The University of the State of New York

The State Education Department
State Review Officer
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No. 23-185

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 Board of Education

Appearances:
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 Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which reduced the rate of reimbursement or direct payment sought by her for unilaterally-obtained special education services delivered to her son during the 2022-23 school year. Respondent (the district) cross-appeals from the IHO's award of reimbursement or direct funding to the parent. The appeal must be sustained. The cross-appeal must be dismissed.

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

A Committee on Preschool Special Education (CPSE) convened on February 11, 2022 and developed an individualized education program (IEP) for the student that recommended a 12-month school year program consisting of 10 hours per week of special education itinerant teacher (SEIT) services and one 60-minute session per week each of group (2:1) speech-language therapy, occupational therapy (OT), and physical therapy (PT) to be delivered in an early childhood center selected by the parent (Parent Ex. B at pp. 1, 17-18).

According to the parent, in anticipation of the student's transition to school-age services, a CSE convened and developed an IEP for the student; however, the parent indicates that the CSE knew the parent intended to place the student in a private school and, therefore, should have developed an IESP (see Parent Ex. K ¶ 4).

On September 7, 2022, the parent executed a contract with Benchmark Student Services (Benchmark) for the delivery of "Special Education Teacher services during the 2022-23 School Year" (Parent Ex. F). In a letter to the district dated September 7, 2022, the parent stated her disagreement with "the services recommended" for the student for the 2022-23 school year and notified the district that the student would be attending a private school for the 2022-23 school year at the parent's expense, that the parent intended to file a due process complaint notice and seek district implementation of services pursuant to pendency, and that the parent would "be forced to contract with private agencies" if the district failed to implement services (Parent Ex. D). According to the parent, she initially filed a due process complaint notice in or around September 2022, alleging that the district failed "to develop and implement an appropriate program of services for the student" but that the matter was subsequently withdrawn without prejudice (Parent Exs. A at pp. 2-3; K ¶ 5).

The student continued attending the same private school for the 2022-23 school year that he attended for preschool (compare Parent Ex. G at p. 1, with Parent Ex. B at p. 1). Benchmark began delivering SETSS to the student during the 2022-23 school year (see Parent Exs. H at p. 1; L ¶ 2).

A CSE convened on November 7, 2022 and formulated an IESP for the student with a projected implementation date of November 21, 2022 (see generally Parent. Ex. C). The November 2022 CSE found the student eligible for special education as a student with autism and recommended 10 periods per week of group special education teacher support services (SETSS), and two 30-minute sessions per week each of group speech-language therapy, OT, and PT, as well as full-time paraprofessional services (id. at pp. 1, 12).

A. Due Process Complaint Notice

In a due process complaint notice dated May 9, 2023, the parent asserted that the district failed to sufficiently evaluate the student, that the November 2022 CSE failed to recommend sufficient behavioral supports or 12-month services, and that the district had not implemented the student's services for the 2022-23 school year (see generally Parent Ex. A). For relief, the parent requested that the district be ordered to provide SETSS, paraprofessional services, services from a Board Certified Behavior Analyst (BCBA), and parent counseling and training, as well as "a bank of services to make up for any of the awarded services not provided to the student during the 2022-2023 school year" (id. at p. 5).

B. Impartial Hearing Officer Decision

After a prehearing conference on June 14, 2023, an impartial hearing convened before the Office of Administrative Trials and Hearings (OATH) on July 7, 2023 and concluded that day (Tr. pp. 1-17; Pre-Hr'g Conf. Summ. & Order). The parent entered 12 exhibits into evidence, including affidavits in lieu of direct testimony from the parent and a Benchmark administrator (Parent Exs.

A-L). The district did not enter any exhibits into evidence and, while the district's counsel initially indicated that he intended to cross-examine parent's witnesses, he ultimately did not (Tr. p. 6). During the impartial hearing, the IHO sought to clarify on the record the main issue to be determined in order to resolve the matter (see Tr. pp. 7-8, 13-15). Initially, the IHO summarized an off-the record discussion whereby the parent indicated that the only relief sought was reimbursement or direct funding of SETSS provided to the student by Benchmark (Tr. p. 7). In addition, the IHO confirmed with the district that it did not dispute that the student required 10 hours per week of SETSS (Tr. p. 8). During its opening statement, the district's counsel further confirmed that the district did "not oppose[] . . . the services requested by the Parent" but would argue the "appropriateness as to the provider and whether the services [we]re being provided to the child" (Tr. pp. 8-9). The IHO then asked the parties whether "[i]f the Parent agrees to market rate . . . do we end the inquiry here or is there more?" (Tr. p. 14). The district's counsel replied in the affirmative that the matter could end with the caveat that the amount per hour requested by the parent as the rate for the unilaterally-obtained SETSS should not be "placed in the order," arguing instead that it should be left "up to the Implementation Unit" (id.). The IHO then inquired of the parent's advocate "if I were to issue an order today, that said the Parent gets ten sessions of SETSS [per week] reimbursed at market rate . . . [w]ould the Parent accept that?" (id.). The advocate answered in the affirmative that would be acceptable to the parent as long as the order covered the entirety of the 10-month 2022-23 school year (Tr. p. 15). The district's counsel agreed that outcome was acceptable to the district and further stated that "the District ha[d] an obligation to provide the services" for the school year at issue (id.). The IHO indicated that she was going to issue a decision effectively memorializing what the parties had agreed to on the record and closed the hearing (Tr. pp. 14-15).

In a decision dated July 19, 2023, the IHO noted that it was uncontested that the student attended a private school during the 2022-23 school year and indicated that the parent did not challenge the content of the November 2022 IESP, but rather alleged that the district failed to deliver the services it recommended (IHO Decision at p. 2). The IHO further stated that it was uncontested that the services recommended for the student in the IESP were appropriate, and the district did not implement or provide those services (id.). The IHO also noted that the parties agreed that pendency for purposes of the proceeding lay in the November 2022 IESP (id. at pp. 2-4).

The IHO examined the relief sought as a request for compensatory education (see IHO Decision at p. 6). The IHO found that "as there [wa]s no dispute as to the appropriateness of the IESP recommendation, this same number of sessions [was] appropriate to put the Student in the position [he] would have been in but for the [district's] failure to implement the IESP" (id.).

The IHO further found that the parent testified credibly that she was able to locate an agency, which provided the SETSS sessions as recommended on the IESP, and that, while the district had argued during its opening statement that the rate actually charged by the agency was inappropriate, the parties had agreed to an award at the "market rate" (IHO Decision at p. 7). With respect to equitable considerations, the IHO found that "there [wa]s no evidence or claim made by the [district] asserting or suggesting that the Parent failed to cooperate with the [district] or interfered in any manner with [its] obligation to provide the Student with a FAPE on an equitable basis for the 2022-2023 school year" (id.).

As relief, the IHO ordered the district to pay Benchmark for the provision of SETSS, "at no more than ten periods per week, less any amounts paid under pendency, at 'market rate' per hour, beginning May 9, 2023, (and for any dates of service between the first day of the twelve-month school year and May 9, 2023, at the Department's standard rate), with such payment to be made within 35 days of a submission to the (district) 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 2022-2023 school year" (IHO Decision at p. 8).[1]

IV. Appeal for State-Level Review

The parties' familiarity with the particular issues for review on appeal in the parent's request for review, the district's answer and cross-appeal, and the parent's reply and answer to the cross-appeal is presumed and will not be recited here in detail. Briefly, the parent alleges that the IHO erred by ordering district funding for any SETSS delivered between the first day of the twelve-month school year and May 9, 2023, at the district's "standard rate" instead of at the "market rate" agreed to by the parties on the record. In the cross-appeal, the district alleges that the IHO erred by failing to the deny the parent's request for district funding of the costs of the services based on equitable considerations.

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

[1] In a second ordering clause, the IHO ordered the district to reimburse the parent the costs of the SETSS within 45 days of submission of proof of payment and an affidavit of the provider stating the dates and times for services, which seems to conflict with the first paragraph in terms of the manner of payment (direct payment to the agency versus reimbursement to the parent) and the time for payment (within 35 days of submission of invoices and affidavits versus 45 days) (IHO Decision at p. 8). Neither party challenges these aspects of the IHO's order, so they will not be further discussed.

[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]).

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 the purpose of receiving special education programming under Education Law § 3602-c 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

A. Framework and Scope of Review

In this matter, the student has been parentally placed in a nonpublic school and the parent does not seek tuition reimbursement for the cost of the student's attendance there. The parent alleged that the district did not implement the student's services for the 2022-23 school year and as a self-help remedy she unilaterally obtained private services from Benchmark for the student without the consent of the school district officials and then commenced due process to obtain remuneration for the costs thereof. Generally, districts can be made to pay for special education services privately obtained for which a parent paid or became legally obligated to pay, a process that is essentially the same as the federal process under IDEA. 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

[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.).

[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 "[p]arents' 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"]).

Accordingly, although the IHO viewed the relief sought as a request for compensatory education (see IHO Decision at p. 6), the parent's request for the costs of the privately-obtained SETSS must be assessed under the Burlington-Carter 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 [1993]; 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]).[4] In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).[5]

Initially, as neither party has appealed the IHO's determination that the district failed to meet its burden to prove that it provided the student appropriate special education services for the 2022-23 school year, that finding has become final and binding on the parties and will not be further discussed (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]). In addition, although the district in its cross-appeal cites the elements of the Burlington-Carter analysis and argues that the parent's relief should be denied based on equitable considerations, it does not allege that the SETSS

[4] State law provides that the parent has the obligation to establish that a unilateral placement is appropriate, which in this case is the special education that the parent obtained from Benchmark for the student (Educ. Law § 4404[1][c]).

[5] In finding that the parent's requested relief was more appropriately treated as compensatory education, the IHO cited authority for the proposition that compensatory education may include reimbursement or direct payment of educational expenses (see IHO Decision at p. 6, citing Foster v. Bd. of Educ. of the City of Chicago, 611 Fed App'x 874, 878-79 [7th Cir. 2015], and Indep. Sch. Dist. No. 283 v. E.M.D.H ., 2022 WL 1607292, at *3 [D. Minn. 2022]). However, the IHO did not consider that, within the jurisdictions at issue in the cases cited, the burden of proof on all issues at the hearing lay on the party seeking relief, namely the parent, making the distinction between the different types of relief perhaps less consequential (see Schaffer v. Weast, 546 U.S. 49, 59-62 [2005]). In contrast, under State law, the burden of proof has been placed 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 Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.F. v. New York City Dep't of Educ., 746 F.3d 68, 76 [2d Cir. 2014]; R.E., 694 F.3d at 184-85). In treating the requested relief as compensatory education, it is problematic to place the burden of production and persuasion on the district to establish appropriate relief when the parent has already chosen the provider and obtained the services and is the party in whose custody and control the evidence necessary to establish appropriateness resides.

delivered to the student by Benchmark during the 2022-23 school year were inappropriate. Accordingly, I will not further discuss the appropriateness of the services.

B. Equitable Considerations

Turning to a review of equitable considerations, the final criterion for a reimbursement award, the federal standard for adjudicating these types of disputes is instructive. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]; L.K. v. New York City Dep't of Educ., 674 Fed. App'x 100, 101 [2d Cir. Jan. 19, 2017]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014] [identifying factors relevant to equitable considerations, including whether the withdrawal of the student from public school was justified, whether the parent provided adequate notice, whether the amount of the private school tuition was reasonable, possible scholarships or other financial aid from the private school, and any fraud or collusion on the part of the parent or private school]; C.L., 744 F.3d at 840 [noting that "[i]mportant to the equitable consideration is whether the parents obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA"]).

1. 10-Day Notice Letter

Under the federal statute, reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to their removal of the student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger v. Medina City Sch. Dist., 348 F.3d 513, 523-24 [6th Cir. 2003]; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G., 459 F.3d at 376; Voluntown, 226 F.3d at 68).

The district argues that the award of district funding for the SETSS delivered by Benchmark should have been denied altogether based on the parent's failure to provide the district with a timely 10-day notice. In particular, the district argues that, given that the parent executed a

contract with Benchmark on September 7, 2022, the 10-day notice letter, also dated September 7, 2022, was untimely (compare Parent Ex. F, with Parent Ex. D). However, the timing of the letter must be examined by reference of the date the parent removes the student from public school, the corollary here being the date the private services began to the exclusion of any attempt by the district to deliver the services directly. There is conflicting information in the hearing record regarding when Benchmark began delivering SETSS to the student (compare Parent Ex. H at p. 1, with Parent Ex. L ¶ 2). In his written testimony, the Benchmark administrator indicated that the agency began providing the student with SETSS "on or about September 12, 2022" (Parent Ex. L ¶ 2). However, in a November 7, 2022 Benchmark initial assessment report, the student's SETSS provider indicated that he began delivering services to the student on October 11, 2022 (Parent Ex. H at p. 1). In any event, even assuming the services began on the earlier date of September 12, 2022—which was less than 10 business days from the date of the parent's letter—on that same date, the district informed the parent that her letter "did not meet the requirements of a 10 day notice of unilateral placement" (see Parent Ex. E). As the district had already disavowed the parent's notice, there should be no penalty to the parent for beginning the services prior to the expiration of the 10 business days.[6] Further, it is undisputed that the district did not implement the student's services for the 2022-23 school year, whether pursuant to an IEP, an IESP, or pursuant to the district's obligation to provide pendency services during the prior impartial hearing that was ultimately withdrawn. Accordingly, there is no basis for a discretionary reduction, let alone a complete denial of relief in this matter, based on the timing of the parent's 10-day notice.

2. Parent's Financial Obligation

Next the district argues that the parent should be denied district funding for the costs of the privately-obtained services based on an insufficient showing of the parent's financial obligation to Benchmark, noting the lack of terms in the contract regarding the frequency of services or the hourly rate therefor. 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]). In New York, a party may agree to be bound to a contract even where a material term is left open but "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, the contract between the parent and Benchmark indicated that Benchmark would provide special education teacher services during the 2022-23 school year "consistent with [the student's] most-current agreed-upon IESP or IESP" (Parent Ex. F at p. 1). The agreement further stated that "Benchmark provide[d] Special Education Teacher services at enhanced market rates"

[6] Notwithstanding the September 12, 2022 notice from the district apparently stating that the content of the parent's September 7, 2022 letter was insufficient (see Parent Ex. E), in its cross-appeal, the district takes issue only with the timing of the parent's letter and does not argue that the letter failed to state the parent's concerns or her intent to obtain private services at public expense.

and indicated that, "[i]f the Parent cho[se] not to seek funding from the [district], the Parent [would be] responsible to the Agency for the cost of services at the rate charged by Benchmark for these services" and that "[t]he Parent w[ould] be billed on a monthly basis" (id. at p. 2). Alternatively, the agreement provided that, if the parent pursued an impartial hearing, Benchmark could agree to "delay invoicing" provided that the parent would "remain[] responsible for the full payment amount that [wa]s not funded by the [district]" (id.).

Thus, the contract itself referenced the most recent agreed-upon IESP or IEP as the objective source for supplying the term about the frequency of the services (Parent Ex. F at p. 1). In her written testimony, the parent acknowledged that she signed the contract assuming responsibility for the costs of the student's services if she did not prevail at the impartial hearing and stated the hourly rate for the SETSS (Parent Ex. K ¶¶ 10-11). In addition, the Benchmark administrator testified to the parties' obligations under the contract and the hourly rate for the services (Parent Ex. L ¶¶ 6-7). The district did not cross-examine the parent or the Benchmark administrator during the impartial hearing to rebut this testimony about the intentions of the parties to the contract.

Accordingly, there is no evidence in the hearing record to support the district's argument that the parent did not incur a financial obligation to Benchmark.

3. Rate for Unilaterally-Obtained SETSS

The parent argues that the IHO erred by in effect reducing the reimbursement or direct funding sought by the parent from the "market rate" to a "district rate" for the SETSS delivered by Benchmark to the student for the period of time commencing with the start of the 2022-23 school year in September 2022 to the date of the May 9, 2023 due process complaint notice. The district, in turn, argues that the IHO properly reduced the rate based on evidence that the rate sought by the parent was excessive.

Among the factors that may warrant a reduction in tuition under equitable considerations is whether the frequency of the services or the rate for the services were excessive (see E.M., 758 F.3d at 461 [noting that whether the amount of the private school tuition was reasonable is one factor relevant to equitable considerations]). The IHO may consider evidence regarding whether the rate charged by the private agency was unreasonable or regarding any segregable costs charged by the private agency that exceed the level that the student required to receive a FAPE (see L.K. v. New York City Dep't of Educ., 2016 WL 899321, at *7 [S.D.N.Y. Mar. 1, 2016], aff'd in part, 674 Fed. App'x 100).

During the impartial hearing, while the district generally objected to the rate sought by the parent (see Tr. p. 8), the district did not present any documentary witnesses or evidence, declined to cross-examine the parent's witnesses, and agreed on the record that the "market rate" was an acceptable rate for funding of SETSS provided by Benchmark (see Tr. p. 14). Indeed, the IHO's solicitation of such an agreement by the parties as to "market rate" reimbursement on the record effectively ended the hearing with all issues seemingly resolved to the satisfaction of the parties (see Tr. pp. 14-15). With respect to the IHO's reference to the district's "standard rate" in the decision (see IHO Decision at p. 8), there is no evidence in the hearing record concerning the "standard rate" and no explanation as to why it was included in the IHO's order with reference to

the services provided to the student during the portion of the 2022-23 school year prior to the filing of the due process complaint notice, particularly after the IHO explained in the body of the decision that the parties agreed to an order requiring funding at "market rate" (id. at p. 7). Accordingly, given the lack of evidence in the hearing record supporting the IHO's decision to order the district's "standard rate" be applied to services provided by Benchmark during the 2022-23 school prior to the May 2023 due process complaint notice, that portion of the IHO's decision must be reversed.[7]

VII. Conclusion

Based on the foregoing, the evidence in the hearing record does not support language included in the IHO's ordering clause providing for district funding of SETSS delivered by Benchmark for a portion of the 2022-23 school year at a "standard rate." Rather, consistent with the discussion herein, the district should fund the services delivered by Benchmark during the 2022-23 school year at "market rate." Further, the hearing record does not support denial or reduction of the award on equitable grounds.

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's decision, dated July 19, 2023, is modified by striking the words: "beginning May 9, 2023, (and for any dates of service between the first day of the twelve-month school year and May 9, 2023, at the Department's standard rate)."

Dated: **Albany, New York**
October 30, 2023

SARAH L. HARRINGTON
STATE REVIEW OFFICER

[7] The use of the terms "market rate" and "standard rate" are not particularly useful without evidence in the hearing record to describe their meanings; however, in this instance, where the district and the parent did not object to the use of the "market rate" terminology by the IHO, I will not disturb that aspect of the IHO's order.