OT) in a group, and two 30-minute sessions of individual speech-language therapy (id. at pp. 7-8).

According to the parent, for the 2022-23 school year the student, was parentally placed at a parochial school (Parent Ex. A at p. 1).

On February 28, 2023, the parent executed an agreement with Special Edge, regarding 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).[1]

In a letter to the district dated March 9, 2023, the parent indicated that the district had "failed to assign a provider" to deliver the services mandated in the student's "CSE/IESP" 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).

In a due process complaint notice, also dated March 9, 2023, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) and appropriate equitable services for the 2022-23 school year (see Parent Ex. A).

After a prehearing conference on April 17, 2023, an impartial hearing took place on May 16, 2023 before the Office of Administrative Trials and Hearings (OATH) (Tr. pp. 1-61; IHO Ex. I). In an interim decision dated April 19, 2023, the IHO "so ordered" that the student's pendency placement be based on the April 2019 IESP (Interim IHO Decision). In a final decision dated May 16, 2023, the IHO determined that the district failed to offer the student a FAPE "on an equitable basis" for the 2022-23 school year, that the student was entitled to receive four periods of SETSS weekly, and that the parent was entitled to district funding of the private SETSS she obtained for the student during the 2022-23 school year; however, the IHO reduced the rate for funding those services from $195 per hour to $75 per hour after finding the requested rate to be "unreasonable" (IHO Decision at pp. 1-3). As relief, the IHO ordered the district to fund the private SETSS for up to four periods of SETSS from March 1, 2023 through the end of the 2022-23 school year at the rate of up to $75 per hour for services rendered (id. at p. 4). The IHO also required that the district convene a CSE to develop an IEP or IESP for the student (id.). The IHO denied the parent's request for compensatory education (id. at pp. 3-4).

IV. Appeal for State-Level Review

The parties' familiarity with the particular issues for review on appeal in the parent's request for review and the district's answer and cross-appeal thereto is also presumed and, therefore, the allegations and arguments will not be recited here in detail. The gravamen of the parties' dispute

[1] Although the document was dated July 1, 2022, the parent electronically signed the document on February 28, 2023 (see Parent Ex. D).

on appeal is whether the IHO erred in reducing the hourly rate for the funding of SETSS and, via the district's cross-appeal, whether 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.

V. Applicable Standards

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

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]).[2] "Boards of education of all school districts of the state shall furnish services to students who are residents of this state and who attend nonpublic schools located in such school districts, upon the written request of the parent" (Educ. Law § 3602-c[2][a]). In such circumstances, the district of location's CSE must review the request for services and "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an [IEP]" (Educ. Law § 3602-c[2][b][1]). The CSE must "assure that special education programs and services are made available to students with disabilities attending nonpublic schools located within the school district on an equitable basis, as compared to special education programs and services provided to other students with disabilities attending public or nonpublic schools located within the school district (id.).[3] Thus, under State law an eligible New York State resident student may be voluntarily enrolled by a parent in a nonpublic school, but at the same time the student is also enrolled in the public school district, that is dually enrolled, for

[2] State law provides that "services" includes "education for students with disabilities," which means "special educational programs designed to serve persons who meet the definition of children with disabilities set forth in [Education Law § 4401(1)]" (Educ. Law § 3602-c[1][a], [d]).

[3] State guidance explains that providing services on an "equitable basis" means that "special education services are provided to parentally placed nonpublic school students with disabilities in the same manner as compared to other students with disabilities attending public or nonpublic schools located within the school district" ("Chapter 378 of the Laws of 2007–Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the Individuals with Disabilities Education Act (IDEA) 2004 and New York State (NYS) Education Law Section 3602-c," Attachment 1 at p. 11, VESID Mem. [Sept. 2007], available at http://www.p12.nysed.gov/specialed/publications/policy/nonpublic907.pdf). The guidance document further provides that "parentally placed nonpublic students must be provided services based on need and the same range of services provided by the district of location to its public school students must be made available to nonpublic students, taking into account the student's placement in the nonpublic school program" (id.).

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 last program developed for the student was the April 2019 IESP and that the district did not supply any providers to deliver services to the student during the 2022-23 school year, and as a 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.[4] 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."]).

Although the IHO did not explicitly do so in the decision, 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

[4] The parties do not dispute that the student was entitled to receive the services set forth in the April 2019 IESP during the 2022-23 school year (IHO Decision at p. 2; Tr. pp. 6-7). During the impartial hearing, the parent withdrew the claim for related services (Tr. p. 8).

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 to the extent that they were implemented by the parent (see IHO Decision at pp. 2-3). 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 amount of 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 July 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, although he signed the contract, he did not date it (Tr. pp. 13, 17). The administrator discussed the factors that went into determining the hourly rates to be charged for the agency's SETSS, which were set at the beginning of each school year (Tr. pp. 12-16). At the time of the impartial hearing in May 2023, the administrator provided direct testimony by affidavit that the agency developed a budget and, based on the budget and what is considered "market rate," determined the appropriate rate of services for the student was $195 per hour (Parent Ex. F ¶¶ 7-8; see Tr. p. 14).[5] The IHO

[5] The administrator indicated that the rate charged by Special Edge for the student's SETSS included the $75 per hour plus "mandated payroll taxes . . . and additional support" paid to the provider as well as agency costs for expenses such as supervision and behavioral specialists, educational materials, office rent and staff, office equipment, utility bills, internet and other related costs, provider bonuses, monthly workshops, case management, assessment tools, and "other administrative costs" (Tr. p. 15; Parent Ex. F ¶¶ 7-8). The student's SETSS provider

questioned the administrator as to why the contract did not specify a rate for the SETSS and the administrator responded that there was an "onboarding packet" that made the parent aware of the hourly rate, however there is no "onboarding" packet in the evidence in the hearing record either (Tr. pp. 25-26).

The administrator indicated that the student was "entitled to 4 hours per week of SETSS" (Parent Ex. F ¶ 3). 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 "while the case is pending and we don't know for sure that the Parent will have to pay, we still wait with the invoices. If the Parents do not prevail at the hearing then they will -- we will share them all the invoices and they'll be financially responsible to pay" (Tr. pp. 20-21; Parent Ex. F ¶ 4). The hearing record does not include any invoices for services. Moreover, contrary to the term of the contract, which was for the 2022-23 school year, the agency did not deliver services to the student until March 2023, and the hearing record does not indicate whether the student was receiving SETSS prior to March 2023 from some other source (Tr. pp. 20, 40). Further, the agency only delivered three hours per week of group SETSS to the student, despite the parent's position and the agency's statements that the student was entitled to and required four hours per week (compare Tr. pp. 32, 34-38, and Parent Ex. E ¶ 5, with Tr. p. 39, and Parent Exs. E ¶ 4; F ¶ 3).[6]

The attorney for the parent indicated that the parent would be called as a witness; however, for reasons that are unclear, the parent did not appear at the impartial hearing (Tr. pp. 5, 49).

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. pp. 20-21; Parent Exs. D-F). 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 for the purported full term of the contract and has not invoiced the parent or the district; (Tr. pp. 20-21; Parent Ex. E ¶ 4). While the district is responsible to fund or provide the services described in the 2019 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]

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testified that he delivered the student's SETSS in a group of four and was "paid $75 for the first student" and then "a smaller amount" of $20 for every additional student (Tr. pp. 37-38).

[6] The student's SETSS provider testified that the student only received three hours per week of SETSS because he was "receiving other services that overlap[ped] with the time that [the provider] had available" (Tr. p. 34).

[7] The district is obligated to satisfy stay put, but there is no evidence that the district agreed to fund special

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 April 2019 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 unilaterally selected services, which places it the same style of analysis as 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 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 the sessions that were actually provided. I need not pass judgment on the IHO's determination that the rate for services charged by Special Edge was excessive, but I do set aside the IHO's order for the district to fund such services.[8] 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 for the 2022-23 school year, the IHO's finding on that point must be reversed and the necessary inquiry is at an end.

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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"]).

[8] Although making a finding regarding the parent's claim on appeal that the IHO erred in reducing the rate for payment of SETSS from $195 per hour to $75 per hour is unnecessary in light of the outcome of this decision, I note that the IHO had some basis in the record for determining that the rate charged by Special Edge was unreasonable (see IHO Decision at pp. 2-3). Testimony from the Special Edge administrator and the SETSS provider employed by the agency to provide the student with group SETSS in the parochial school revealed that the SETSS provider bills her services at the rate of $75 per hour to deliver SETSS in the school and that she receives an additional $20 per hour for each additional student that is added to a group of students who receive SETSS at the same time and location (Tr. pp. 36-37; Parent Ex. F ¶ 8). Further testimony revealed that the student was the last student added to a group of four total because the student began receiving SETSS from the agency in March 2023, well into the 2022-23 school year (Tr. pp. 40, 43-47). Thus, for a group of four students the SETSS provider would be paid $75 plus an additional $60 for the three additional students for a total of $135 (Tr. p. 46). The provider did not know if the agency billed $195 per hour for each of the four students in the group, but the agency intended to charge $195 per hour to provide SETSS to this student (Tr. pp. 22, 46; Parent Ex. F ¶ 8). The IHO calculated that, at times when the student would receive SETSS in a group of four, the provider would receive $135 per hour while the agency would bill for $195 per student for a total of $780 per hour leaving $645 per hour to go to the agency rather than the provider (IHO Decision at p. 3). I note that the agency has not been candid with the full details of the amounts it intends to bill for group SETSS in its contract with the parent or during the impartial hearing, and further that the contention that the rate charged by the agency is excessive may be legitimate; however, I need not render a finding regarding the IHO's decision to select $75 in remuneration for the cost of an additional student in a group due to the disposition herein.

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

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision, dated May 16, 2023, is modified by reversing that portion which ordered the district to directly pay Special Edge for up to four hours per week of SETSS delivered to the student from March 1, 2023, to the end of the 2022-23 school year at a rate of $75 per hour.

Dated: **Albany, New York**
July 28, 2023

JUSTYN P. BATES
STATE REVIEW OFFICER