**FINDINGS OF FACT AND DECISION**

Case Number: [REDACTED]

Student’s Name: [REDACTED]

School District: [REDACTED]

Impartial Hearing Officer: Richard J. Zeitler, Jr.

Date of Filing: June 16, 2024

Hearing Requested by: Parent

Dates of Hearing: 09/24/2024

Record Close Date: 03/14/2025

Date of Decision: 03/14/2025

**Names and Titles of Persons Who Appeared [REDACTED]**

**For the Student**

[REDACTED], Parent Attorney

[REDACTED], Parent

**For the New York City Department of Education**

[REDACTED], Department Representative

**Background**

On or about June 16, 2024, the Parent, by and through the Parent’s Attorney, filed a due process complaint (DPC) against the New York City Department of Education (DOE or Department) (*See* Ex. A), on behalf of the Student, pursuant to the Individuals with Disabilities Education Act (IDEA or the Act) (*see* 20 U.S.C. § 1415(f)), and the New York State Education Law (*see* Educ. Law § 4401 *et seq*.). The DPC asserts that a free appropriate public education (FAPE) and equitable services have been denied in the implementation of services during the Student’s attendance at a nonpublic school (NPS) for the 2023-2024 school year (*see* Ex. A). The Parent now requests that the Department fund the cost of special education and a related service at enhanced rates for the 2023-2024 school year (*see id*.).

**Procedural History**

I issued a Scheduling Order on August 20, 2024, and Orders of Extension on August 20, 2024, and September 24, 2024 (*see* IHO Exs. I to III, respectively). The merits hearing was held before me on September 24, 2024,[[1]](#footnote-1) wherein all the exhibits were admitted into evidence, except for one page of one exhibit (*see* Exs. 1 to 7, A to D, and E-2 to J).[[2]](#footnote-2) The Parent also offered an additional document, which I admitted as my own exhibit (*see* IHO Ex. IV). The Department did not produce any witnesses, while the Parent offered the affidavit testimony of the SETSS[[3]](#footnote-3) Provider Agency’s Technical Supervisor and the live testimony of the Parent.[[4]](#footnote-4) This decision now follows.[[5]](#footnote-5)

**I. Pendency**

At the hearing and in the DPC, the Parent Attorney requested pendency, from the date of filing the DPC to the end of the 2023-2024 school year (*see* Tr. at pp. 32 to 33). The Department Representative argued that that pendency is unavailable in State law cases, but if it were, the DOE’s position would be that pendency would still be unavailable in this case because the Parent signed a “SETSS authorization form,”[[6]](#footnote-6) which means that “the program has been implemented by the DOE” and therefore there is no entitlement to pendency (*id*. at pp. 33 to 35).

The IDEA and New York State Education Law require that a student remain in his or her then-current educational placement, unless the student’s parents and the board of education otherwise agree, during the pendency of any proceedings relating to the identification, evaluation, or placement of the student. 20 U.S.C. § 1415(j); N.Y. Educ. Law §§ 4404(4); 34 C.F.R. § 300.518(a); 8 NYCRR § 200.5(m); *see also Arlington Cent. Sch. Dist. V. L.P.*, 421 F. Supp. 2d 692, 696 (S.D.N.Y. 2006). Pendency has the effect of an automatic injunction, and the party requesting it need not meet the requirements for injunctive relief such as irreparable harm, likelihood of success on the merits, and a balancing of the hardships. *See Zvi D. v. Ambach*, 694 F.2d 904, 906 (2d Cir. 1982).

The DOE opposes pendency because the Student is in a parentally placed nonpublic school and thus, according to the Department Representative, has no right to implementation of equitable services in pendency under N.Y. Educ. Law § 3602-c. The Department’s position, however, has been rejected by the SRO, which was “unpersuaded by the district's argument that a student who has an IESP pursuant to New York state's dual enrollment statute has no right to due process—and thus pendency—when seeking to challenge the district's implementation of the plan” (*Application of a Student with a Disability*, Appeal No. 23-068 (Jun. 30, 2023), at pg. 10).

Parents of students with disabilities who have voluntarily enrolled their children in nonpublic schools may seek to obtain educational services, commonly known as “equitable services,” for their children at the DOE’s expense. *See* N.Y. Educ. Law § 3602-c. Such services include “special educational programs designed to serve persons who meet the definition of children with disabilities as set forth in [N.Y. Educ. Law § 4401].” N.Y. Educ. Law §§ 3602-c(1)(a, d). Once requested, the district of location’s Committee on Special Education (“CSE”) must “develop an [IESP] for the student based on the student’s individual needs in the same manner and with the same contents as an individualized education program.” N.Y. Educ. Law

§ 3602-c(2)(b)(1). The district must also ensure that such educational services are “made available to students with disabilities attending nonpublic schools” on an “equitable basis” as compared to the services delivered to students attending public schools located within the district. *Id*.

Parents who disagree with the CSE’s recommendations on their children’s IESPs are permitted to seek review “pursuant to the provisions of [N.Y. Educ. Law § 4404].” *Id.* While the District is correct that § 3602-c does not explicitly address implementation failures of the type at issue in this case, the New York State Education Department has opined that “[a] parent of a student who is a NYS resident who disagrees with the individual evaluation, eligibility determination, recommendations of the CSE on the IESP *and/or the provision of special education services* may submit a Due Process Complaint Notice to the school district of location.” *See* *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* (Sept. 2007) (emphasis added)[[7]](#footnote-7); *see also Gabel ex rel. L.G. v. Bd. Of Educ.*, 368 F. Supp. 2d 313 at 332–33 (S.D.N.Y. May 10, 2005) (holding that an IHO has jurisdiction to hear claims regarding a district’s failure to provide related services to a parentally placed student attending a nonpublic school). Parents, therefore, have a right to initiate due process proceedings under N.Y. Educ. Law § 4404 for implementation failures when their children are parentally placed pursuant to N.Y. Educ. Law § 3602-c. To find otherwise would leave a parent without an avenue to challenge a district’s failure to provide the services to which their child is entitled.

Section 4404, in turn, establishes a student’s right to pendency. N.Y. Educ. Law

§ 4404(4)(a) (“During the pendency of any proceedings conducted pursuant to this section . . . unless the local school district and the parents or persons in parental relationship otherwise agree, the student shall remain in the then current educational placement of such student.”). Because § 3602-c(2)(b)(1) expressly incorporates § 4404’s due process procedures, the DOE’s argument is without merit. *See also Application of a Student with a Disability*, Appeal No. 23-068, *supra*. (noting that the 2004 revisions to Education Law “removed the requirement that the Commissioner of Education had to review claims regarding the refusal or failure of a board of education to provide services in accordance with Education Law § 3602-c and, instead, left a cross-reference to Education Law § 4404 as the vessel for review for such claims”).Accordingly, I find that the Student is entitled to pendency as a matter of law. The SETSS authorization form cited by the Department Representative (*see* Ex. J) does not change this, because even if the Department had implemented the program from the date the DPC was filed (and that will be discussed later in this decision), the *right* to pendency as a procedural mechanism would have remained.

The next issue is determining the appropriate placement. Under the IDEA, this inquiry focuses on identifying what specific services and placement are required to maintain the student’s "then current educational placement” because the district must continue to finance those services and placement until the dispute is resolved. *Zvi D. v. Ambach, supra*, 694 F.2d 904. “To cut off public funds would amount to a unilateral change in placement, [which is] prohibited by the Act.” *See id.* (*citing Monahan v. State of Neb.*, 491 F.Supp. 1074 [D. Neb. 1980]). Hearing officers and courts have the authority to address disputes regarding the pendency and to determine what constitutes the then current educational placement. *See* *Analysis and Comments to the Regulations*, Federal Register, Vol 71, No. 156, Page 46704 (August 14, 2006). The phrase “then current educational placement” is not defined in the IDEA or New York statute, but it has been found to mean “the last agreed upon placement at the moment when the due process proceeding is commenced,” *Arlington Cent Sch. Dist. v. L.P.*, 421 F.Supp. 2d 692. 696 (S.D.N.Y. 2006) (citing *Murphy v. Arlington Cent. Bd. of Educ.*, 86 F.Supp. 2d 354, 359 [S.D.N.Y. 2000], *aff’d* 297 F.3d 195 [2002]), including: “(1) 'the placement described in the child's most recently implemented IEP'; (2) 'the operative placement actually functioning at the time when the stay put provision of the IDEA was invoked'; or (3) 'the placement at the time of the previously implemented IEP.'" *DOE v. East Lyme Bd. of Educ. et al*, 790 F.3d 440, 452 (quoting *Mackey ex rel. Thomas M. v. Bd. of Educ. for the Arlington Cent. Sch. Dist*., 386 F.3d 158, 160 [2d Cir. 2004]).

If there is an agreement between the parties on placement during the proceedings, it need not be reduced to a new IEP or IESP, and it can supersede the prior unchallenged IEP or IESP as the then-current placement. *See* 20 U.S.C. § 1415(j); *see also* *Bd. of Educ. of Pawling Cent. Sch. Dist. v. Schutz*, 137 F. Supp. 2d 83 (N.D.N.Y.2001), *aff'd*, 290 F. 3d 476, 484 (2d Cir. 2002), *cert. denied*, 123 S. Ct. 1284 (2003). This has not always included resolution agreements that resolve prior DPCs, *see* *Zvi D. v. Ambach, supra*, but the Southern District of New York has permitted a prior resolution agreement to form the basis for pendency in a subsequent school year when there is no express language in the resolution agreement that limits the agreement to the one school year, such as “funding is being provided with the stipulation that a review . . . will be conducted at the end of the current school year *with a view toward placing* [the student] *in an appropriate public program in September*[.]” *Gabel* ex rel. *L.G. v. Bd. of Educ.*, 368 F.Supp. 2d 313, 324-5 (S.D.N.Y. 2005) (emphasis in original).

In addition to agreements, a prior impartial hearing officer's findings of fact and decision that was not appealed may also establish a student's current educational placement for purposes of pendency. *See Student X v. New York City Dep't of Educ.*, 51 IDELR 122 (2008) [citing *Letter to Hampden*, 49 IDELR 197 [OSEP 2007]); *see also* 34 C.F.R. § 300.518(d), and 8 NYCRR 200.5(m)(2). Moreover, if “a State review official in an administrative appeal agrees with the child's parents that a change of placement is appropriate, that placement must be treated as an agreement between the State and the parents” for purposes of establishing the student's current educational placement. *See Bd. of Educ. of Pawling Cent. Sch. Dist. v. Schutz*, *supra*. Lastly, a pendency determination can be established by a court on appeal from an SRO decision. *See id*. Such decisions must be final decisions on the merits. *See Student X v. New York City Dep't of Educ.*, *supra*.

As to the “placement” of pendency, this refers not just to a student’s classroom setting, but also to their related services. *Doe v. East Lyme Bd. of Educ.*, 790 F.3d 440, 453 (2d Cir. 2015) (“the IDEA defines ‘free appropriate public education’ to include ‘special education *and related services*’”) (*quoting* 20 U.S.C. § 1401(9)) (emphasis in original); *see also* *Letter to Baugh*, 211 IDELR 481 (OSEP 1987) (“The term ‘present educational placement’ . . . would generally be taken to mean the current education *and related services* provided in accordance with the child’s most recent individualized education program” (emphasis added)).

Here, the Parent requests that pendency be ordered in the “last program the . . . DOE . . . developed for the child that the [P]aren’t agreed with . . . an Individualized Education Services Program developed on 1-25-24 (IESP)” (Ex. A-1; *see also* Exs. 2 and B). The Department did not dispute that the 2024 IESP was the last agreed program; nor did it offer an alternative program that could have been argued to have been more appropriate for purposes of pendency. I therefore find, on this record, that the January 25, 2024, IESP represents the then current placement and thus the pendency program for the Student for the 2023-2024 school year, as of the filing of the DPC.

**II. Findings of Fact and Analysis**

At the hearing, the following was not in dispute. The Student turned 9 years old and attended the Private School during the 2023-2024 school year as an fourth grader (*see* Exs. A-1 and I-1; *see also* Tr. at pg. 44). The Student has been classified by the Committee on Special Education (CSE) as a student with a Speech or Language Impairment (*see* Exs. 2-1 and B-1), and in an IESP developed on January 25, 2024, the CSE recommended “Special Education Teacher Support Service (SETSS) . . . Group service . . . Language of Service: Yiddish . . . 3 [periods] per week . . . [and] Speech-Language Therapy [(SLT)] . . . Individual service . . . Language of Service: Yiddish . . . 2 time(s) per week [at] 30 minutes” (Exs. 2-9 and B-9). The Department did not offer the Parent any specific providers, but the Parent found a provider who could administer the SETSS at an enhanced rate (*see* Ex. A).

The Parent testified as follows. She was unable to find a SLT provider for the 2023-2024 school year, but she was able to find the SETSS Provider Agency, which administered three hours of SETSS per week (*see* Tr. at pp. 39 to 40 and 45). She is fluent in English and Yiddish and she knows that the SETSS Instructor was fluent in English and Yiddish, based upon her experiences with the Instructor (*see id*. at pg. 43). She learned about the SETSS Provider Agency (Agency) from the Private School (*see id*. at pp. 45 to 46). The Agency helped her find her attorneys but she did not know if the Agency helped pay for the attorneys (*see id*. pp. 47 to 48).

After considering the evidence, including all the admitted documents and the witness testimony, I make the following findings. All exhibits and testimony described below have been credited, unless otherwise indicated. The weight I afford credited exhibits and testimony is reflected in the analysis.

FAPE and Equitable Services

The IDEA and the New York Education Law require school districts to offer a FAPE to each child with a disability residing in their district who requires special education programs or services.[[8]](#footnote-8) A FAPE consists of specialized education and related services designed to meet a student’s unique needs, provided in conformity with a comprehensive IEP or IESP.[[9]](#footnote-9) When the program is developed in New York City, a FAPE requires the DOE to both comply with the procedural requirements set forth in the IDEA, and recommend a placement and program that are reasonably calculated to enable the student to receive educational benefits.[[10]](#footnote-10)

Disputes between a parent and a school district are resolved via an impartial due process hearing, as called for by the IDEA.[[11]](#footnote-11) The remedies available for a school district’s failure to provide appropriate equitable services under dual enrollment is similar to the remedy for a school district’s failure to provide appropriate services under the IDEA.[[12]](#footnote-12) The only limitations on the scope of relief are that it must “be appropriate in light of the purpose of the Act,”[[13]](#footnote-13) and that damage awards are not available under the IDEA.[[14]](#footnote-14) An IHO “may award various forms of retroactive and prospective equitable relief, including reimbursement of tuition, compensatory education, and other declaratory and injunctive remedies.”[[15]](#footnote-15)

FAPE on an Equitable Basis in the Implementation

Under the IDEA and the NY State Education Law, school districts have the burden of proof that a FAPE on an equitable basis has been provided to the student, except that where tuition reimbursement is sought, the parent has the burden of proof with respect to the appropriateness of the parent’s chosen educational placement.[[16]](#footnote-16) I must, therefore, determine whether the Department met its burden to demonstrate that the IESP program was implemented to provide this Student with educational benefits.

The DOE developed the program in evidence and therefore was responsible for implementing services to the Student. It offered no evidence that DOE providers were assigned to the Student, or that the Department otherwise itself contracted for the provision of the IESP services for the 2023-2024 school year, instead leaving it to the Parent to find a provider. It has been held, however, that the Department may not effectively compel the Parent to resort to self-help in obtaining a special education provider.[[17]](#footnote-17) Such a “*de facto* delegation from the district to the parent of the obligation to find a SETSS provider . . . at an acceptable rate is manifestly unreasonable,”[[18]](#footnote-18) and a violation of State law.[[19]](#footnote-19) The DOE thus failed to implement the program, which constitutes a denial of FAPE on an equitable basis.[[20]](#footnote-20) The Department, therefore, will be responsible for the services the Parent obtained for the 2023-2024 school year.

Equitable Award for Failure Provide a FAPE on an Equitable Basis

In determining the relief for the denial of a FAPE on an equitable basis when, as here, the Parent has not paid the provider and seeks direct funding, the State Review Office (SRO) has held that the “matter is in a subset of more complicated cases in which the financial injury to the parent and the appropriate remedy are less clear.[[21]](#footnote-21) Because the Parent had to find the provider on her own and because “caselaw supports reimbursement and direct remedies in a unilateral placement case,” the SRO has determined that the question of whether a SETSS provider should be directly paid is somewhat akin to the *Burlington*/*Carter* framework, which “forecloses any complete disavowal of the parent’s burden of production and persuasion related to the private, unilateral services obtained by the parent.”[[22]](#footnote-22) Thus, in a case such as this, where the central issue is whether a third-party SETSS provider selected by a parent should be remunerated with an enhanced rate over what the Department normally pays, the Parent’s evidence must be scrutinized, consistent with my obligation and equitable authority to ensure that the remedy “be appropriate in light of the purpose of the Act.”[[23]](#footnote-23) The evidence therefore must show that the SETSS providers’ rates are reasonable and appropriate under the circumstances.

The factors that have been found relevant to the reasonableness of a SETSS rate include: (1) the Provider’s explanation of the rate, including its costs and overhead[[24]](#footnote-24); (2) the qualifications of its instructors the value that specialized certification, such as a bilingual extension, adds to instruction[[25]](#footnote-25); (3) whether the Parent directly paid the Provider or is contractually obligated to pay the Provider in the event the Department is not ordered to fund SETSS at the requested rate[[26]](#footnote-26); (4) how the Agency and providing instructor’s “services were specially designed to meet the [S]tudent’s [unique] needs”[[27]](#footnote-27); (5) whether the Agency implements the program exactly as described in the most recent IEP or IESP and, if not, the Parent’s explanation for why the program is not being followed as recommended; and (6) the Parent’s access to, and efforts at, utilizing DOE resources to locate DOE-approved providers.[[28]](#footnote-28) I will therefore determine, in light of these factors, whether the requested rate is unreasonable.[[29]](#footnote-29) Finally, I will consider (7) when the Parent notified the Department of the enhanced rate claim, because this establishes the first date the DOE would have had an opportunity to modify its offered rate for SETSS in light of the Parent’s claims.[[30]](#footnote-30) In deciding the ultimate remedy, however, I am mindful that regardless of any deficiencies in the Parent’s justification for a particular rate paid to a provider, the Department remained obligated to implement or fund the services, as holding otherwise would countenance the denial of FAPE on an equitable basis.

Reasonableness of Rate

*Department’s Rate Evidence*

In support of its position that the Parent’s request for enhance rate services was not reasonable, and that a more reasonable rate is $125.00 per hour (*see* Tr. at pp. 54 to 55), the Department Representative introduced the report of the American Institute of Research (A.I.R. Report) into evidence (Ex. 1-ii). The Report is based, in part, upon a May 2022 study of the US Bureau of Labor Statistics (BLS) entitled “Metropolitan and Nonmetropolitan Area Occupational Employment and Wage Estimates New York-Newark-Jersey City, NY-NJ-PA[,]” which analyzed figures from the New York City metropolitan area, but also from surrounding non-metropolitan areas in New York State, New Jersey and Pennsylvania (*see id*. at 1-4 to 1-5). There is no breakdown, however, that compares the earnings of special educators between New York City and, *e.g.*, Harrisburg, Syracuse, Atlantic City, and many other places that I will take notice do not have a cost of living or service pricing anywhere near as high as they are in New York City. Moreover, the Report makes no distinction between independent contractors and salaried employees. This was clearly understood to be an issue by the Report’s authors, as they accounted for the benefits a salaried employee would receive (*see id*. at 1-5). The BLS numbers also do not reflect any variances in the minimum qualifications of special educators between the states. New York, New Jersey, and Pennsylvania do not necessarily have the same educational and certification/licensure requirements, which could clearly affect the rate of pay someone with each state’s qualifications might expect. With so much room for variation in the factors of geography, qualifications, and pay structure (salaried vs. non-salaried), it is difficult to discern how the Department concluded $125.00 is the reasonable hourly rate for SETSS in New York City.

There is more. The Report goes on to use the unreliable BLS numbers to declare what the authors found to be a median New York City special education teacher’s salary, despite having only tri-state regional data. They choose $65,192.00 as their estimated “midpoint” of the BLS salary distribution for New York City (*see id*. at 1-9), describing that amount as “between the 10th and 25th percentiles of the distribution[,]” which was picked “because the labor market from which the BLS salary distributions are derived from include districts that will tend to pay less than NYC” (*id*.). Importantly, however, they do not explain why a number between the 10th and 25th percentiles was the better option, or how their chosen salary in that range more accurately accounts for the differences between the tri-state regional average and New York City. Again, without such information, I cannot discern the precision of the analysis.

Finally, there is no one single amount being listed – let alone recommended as the “reasonable market rate” – in the A.I.R. Report. The appendices list ranges of annual salaries and hourly rates, from $59,620.00 to $167,850.00 (*see id*. at 1-15), and from $71.12 to $200.22 (*see id*. at 1-18), respectively. The most comprehensive chart (Table A13) lists a distribution of “inflation adjusted hourly compensation” beginning at $77.80 for first year special educators with a bachelor’s degree, up to $163.80 for special educators with a Master’s degree, and eight or more years of experience (when there are additional factors such as differentials and a certain amount of professional development hours) (*see id*. at 1-24). These rates are described as having factored in (1) the maximum benefits DOE salaried special educators can receive (a 35% valuation); (2) an 8.3% adjustment to cover the “indirect costs” associated with and in addition to salary (but not benefits), “such as general maintenance and operating expenses, general office and administrative expenses, [and] general overhead expenses”; and (3) a 4.3% adjustment “for inflation in the NY-NJ-PA metro area” between May 2022 and July 2023 (*id*. at 2-11). It is difficult to see how the DOE could have concluded from the above how this range of circumstance-dependent rates can be distilled to one amount that will carry the title “reasonable” (*e.g.*, the average of the lowest and highest rates from Table A13 is $120.80). I note, however, that in the decision of *Application of a Student with a Disability*, Appeal No. 24-222 (Jul. 5, 2024), the SRO determined that more accurate BLS data for *private* sector education fringe benefits and incidental costs is 27.7% (*id*. at pp. 18 to 19)[[31]](#footnote-31) which, when adjusted from 8.3% to 27.7% would make the average hourly rate in Table A13 $142.44. and the highest hourly rate in that table $193.14. This is not that different than amounts, discussed below, that the SRO has upheld as the upper-bound of reasonable rates for special education. The A.I.R. Report will not, therefore, be treated as a definitive source for what a reasonable rate must be for special education services in New York City. That said, it may be viewed as a resource against which I can weigh the Parent’s evidence.

*Parent’s Rate Evidence*

I turn to whether the rates requested by the Parent are reasonable and appropriate under the circumstances. The Agency’s Technical Supervisor testified, via affidavit, as follows. The SETSS Instructor (Instructor) administered 3 hours of SETSS per week to the Student during the ten-month 2023-2024 school year, beginning February 14, 2024 (*see* Ex. D ¶¶ 1 to 4). The Agency billed $190.00 per hour for SETSS during that period (*see id*. ¶ 7). The Technical Supervisor did not explain how much of that rate was paid to the Instructor, or what other costs, overhearing, and expenses were factored into the rate. This is a deficit in the evidence, as I am unable to discern how the rate was calculated. That said, SROs have provided some guidance as to the upper bound for special education services. They have held that $175.00 per hour is not unreasonable,[[32]](#footnote-32) and even $200.00 per hour under certain circumstances.[[33]](#footnote-33) In 2011, a SRO upheld a $150.00 rate for SETSS,[[34]](#footnote-34) which translates to $214.89 as of November 2024.[[35]](#footnote-35) On this record, therefore, I do not find the Agency’s rate to be *per se* unreasonable, but the award must be reduced where nothing in evidence shows how the Agency’s requested rate was determined.

The explanation for the rate is not the end of the inquiry. As stated above, there are multiple factors that can affect whether a requested rate is reasonable and appropriate under the circumstances. I will turn to those factors now. The second reasonableness factor is the qualification of the special education Instructor. The Instructor was qualified with respect to the Student’s needs, as the Student was in 4th grade during the 2023-2024 school year (*see* Ex. G-1), and the Instructor had held a New York State teaching certificate in “Students with Disabilities (Grades 1-6)” since January 11, 2023, with an expiration date of August 31, 2028 (*see* IHO Ex. IV). The list of certifications, however, do not show whether the Instructor held a bilingual extension, and the 2024 IESP directed SETSS to be provided in Yiddish (*see* Exs. 2-9 and B-9). It may be that the Instructor was proficient in Yiddish – as confirmed by the Parent (*see id*. at pg. 43) – but this is not the same as earning a bilingual extension, which confirms that a teacher is certified to teach in a language other than English. SROs have determined that “there must be objective evidence of special education instruction or supports that are specially designed by . . . providers . . . who have reasonable qualifications that are specifically related to the student’s deficits” and I find that complete certification represents such reasonable qualification. This will have an impact on the award, although not as substantially, as the Parent had personal knowledge of the Instructor’s ability to speak Yiddish fluently and the Instructor was otherwise properly certified.

Third, the contract in this case properly notified the Parent that she was “responsible for the fees [the] Agency charges for [its] services . . . if the DOE is not required or does not agree to pay [the] Agency directly” and that the “Parent knows that the [hourly] rate(s) charged for the[] service[] is . . . $190” (Ex. C-1). The contract states further that it was “[e]ffective February 14, 2024” (*id*.). The contract supports the Parents claims, as of that date.

Fourth is the Agency’s approach to how it addressed the Student’s specific needs. The DOE conducted a psychoeducational evaluation on January 16, 2024, and determined, *inter alia*: the Student was “having trouble within the academic domains . . . of reading and math”; Verbal Comprehension was in the “Low Average” for vocabulary; Fluid Reasoning was in the “Low Average” for figure weights; Working Memory was in in the “Low Average” for all subtests; her Reading was in the “Very Low” range, while Word Reading and Math Problem Solving were in the ”Low Average” range (Ex. 3-2 to 3-9). In the IESP, the CSE noted additional findings: the Student had “reduced sentence comprehension . . . [a] decreased ability to make inferences across individual sentences of a story, and a limited ability to understand information that may be implied”; she was “limited in her ability to produce age-appropriate sentences of increasing length and complexity”; her “performance for both listening comprehension and reading comprehension [we]re reduced”; she did “not include sufficient age-appropriate story grammar components when retelling a narrative” and her “ability to draw inferences about pictures and theory of mind [we]re reduced”; in writing, she “ha[d] a hard time organizing her thoughts” and “ha[d] poor sentence structure”; her writing was “very disorganized” and “spelling and grammar [were] very poor; in math it took her “very long to comprehend math concepts” and she was “very weak at problem solving and [could ]not complete examples independently” (Exs. 2-3 to 2-4 and B-3 to B-4)

In order to target the Student’s areas of need, the Instructor administered multiple interventions, supports, and manipulatives, including: teaching the Student “how to summarize a text she has read by ‘plugging her thoughts into a given formula’”; “model[ing] making predictions” to “help[ the Student] understand how to predict”; one-to-one (1:1) support to “learn[] to use the writing process as an aid to writing” and with “expressing herself in an age-appropriate manner”; in math, providing “extra review to enable her to grasp the concepts” especially with “solving multi-step word problems”; and using “a checklist” to “identify what operation is necessary and [then] the drawing method to help her solve” each problem (Ex. I-1 to I-2). On this record, I find that the Agency’s “services were specially designed to meet the [S]tudent’s [unique] needs.”[[36]](#footnote-36)

Fifth is the degree to which the Agency adhered to or deviated from the recommended program. Here, it has been determined that the program to be implemented was the 2024 IESP (*see* Exs. 2 and B). The IESP recommended SETSS to be provided in a group (*see* Exs. 2-9 and B-9), but the Instructor administered 1:1 SETSS (*see* Ex. I-3). SROs have held that individual services can be appropriate despite a recommendation of group service when the “IESP contained [no] annual goals related to social interaction with peers,” because a “parent may be afforded some leeway in locating services . . . since identifying an appropriate group setting . . . in [a] private [program] may not have been possible and the district could have avoided this problem by implementing the recommendation for direct group SETSS.”[[37]](#footnote-37) The IESP in evidence contains no such goals (*see* Exs. 2-7 to 2-9 and B-7 to B-9). This factor, therefore, will not have a negative impact on the award, notwithstanding the Instructor’s divergence from the IESP program.

The sixth factor regards the Parent’s efforts in attempting to find other providers before resorting to an agency that charged higher rates. The Parent did not describe having looked for less expensive providers. In fact, she testified only that she learned about the Agency from the Private School (*see id*. at pp. 45 to 46), and it appears she entered into a contract with the Agency without additional research into other options. This will result in a reduction of the rate, although not significantly, because the Department did not actually provide or itself contract for SETSS for the Student, which left the Parent no choice but to find an agency upon the DOE’s failure to meet its obligations.

The final factor is *when* the Department had notice of the Parent’s request for enhanced rate services. The DPC was not filed until June 16, 2024, near the end of the 2023-2024 school year, and there is no evidence of a Ten-Day Notice being filed. The Parent, however, is not requesting services before February 8, 2024 (the implementation date on the IESP for services) (*see* Exs. 2-9 and B-9; *see also* Tr. at pg. 64), and the DOE issued a Prior Written Notice on January 29, 2024, wherein it noted that, during the IESP meeting, the Parent “indicated that [she] w[as] placing [he]r child in a nonpublic school . . . and [was] seeking equitable services from the New York City Department of Education” (Ex. G-1). From this I reasonably infer that the Department had reason to know before February 8, 2024, that if it did not provide or itself contract for services for the Student, the Parent would likely find her own providers at enhanced rates. Therefore, the DOE had timely notice, and the awarded rate will apply from February 8, 2024, to the end of the 2023-2024 school year.[[38]](#footnote-38)

The Award

On the totality of the record before me, I find as follows. The reasonableness factors discussed above support the Parent’s request for an enhanced rate, except that (1) the Agency did not explain its rate; (2) the Instructor’s qualifications did not include a bilingual certificate extension, and (3) the Parent did not demonstrate whether any efforts were made to find less expensive providers. For the reasons stated earlier in the decision, I conclude that the awarded rate should be decreased by 15%, 10%, and 5%, respectively, for these three deficiencies, which results in a 30% reduction of the requested hourly rate of $190.00, for a total awarded rate of $133.00 per hour for SETSS. I note that a ten-month school year in New York is 36 weeks.[[39]](#footnote-39) To the extent SLT was not provided to the Student during the 2023-2024 school year, I find that the Student was entitled to the service, which shall be awarded in compensation, either through a bank of hours or through a Related Services Authorization.

**Decision and Order**

**It is hereby ordered**, that the New York City Department of Education shall provide the following during the pendency of this matter, retroactive to June 16, 2024, the filing date of the DPC, for the ten-month 2023-2024 school year: 3 hours per week of SETSS, and 2x30 per week of SLT; and, it is further,

**Ordered**, that the New York City Department of Education shall pay the SETSS Provider Agency for the administration of SETSS, at no more than 3 hours per week, less any amounts paid under pendency, at $133.00 per hour, from February 8, 2024, to the end of the ten-month (36-week), 2023-2024 school year, with such payment to be made within 35 days of a submission to the DOE of any invoices for such services, together with an affidavit attached to each invoice attesting to the provision of the SETSS administered to the Student for the period covered by each invoice, up to the end of the ten-month 2023-2024 school year; and, it is further,

**Ordered**, that the New York City Department of Education shall pay to the SETSS Provider Agency or to another provider of the Parent’s choice, for the administration of SLT services, at no more than 1 hour per week, less any amounts paid under pendency, at a reasonable rate consistent with rates the DOE has paid to similarly qualified providers in the six months preceding the date of this decision, from February 8, 2024, to the end of the ten-month (36-week), 2023-2024 school year, with such payment to be made within 35 days of a submission to the DOE of any invoices for such services, together with an affidavit attached to each invoice attesting to the provision of the SLT administered to the Student for the period covered by each invoice; provided that, for any SLT services not utilized during the above period, they shall, at the Parent’s election, either be reserved in a bank, up to the number of hours equal to those awarded for the above period, and paid as described herein, in which case such bank shall expire one year from the date of this order, or they shall be provided to the Student in the form of a Related Service Authorization.

**So Ordered.**

Dated: March 14, 2025

Richard J. Zeitler, Jr. (signed electronically)

Impartial Hearing Officer

***NOTICE OF RIGHT TO APPEAL***

*Within 40 days of the date of this decision, the parent and/or the Public School District has a right to appeal the decision to a State Review Officer (SRO) of the New York State Education Department under section 4404 of the Education Law and the Individuals with Disabilities Education Act.*

*If either party plans to appeal the decision, a notice of intention to seek review shall be personally served upon the opposing party no later than 25 days after the date of the decision sought to be reviewed.*

*An appealing party's request for review shall be personally served upon the opposing party within 40 days from the date of the decision sought to be reviewed. An appealing party shall file the notice of intention to seek review, notice of request for review, request for review, and proof of service with the Office of State Review of the State Education Department within two days after service of the request for review is complete. The rules of procedure for appeals before an SRO are found in Part 279 of the Regulations of the Commissioner of Education. A copy of the rules in Part 279 and model forms are available at* http://www.sro.nysed.gov.

**DISTRICT EVIDENCE**

|  |  |  |  |
| --- | --- | --- | --- |
| Exhibit | Title | Date | Pages |
| 1 | Hourly Rates for Independently Contracted  Special Education Teachers and Related Service Providers Final Report | October 2023 | 25 |
| 2 | IESP | 1/25/24 | 12 |
| 3 | Psychoeducational Evaluation Report | 1/18/24 | 11 |
| 4 | Speech and Language Evaluation | 12/22/23 | 7 |
| 5 | Classroom Observation | 12/18/23 | 1 |
| 6 | No. 24-222 SRO Decision | July 2024 | 20 |
| 7 | Occupational Employment and Wage Statistics Report | May 2022 | 5 |

**PARENT EVIDENCE**

|  |  |  |  |
| --- | --- | --- | --- |
| Exhibit | Title | Date | Pages |
| A | Impartial Hearing Request | 06/16/2024 | 4 |
| B | Individualized Education Services Program | 01/25/2024 | 12 |
| C | Parent's Contract | 02/14/2024 | 1 |
| D | Affidavit of [REDACTED] | 05/20/2024 | 1 |
| E | Provider's Certificates | Various | 2 |
| F | Due Process Response | 07/02/2024 | 2 |
| G | Prior Written Notice | 01/29/2024 | 8 |
| H | Attendance Records | Various | 5 |
| I | Progress Report | 06/01/2024 | 3 |
| J | SETSS Authorization Form | 05/07/2024 | 1 |

**IHO EVIDENCE**

|  |  |  |  |
| --- | --- | --- | --- |
| Exhibit | Title | Date | Pages |
| I | Scheduling Order | 08/20/2024 | 2 |
| II | Order of Extension | 08/20/2024 | 1 |
| III | Order of Extension 2 | 09/24/2024 | 1 |
| IV | SETSS Instructor Certification Printout | (undated) | 1 |

1. The Transcript of the hearing shall be denoted as “Tr.” [↑](#footnote-ref-1)
2. Ex. E-1 was excluded because it did not pertain to the Student in this case (*see* Tr. at pp. 18 to 25). [↑](#footnote-ref-2)
3. “SETSS” is Special Education Teacher Support Services. [↑](#footnote-ref-3)
4. The Department did not comply with my rules regarding announcing an intent to cross-examine affiants and I therefore determined that the Department waived its right to cross of the Technical Supervisor, but I did allow cross of the Parent (*see* Tr. at pp. 25 to 26). [↑](#footnote-ref-4)
5. The Department did not raise the so-called “June 1” affirmative defense during the hearing. To the extent it was raised as a *pro forma* defense in the Department’s Due Process Response (*see* Ex. F-1), I find this insufficient to have been properly placed before me. If, however, it is determined that it was properly raised, I would have denied it because affirmative defenses must be established with evidence and the DOE offered none, as well as for the same reasons that were rejected by a State Review Officer (SRO) in *Application of a Student with a Disability*, Appeal No. 23-166 (October 3, 2023). Moreover, I would have found that the DOE waived the defense, pursuant to the authority of *N.L.R.B. v. New York Tele. Co.*, 930 F.2d 1009 (2d Cir. 1991), because the DOE developed a program for the Student for the 2023-2024 school year *after* the Parent’s due date of June 1, 2023 to request services. [↑](#footnote-ref-5)
6. The title to the form is “Authorization for Independent Special Education Teacher Services for a Parentally-Placed Student” (*see* Ex. J). [↑](#footnote-ref-6)
7. Found at <https://p12.nysed.gov/specialed/publications/policy/nonpublic907.htm> (last visited July 9, 2023). [↑](#footnote-ref-7)
8. *See* 20 U.S.C. § 1412 (a)(1)(A); Education Law §§ 4402(2)(a) and (b)(2). [↑](#footnote-ref-8)
9. 34 C.F.R. § 300.13. [↑](#footnote-ref-9)
10. *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 206-07 (1982). [↑](#footnote-ref-10)
11. 20 U.S.C. §§ 1221e-3, 1415(e)-(f); *see also* Education Law § 4404(1); 34 CFR §§ 300.151- 300.152; 8 NYCRR

    §§ 200.5(h)-(l). [↑](#footnote-ref-11)
12. *See Application of a Student with a Disability,* Appeal No. 20-023, citing *Doe v. E. Lyme Bd. of Educ.,* 262 F. Supp. 3d 11, 27 (D.Conn. 2017). [↑](#footnote-ref-12)
13. *Doe v. East Lyme Bd. of Educ*., 790 F.3d 440, 454 (2d Cir. 2015) (citation omitted). [↑](#footnote-ref-13)
14. *See* *Polera v. Bd. of Educ. of Newburgh Enlarged City Sch. Dist.*, 288 F.3d 478, 486 (2d Cir.2002). [↑](#footnote-ref-14)
15. *See East Lyme Bd. of Educ.*, 790 F.3d at 454. [↑](#footnote-ref-15)
16. Education Law § 4404(1)(c); *C.F. v. New York City Dep’t of Educ.*, 746 F.3d 68, 76 (2d Cir. 2014); *R.E. v. New York City Dep't of Educ.*, 694 F.3d 167, 184-85 (2d Cir. 2012). As explained more fully below, SETSS cases have been treated as a hybrid between unilateral placement theory cases, *see*, *e.g.*, *Application of a Student with a Disability*, Appeal No. 20-115, and pure compensatory education cases. *See*, *e.g.*, *Foster v. Bd. of Educ. Of the City of Chicago*, 611 Fed. App.’x 874, 878-79 (7th Cir. 2015) (compensatory education includes reimbursement for out-out-pocket educational expenses); *see also P. V. Newington Bd. of Educ.*, 546 F.3d 111, 123 (2d Cir. 2008) (compensatory education is an appropriate remedy for a denial of FAPE). [↑](#footnote-ref-16)
17. *See*, *e.g.*, *Application of a Student with a Disability*, Appeal No. 21-068. [↑](#footnote-ref-17)
18. *Id*. [↑](#footnote-ref-18)
19. *See* *Application of a Student with a Disability*, Appeal No. 20-115 (“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,” *id*.) (internal citation omitted, emphasis added); *see also* *Application of a Student with a Disability*, Appeal No. 20-087; and *Application of a Student with a Disability*, Appeal No. 20-140. In other words, if the DOE is not directly performing core instruction, it should not then be passing the obligation to contract out that instruction onto the Parent. [↑](#footnote-ref-19)
20. *See Davis v. Wappingers Cent. Sch. Dist.*, 431 Fed. App. 12, 14 (2d Cir. 2011). [↑](#footnote-ref-20)
21. *Application of a Student with a Disability*, Appeal No. 20-115 (*citing E.M. v. New York City Dep’t of Educ.*, 758 F.3d 442, 453 [2d Cir. 2014] [holding that equitable considerations allow for direct payment for tuition where the parents were legally obligated to make payments but had not done so due to a lack of financial resources]). [↑](#footnote-ref-21)
22. *Application of a Student with a Disability*, Appeal No. 20-115 (finding, *inter alia*, the analysis "unworkable to the extent that the SETSS services can be construed as a state-approved option”). [↑](#footnote-ref-22)
23. *East Lyme Bd. of Educ.*, 790 F.3d at 454 (citation omitted). [↑](#footnote-ref-23)
24. *Application of a Student with a Disability*, Appeal No. 20-140 (while “[g]enerally, teachers at a unilateral placement need not be State-certified . . . there must be objective evidence of special education instruction or supports that are specially designed by . . . providers . . . who have reasonable qualifications that are specifically related to the student’s deficits”). [↑](#footnote-ref-24)
25. *Application of a Student with a Disability*, Appeal No. 21-183, at pp. 20-21 (Oct. 29, 2021) (approving compensatory SETSS by a bilingual reading specialist at an even higher rate, not to exceed $200 per hour). [↑](#footnote-ref-25)
26. *See Application of a Student with a Disability*, Appeal No. 21-068 (holding that “it is not appropriate equitable relief . . . to require the district to either reimburse the parent for the costs of SETSS or to directly fund SETSS” where “there is inadequate proof that the parent has expended any funds to pay for SETSS . . . or is legally obligated to do so”). [↑](#footnote-ref-26)
27. *Application of a Student with a Disability*, Appeal No. 23-166, at pg. 9 (Oct. 3, 2023). [↑](#footnote-ref-27)
28. *See*, *e.g.*, *Application of a Student with a Disability*, Appeal No. 21-096 (May 26, 2021). [↑](#footnote-ref-28)
29. *See*, *e.g.*, *Application of a Student with a Disability*, Appeal No. 21-138 at pp. 12-13 (Aug. 11, 2021) (determining that “there is no basis for a finding that the rate of $175 was unreasonable”). [↑](#footnote-ref-29)
30. *See id*. (finding further that, despite the *per se* reasonableness of the rate, a reduction in rate that had been imposed by the IHO was justified where the parent did not provide a ten-day notice (TDN), per 20 U.S.C.

    § 1412[a][10][C][iii] and 34 CFR § 300.148[d][1]). I will contrast this decision, however, to the extent that I do not find a TDN necessary in a NPS services rate case where the parent files a DPC, as it provides the same notice and opportunity for the DOE to address how it provides SETSS to the Student as would a TDN. [↑](#footnote-ref-30)
31. The SRO found that BLS data at <https://www.bls.gov/news.release/archives/ecec\_09122023.pdf> (last visited Aug. 6, 2024), in a document entitled “Employer Costs for Employe Compensation – June 2023,” at pg. 11. [↑](#footnote-ref-31)
32. *See*, *e.g.*, *Application of a Student with a Disability*, Appeal No. 21-138 at pp. 12-13 (Aug. 11, 2021) (determining that “there is no basis for a finding that the rate of $175 was unreasonable”). [↑](#footnote-ref-32)
33. *See Application of a Student with a Disability*, Appeal No. 21-183, at pp. 20-21 (Oct. 29, 2021) (approving compensatory SETSS by a bilingual reading specialist at an even higher rate, not to exceed $200 per hour). [↑](#footnote-ref-33)
34. *See Application of a Student with a Disability*, Appeal No. 11-045 (Jul. 25, 2011). [↑](#footnote-ref-34)
35. *See* U.S. Department of Labor’s Bureau of Labor Statistics, Consumer Price Index Inflation Calculator (found at <https://www.bls.gov/data/inflation\_calculator.htm>, last visited January 2, 2025); *see Kingsbrook Jewish Med. Ctr. v. Allstate Ins. Co.*, 61 A.D.3d 13 (2nd Dept. 2009) (judicial notice may be extended to government websites that provide official data that is not challenged and otherwise reliable). [↑](#footnote-ref-35)
36. *Application of a Student with a Disability*, Appeal No. 23-166, at pg. 9 (Oct. 3, 2023). [↑](#footnote-ref-36)
37. *Application of a Student with a Disability*, Appeal No. 23-033, at pp. 12-13 (May 18, 2023). [↑](#footnote-ref-37)
38. I could reduce the rate further for the period of February 8, 2024, to February 13, 2024, because the Parent did not sign the contract with the Agency until February 14, 2024 (*see* Ex. C-1), and therefore there is no proof of her privity with the Agency (and thus notice of her liability to pay if the DOE does not) before February 14, 2024; however, the Agency’s invoices show the first date of service was February 19, 2024 (*see* Ex. H-1) so any potential change in the award before February 14, 2024, is moot. [↑](#footnote-ref-38)
39. *See Application of a Student with a Disability*, Appeal No. 23-153 (Aug. 30, 2023), at pg. 25. [↑](#footnote-ref-39)