**FINDINGS OF FACT AND DECISION**

Case Number: 123456

Student’s Name: Student’s Name

School District: N.Y.C. Dept. of Ed., District #21

Impartial Hearing Officer: Ronald Abraham, Esq.

Date of Filing: November 1, 2023

Hearing Requested by: Parent

Date of Hearing: January 23, 2024

Record Close Date: January 23, 2024

Date of Decision: January 24, 2024

Time Sensitive: No

**Names and Titles of Persons Who Appeared January 23, 2024**

**For the Student**

Parent Representative’s Name, Parent’s Attorney/Representative

Parent’s Name, Parent

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

DOE Representative’s Name, DOE’s Attorney/Representative

**BACKGROUND**

On November 1, 2023, the parent filed a Due Process Complaint (DPC) alleging that the Department of Education (DOE) failed to implement an individualized education service plan (IESP) for the 2023-2024 school year. The parent seeks an order directing the DOE to implement the IESP with providers at an enhanced rate for services. On January 23, 2024, the hearing on the merits was held.

Based upon the record, I find: 1) the DOE failed to implement the IESP denying the student a free appropriate public education (FAPE) for the 2023-2024 school year; and 2) the relief Parent seeks is appropriate.

**PROCEDURAL HISTORY**

During the due process hearing, the DOE waived its opening statement, submitted one (1) exhibit into the record, did not present any witness testimony, rested its case on its exhibits, did not cross-examine Parent’s witness, and made a closing statement. Parent submitted ten (10) exhibits into the record. Parent also presented two (2) witnesses via affidavit. A list of the documentary evidence in this proceeding is appended to this Order.

**JURISDICTION**

A decision in this matter is being rendered, pursuant to the IDEA, 20 U.S.C. § 1400 *et seq*., and its implementing regulations, 34 C.F.R. § 300 *et seq*., and the New York State Education Law, Educ. Law Art. 89 § 4404 *et seq.*, and its implementing regulations, 8 NYCRR § Part 200.

**FINDINGS OF FACT AND DECISION**

Except for circumstances not applicable here, the burden of proof is on the school district during an impartial hearing (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); *C.F. v. New York City Dep’t of Educ.*, 746 F.3d 68, 76 (2d Cir. 2014)).

The IDEA provides that children with disabilities are entitled to a FAPE (20 U.S.C. § 1400 (d)(1)(A). A FAPE consists of specialized education and related services designed to meet a student’s unique needs, provided in conformity with a comprehensive written Individualized Education Program (IEP) (20 U.S.C. § 1401[9]). Under State law, parents who have privately enrolled their child in a nonpublic school may seek educational "services" for their child with a disability by filing a request in the district 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]). In response, the district must review the request 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] [l]). Further, the location district is responsible for implementing the IESP services (Educ. Law § 3602-c [2] [a]). 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” (Educ. Law § 3602-c [2] [b] [1]).

At the hearing, the following was undisputed: 1) the IESP submitted into evidence by Parent, dated August 31, 2023, is Student’s most recent IESP; and 2) Student is entitled to the SETSS and Related Services mandated in said IESP. The DOE did not allege and did not submit any evidence to prove that the services were implemented. Therefore, it is undisputed that the DOE failed to implement the services set forth in the IESP. It is noted that Parent has located a provider to implement the SETSS and Related Services listed in the IESP at an enhanced rate. Although the DOE argued that the rate charged by the Providers was excessive, and submitted a study into evidence regarding what it believes the fair market rate for SETSS and Related Services should be, it failed to present any witness testimony addressing the study or substantiating its contents and conclusions. As a result, I do not find the study credible. Finally, although the DOE made a motion to dismiss based upon a lack of subject matter jurisdiction, the motion was denied.

I hereby make the following findings: (1) the DOE did not provide Student a FAPE for the 2023-2024 school year; and (2) Student is entitled to receive the SETSS and Related Services mandated in Student’s IESP dated August 31, 2023.

**ORDER**

Based on the above findings, it is hereby:

**ORDERED**, the DOE failed to provide Student a FAPE for the 2023-2024 school year;

**ORDERED**, the DOE fund/reimburse three (3) periods per week of SETSS, as set forth in Student’s IESP dated August 31, 2023, for the 2023-2024 school year, by an independent provider of Parent’s choosing, at a rate not to exceed $175.00 per hour; and

**ORDERED**, the DOE fund/reimburse two (2) periods per week of Speech-Language Therapy, as set forth in Student’s IESP dated August 31, 2023, for the 2023-2024 school year, by an independent provider of Parent’s choosing, at a rate not to exceed $175.00 per hour.

**So Ordered.**

/s/Ronald Abraham Dated: January 24, 2024

Ronald Abraham

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.

**PARENT EVIDENCE**

|  |  |  |  |
| --- | --- | --- | --- |
| Exhibit | Title | Date | Pages |
| A | Due Process Complaint | 11/01/2023 | 5 |
| B | IESP | 8/31/2024 | 12 |
| C | SETSS Progress Report | 01/10/2024 | 2 |
| D | Speech Progress Report | 01/10/2024 | 2 |
| E | Affidavit of Provider | 01/11/2024 | 2 |
| F | DOE P4 SETSS Policy | Undated | 1 |
| G | Enhanced Rate P4 Form | Undated | 2 |
| H | Enhanced Rate P4 Form | 07/07/2021 | 2 |
| I | Enhanced Rate P4 Form | 06/21/2023 | 2 |
| J | Affidavit of Parent | 01/16/2024 | 3 |

**DOE EVIDENCE**

|  |  |  |  |
| --- | --- | --- | --- |
| Exhibit | Title | Date | Pages |
| 1 | AIR Market Rate Study | 10/2023 | 25 |

**APPENDIX**

|  |  |
| --- | --- |
| **Redacted Information** | **Term Used In FOFD** |
| Student’s Name | Student |
| Parent’s Name | Parent/Guardian |
| Parent Representative’s Name | Parent Attorney/Representative |
| DOE Representative’s Name | DOE Attorney/Representative |
| Provider’s Name | Provider |
| N.Y.C. Dept. of Ed., District #21 | School District |