The University of the State of New York

The State Education Department
State Review Officer
www.sro.nysed.gov

No. 23-216

Application of a STUDENT WITH A DISABILITY, by her parent, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

Appearances:
Liz Vladeck, General Counsel, attorneys for respondent, by Cynthia Sheps, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which ordered the district to reimburse the parent for the costs of her daughter's private special education teacher support services (SETSS) for the 2022-23 school year, rather than directly fund the services. Respondent (the district) cross-appeals from the IHO's award of reimbursement 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

For all periods of time relevant to this appeal, the student was attending a religious nonpublic school at the parent's expense (see Parent Exs. C; F;. see also Dist. Ex. 2 at p. 9). On January 9, 2019, a CSE convened, found the student eligible for special education as a student with a speech or language impairment, and developed an IESP that recommended three periods per week of group SETSS, two 30-minute sessions per week of individual speech-language therapy, and one 30-minute session per week of individual occupational therapy (OT) to be implemented

as a student who was dually enrolled in the public school (Parent Ex. B at pp. 1, 9).[1] According to the parent, the district failed to thereafter develop "an updated IESP for the 2022-2023 school year" (Parent Ex. H ¶ 3).

By letter to the district dated August 29, 2022, the parent indicated that, as of the date of the letter, the district had failed to implement the services recommended for the student (Parent Ex. C). The parent notified the district of her intent to "contract with a private agency for the provision of those services" (id.). The parent stated her belief that "these privately obtained services should be at public expense. I will therefore continue to pursue reimbursement for these appropriate and specially designed private educational services" (id.). On September 6, 2022, the parent entered an agreement with Benchmark Student Services (Benchmark) for the delivery of "Special Education Teacher services during the 2022-23 School Year" consistent with the student's "most-current agreed-upon IEP or IESP" developed by the district (Parent Ex. D).[2]

According to the parent, she initially filed a due process complaint notice on September 18, 2022, but the matter was subsequently withdrawn on January 19, 2023 without prejudice (Parent Ex. A at p. 2). The administrator from Benchmark indicated that the agency began delivering SETSS to the student "on or about September 19, 2022" (Parent Ex. G ¶ 3). In addition, service delivery records show that the student received speech-language therapy and OT services during the 2022-23 school year (Dist. Ex. 4).

A CSE convened on December 21, 2022, and formulated an IESP for the student with a projected implementation date of January 4, 2023 that recommended three periods per week of group SETSS, two 30-minute sessions per week of individual speech-language therapy, and one 30-minute session per week of individual OT (Dist. Ex. 2 at pp. 1, 6).

A. Due Process Complaint Notice

In a due process complaint notice, dated May 24, 2023, the parent, through a lay advocate, alleged that the district "failed to offer the student a program of special education services and supports" and failed to implement the "recommended services" for the 2022-23 school year (see Parent Ex. A at pp. 1-2). The parent asserted that she had been unable to locate providers to deliver the student's services "at the regular [district]-published rates" and, therefore, obtained private services from an agency "at enhanced rates" (id. at p. 2). The parent also alleged that the district failed to implement the student's stay put services during that period of time between September 2022 and January 2023 when the prior due process complaint notice was pending (id.). For relief, the parent requested that the district be ordered to implement the student's program of SETSS and related services at "enhanced market rates," as well as compensatory education to make up for any services not provided during the 2022-23 school year (id.).

---

[1] The student's eligibility for special education as a student with a speech or language impairment is not in dispute (see 34 CFR 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

[2] Benchmark has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

B. Impartial Hearing Officer Decision

After a prehearing conference on June 15, 2023, an impartial hearing convened before the Office of Administrative Trials and Hearings (OATH) on July 20, 2023 (Tr. pp. 1-67; Pre-Hr'g Conf. Summ. & Order). During the impartial hearing, the parent requested direct funding from the district for the SETSS she obtained from Benchmark in accordance with the rate of $175.00 per hour that she contracted for and testified that she had not been able to pay any of the funds she owed to Benchmark (Parent Ex. H at ¶¶ 9-11; see Tr. pp 15-16). In a decision dated September 8, 2023, the IHO determined that the district failed to meet its burden to prove that it provided the student with mandated services for the 2022-23 school year (IHO Decision at pp. 2, 6-7). The IHO also found that, by its actions in delivering some services and developing the December 2022 IESP, the district waived the requirement for the parent to request equitable services from the district in writing before June first and, further, waived the defense relating to the June first deadline by not raising it in a timely manner in accord with the IHO's prehearing conference summary and order (id. at pp. 7-8).

The IHO examined the relief sought as a request for compensatory education (see IHO Decision at pp. 8-10). Finding that the district did not articulate its position regarding an appropriate compensatory award or offer evidence regarding appropriate relief, the IHO determined that the student was entitled to the three periods per week of SETSS and the related services identified in the "2022 IESP" (id. at p. 10). The IHO further noted that the parent presented evidence regarding the "certifications and qualifications" of the private provider from Benchmark and the agency's rate (id.).

Based on the foregoing, the IHO ordered the district to reimburse the parent for the costs of the privately obtained SETSS delivered to the student during the 2022-23 school year (IHO Decision at p. 11). In addition, the IHO ordered the district to directly fund compensatory education services consisting of a total of 10 hours of OT and 20 hours of speech-language therapy by providers of the parent's choosing (id.).

IV. Appeal for State-Level Review

The parent through the lay advocate appeals from the decision of the IHO, alleging that she erred in ordering the district to reimburse the parent for the costs of the privately obtained SETSS instead of requiring the district to fund the services by remitting payment directly to the agency.

In an answer and cross-appeal, the district responds to the parent's material allegations, arguing that the IHO did not err in ordering reimbursement instead of direct payment given the lack of evidence in the hearing record regarding the parent's ability to pay for the privately-obtained services. As for its cross-appeal, the district alleges that the IHO erred in awarding any relief. In particular, the district appeals the IHO's determination that it waived its defense pertaining to the June first deadline, arguing that it was sufficient that the district's counsel raised it in his opening and closing statements at the impartial hearing. As for the relief, the district alleges that the parent failed to meet her burden to prove the appropriateness of the SETSS delivered by Benchmark during the 2022-23 school year, noting a lack of evidence regarding Benchmark's provision of the services. The district further argues that the IHO should have denied the parent's requested relief on equitable grounds related to the timing and sufficiency of the

parent's 10-day notice letter and the lack of evidence regarding the parent's legal obligation to pay the costs of the SETSS delivered during the 2022-23 school year.

In an answer to the cross-appeal, the parent responds to the district's material allegations and argues that she met her burden to prove that the privately-obtained services were appropriate and that equitable considerations supported her request for relief. In particular, the parent argues that the private provider was delivering the same SETSS recommended for the student in the January 2019 and December 2022 IESPs, that the evidence showed that the provider held State-certification as a special education teacher, and that a progress report from the private provider reflected the student's needs, strategies used by the provider, and goals for the student, and showed that the student made progress. The parent also argues that the parent's 10-day notice letter was sufficient and timely and that the parent had a financial obligation to pay for the services delivered by Benchmark.

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]).[3] "Boards of education of all school districts of the state shall furnish services to students who are residents of this state and who attend nonpublic schools located in such school districts, upon the written request of the parent" (Educ. Law § 3602-c[2][a]). In such circumstances, the district of location's CSE must review the request for services and "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an [IEP]" (Educ. Law § 3602-c[2][b][1]). The CSE must "assure that special education programs and services are made available to students with disabilities attending nonpublic schools located within the school district on an equitable basis, as compared to special education programs and services provided to other students with disabilities attending public or nonpublic schools located within the school district (id.).[4] Thus, under State law an eligible New

[3] 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]).

[4] 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

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, dual enrollment services for which a public school district may be held accountable through an impartial hearing.

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E. v. New York City Dep't of Educ., 694 F.3d 167, 184-85 [2d Cir. 2012]).

VI. Discussion

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 from the district for the cost of the student's parental placement. Instead, the parent alleged that the district did not implement the student's mandated public services under the State's dual enrollment statute 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 who fail to comply with their statutory mandates to provide special education 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 [2d Cir. 2020] [internal quotations and citations omitted]; see Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 14 [1993] [finding that the "Parents' failure to select a program known to be approved by the State in favor of an unapproved option is not itself a bar to reimbursement."]).

The IHO treated the relief sought by the parent as compensatory education (IHO Decision at pp. 8-10). In support of her treatment of the relief as compensatory education, the IHO cited authority for the proposition that compensatory education may include reimbursement or direct payment of educational expenses (see id. at pp. 9-10, citing Foster v. Bd. of Educ. of the City of

---

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.).

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 in this jurisdiction, 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 unilaterally chosen the provider and obtained the services and is the party in whose custody and control the evidence necessary to establish appropriateness resides.

As a practical matter this kind of dispute can really only be effectively examined using a Burlington/Carter unilateral placement framework because the administrative due process system was not designed to set rate-making policies for what has grown into a completely unregulated industry of independent special education teachers whom parents within the New York City Department of Education are increasingly reliant upon, an industry that is not authorized by the State in the first place. The attempts to resolve such cases that do not use a Burlington/Carter style of analysis have tended to lead to chaos. All IHOs should use a Burlington/Carter style analysis when deciding cases in which a parent requests a school district to directly fund or reimburse costs incurred by the parent on behalf of a student when obtaining private services without the consent of public school officials.

Even the parent in this case made it very clear to the IHO at the outset of the impartial hearing that she was following a Burlington/Carter style of analysis and simply seeking direct funding rather than reimbursement for the privately contracted services (Tr. pp 15-16; see Parent Ex. H ¶¶ 9-11).[5] Accordingly, although the IHO viewed the relief sought as a request for compensatory education (see IHO Decision at pp. 9-10), 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]).[6] In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials

[5] The parent also stated at the conclusion of the hearing that she was seeking compensatory services that the student missed and distinguished them from her direct funding request for Benchmark's SETSS services (Tr. p. 65).

[6] 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]).

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).

Initially, the district has not appealed the IHO's determination that the district waived the requirement that the parent provide a written request for equitable services by June first by conceding at the impartial hearing that the student was entitled to the services recommended in the IESP, by developing the December 2022 IESP after the June first deadline, and by delivering to the student some of the related services mandated (see IHO Decision at pp. 7-8). In addition, neither party has appealed the IHOs determinations 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 or that the student was entitled to a bank of compensatory speech-language therapy and OT services (see id. at pp. 2, 6-7, 11). According, these findings have 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]).[7]

B. Unilaterally-Obtained Services

Turning to a review of the appropriateness of the unilaterally-obtained services, the federal standard for adjudicating these types of disputes is instructive. A private school placement or, as in this case, private services must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school or services offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998]). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 207 [1982]). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether a unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether the placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [finding that "evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate

[7] Because the district does not appeal the IHO's determination that the district waived the requirement for a written request for equitable services by June first, the question of the district's waiver of the defense at the impartial hearing is moot and will not be further discussed.

education under the IDEA"]). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

The Second Circuit has set forth the standard for determining whether parents have carried their burden of demonstrating the appropriateness of their unilateral placement.

> No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

(Gagliardo, 489 F.3d at 112, quoting Frank G., 459 F.3d at 364-65).

1. Student's Needs

Here, evidence of the student's needs includes the descriptions of the student in the January 2019 and December 2022 IESPs, which are not in dispute (see Parent Exs. B; Dist. Ex. 2). The January 2019 IESP noted the student's struggled with receptive and expressive language skills, reading and writing (specifically, blending words, fluency, and sounding out words accurately), math problem solving, and completion of assignments, as well as decreased fine motor, graphomotor, visual motor, and perceptual skills (Parent Ex. B at pp. 2-3). The IESP also noted the student's need for support to initiate social interactions and distractibility and indicated that the student would benefit from praise and feedback, modeling, visual and concrete aids, and use of concrete and specific language (id. at p. 3).

The December 2022 IESP, developed approximately three months after the student began receiving the privately obtained SETSS from Benchmark for the 2022-23 school year, included information from a December 2022 speech-language progress report and a January 2023 report from the student's special education provider (Dist. Exs. 2 at p. 2; 3 at p. 1).[8]

[8] Although the IESP refers to a "2022 SETSS Report," the prior written notice implausibly indicates that the CSE, which met on December 21, 2022, considered a special education report that was dated January 3, 2023, and while it is theoretically possible that one or more dates in the district's records are mixed up, it's also possible that

With respect to speech-language, the December 2022 IESP described the student's receptive and expressive language delays, indicating that the student struggled "comprehending aurally presented stories and instructions" and "following instructions in class" and had difficulty "formulating sentences, telling stories and finding words" (Dist. Ex. 2 at p. 1). In the area of writing, the IESP reported that "it [had] becom[e] more difficult for her to formulate age-appropriate sentences and paragraphs," that the student's vocabulary was "below grade level," and that the student struggled generating ideas and "transferring her thoughts and ideas into a coherent reading piece" (id.). In the area of reading, the IESP included information from the SETSS provider that the student was "approaching grade level" but "struggle[d] with vocabulary, background knowledge and inferencing" and had a "reading rate . . . slower than her peers" (id.). The December 2022 IESP reported that the student had not been "accessing" her OT services and that the parent wanted the services removed (id. at p. 1).[9]

To address the student's needs, the CSE recommended three periods per week of group SETSS, as well as supports for the student's management needs including consistent praise and feedback, modeling of strategies, and use of visual and concrete aids and concrete and specific language when teaching (Dist. Ex. 2 at pp. 2, 6). The CSE recommended two 30-minute sessions of group speech-language therapy per week and continued the recommendation for one 30-minute session per week of OT pending a "declassification report" (id. at pp. 1, 6).

2. Services from Benchmark

The parent's agreement with Benchmark indicated that the agency would provide the student with "Special Education Teacher services" during the 2022-23 school year consistent with the student's "most-current agreed-upon IEP or IESP, developed by [the district]" . . . . in a location consistent with the IEP/IESP mandate" (Parent Ex. D at p. 1).

The administrator from Benchmark testified by way of affidavit that the agency was providing the student with three periods per week of SETSS for the 2022-23 school year and that services had begun "on or about September 19, 2022" (Parent Ex. G ¶¶ 2-3). During the impartial hearing, the administrator testified that, for the 2022-23 school year, the agency delivered 60 hours of SETSS out of 120 hours (Tr. p. 56). The administrator opined that this was because the school was not in session "every day of the year, with all the holidays and days that [the student] was absent" (Tr. pp. 56-57).[10] The administrator identified, by name, the individual delivering the student's SETSS and indicated that she held State certification to teach students with disabilities

---

the district developed the IESP from documents that were not before the CSE (compare Dist. Ex. 2 at p. 1, with Dist. Ex. 3 at p. 1).

[9] Contrary to this characterization, service delivery records show that the student was receiving OT services at the time of the December 2022 CSE meeting, although the services had not begun for the 2022-23 school year until October 25, 2022 (Dist. Ex. 4).

[10] There is no evidence in the hearing record as to the length of a period; however, as the student was recommended for three periods of SETSS per week and the administrator indicated that the agency delivered three periods of SETSS per week, not three hours (see Parent Exs. B at p. 9; G ¶ 2; Dist. Ex. 2 at p. 6), aside from the administrator's testimony, it is not clear from the hearing record that the student could have received up to 120 hours of SETSS for the school year unless a period was an hour long.

(Parent Ex. I ¶ 4). For the provider named, the hearing record includes a document indicating that the provider held certifications in early childhood and childhood education and to teach students with disabilities ages birth through sixth grade (compare Parent Ex. I ¶ 4, with Parent Ex. E).

Regarding the SETSS delivered to the student during the 2022-23 school year, the July 2023 progress report was completed by the SETSS provider (Parent Ex. F at p. 2). The progress report noted that the student struggled with language, comprehension, vocabulary, fluency, and rate of reading, which affected her progress in reading, writing, and math (id. at p. 1). According to the progress report, the student "learn[ed] best in a small group setting with visual modalities and cooperative learning" and the provider supported the student's writing with use of graphic organizers and writing webs to organize ideas and create a coherent paragraph (id.). The progress report proposed annual goals for the upcoming school year (i.e. 2023-24 school year) but did not identify what goals the provider worked on with the student during the 2022-23 school year (id. at p. 2). The provider stated her view that the student "require[d] the support of SETSS and related services to assist her in functioning in her mainstream setting" (id. at p. 1).

With respect to the student's progress, it is well settled that a finding of progress is not required for a determination that a student's unilateral placement is adequate (Scarsdale Union Free Sch. Dist. v. R.C., 2013 WL 563377, at *9-*10 [S.D.N.Y. Feb. 4, 2013] [noting that evidence of academic progress is not dispositive in determining whether a unilateral placement is appropriate]; see M.B. v. Minisink Valley Cent. Sch. Dist., 523 Fed. App'x 76, 78 [2d Cir. Mar. 29, 2013]; D.D-S. v. Southold Union Free Sch. Dist., 506 Fed. App'x 80, 81 [2d Cir. Dec. 26, 2012]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 486-87 [S.D.N.Y. 2013]; C.L. v. Scarsdale Union Free Sch. Dist., 913 F. Supp. 2d 26, 34, 39 [S.D.N.Y. 2012]; G.R. v. New York City Dep't of Educ., 2009 WL 2432369, at *3 [S.D.N.Y. Aug. 7, 2009]; Omidian v. Bd. of Educ. of New Hartford Cent. Sch. Dist., 2009 WL 904077, at *22-*23 [N.D.N.Y. Mar. 31, 2009]; see also Frank G., 459 F.3d at 364). However, while not dispositive, a finding of progress is, nevertheless, a relevant factor to be considered in determining whether a unilateral placement is appropriate (Gagliardo, 489 F.3d at 115, citing Berger, 348 F.3d at 522 and Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]).

The July 2023 SETSS progress report indicated that, as a result of the SETSS support, the student "had gained in vocabulary skills, ability to understand and answer questions, and understand the author's intent" (Parent Ex. F at p. 1). In addition, the progress report noted that the student's reading fluency skills had improved and that she was "approaching grade level" in that area (id.).

Overall, while the evidence in the hearing record cannot be described as robust concerning the implementation of the privately obtained services,[11] there is sufficient evidence to show that the student received SETSS, which both parties agreed that the student required, and it further shows that the provider identified the student's specific needs and delivered instruction specially designed to meet those needs during the 2022-23 school year and that the student benefited from

[11] For example, there is no evidence in the hearing record as to whether the SETSS were delivered at the student's school and in a group, as contemplated by the district's IESPs. In addition, evidence such as service delivery records and/or testimony from the actual provider would be preferrable in these matters, over the testimony of administrators who are less familiar with the delivery of the student's services.

the services and made educational progress as a result. The administrator's testimony about the number of hours of services delivered is sufficiently explained in the testimony and, moreover, the evidence shows that the student received benefit from the services at the frequency they were delivered. The district did not successfully rebut the parent's evidence through cross-examination. Accordingly, I find the parent met her burden to prove that the SETSS delivered by Benchmark during the 2022-23 school year were appropriate.

C. 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, once again, 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

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).

In her decision the IHO did not address the fact that the parent offered a notice of unilateral placement into evidence. 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 6, 2022, the 10-day notice letter, dated August 29, 2022, was untimely (compare Parent Ex. C, 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. As noted above, the Benchmark administrator indicated that the agency began to deliver services to the student "on or about September 19, 2022" (Parent Ex. G ¶ 3). Accordingly, the services from Benchmark began more than 10 business days after the parent provided the district with notice of her intent to privately obtain the services on a unilateral basis.

Further, the district argues that the content of the 10-day notice was deficient as it did not identify the date of the last IEP/IESP meeting for the student or the services recommended and instead read: "The District last convened an IEP/IESP meeting on and recommended the following services . However, since that time, and as of the date of this letter, the District has failed to implement the recommended services." (Parent Ex. C). Despite the incomplete phrasing in the letter, the parent sufficiently stated her concern that the district was not delivering services to the student and there is no indication that the missing information in the 10-day notice letter prevented the district from implementing any services to which the student was entitled at that time. For that matter, it is undisputed that the district did not implement the student's SETSS for the 2022-23 school year, whether pursuant to 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 or content 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 hourly rate for the services. The Second Circuit has held that some blanks that the parties did not fill in in a written agreement would not render an entire contract void and indicated that in the case before it that "the contract's essential terms—namely, the educational services to be provided and the amount of tuition—were plainly set out in the written agreement, and we cannot agree that the contract, read as a whole, is so vague or indefinite as to make it unenforceable as a matter of law" (E.M., 758 F.3d at 458). 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]).

As noted above, 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. D at p. 1). The agreement further stated that "Benchmark provide[d] Special Education Teacher services at enhanced market rates" 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. D 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. H ¶¶ 8-9). In addition, the Benchmark administrator testified to the parties' obligations under the contract and the hourly rate for the services (Parent Ex. G ¶¶ 5-6). 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 contractual liability for the services provided by Benchmark.

Based on the foregoing, no equitable considerations warrant a reduction in the costs or complete denial of the relief sought by the parent.

D. Relief

With regard to fashioning equitable relief under the IDEA for private school tuition, courts have determined that it may be appropriate to order a school district to make retroactive tuition payment directly to a private school where: (1) a student with disabilities has been denied a FAPE; (2) the student has been enrolled in an appropriate private school; and (3) the equities favor an award of the costs of private school tuition; but (4) the parents, due to a lack of financial resources, have not made tuition payments but are legally obligated to do so (Mr. and Mrs. A. v. New York City Dep't of Educ., 769 F. Supp. 2d 403, 406 [S.D.N.Y. 2011]; see E.M., 758 F.3d at 453 [noting that "the broad spectrum of equitable relief contemplated [by] the IDEA encompasses, in appropriate circumstances, a direct-payment remedy" [internal quotation marks omitted]). It has been held that "[w]here . . . parents lack the financial resources to 'front' the costs of private school tuition, and in the rare instance where a private school is willing to enroll the student and take the risk that the parents will not be able to pay tuition costs—or will take years to do so—parents who satisfy the Burlington factors have a right to retroactive direct tuition payment relief" (Mr. and Mrs. A., 769 F. Supp. 2d at 428; see also A.R. v. New York City Dep't of Educ., 2013 WL 5312537, at *11 [S.D.N.Y. Sept. 23, 2013]).

The Mr. and Mrs. A. Court relied in part on dicta from earlier cases in which claims seeking direct prospective payment to a private non-approved school were asserted (see Connors v. Mills, 34 F. Supp. 2d 795, 805-06 [N.D.N.Y. 1998] [opining that, under the facts presented, where both the parent and district agreed that the student's needs required placement in a private non-approved

school, denial of prospective placement "would deny assistance to families that are not able to front the cost of a private non-approved school, without exception"]; see also S.W. v. New York City Dep't of Educ., 646 F. Supp. 2d 346, 360 [S.D.N.Y. 2009]). In Mr. and Mrs. A., the district court held that, in fashioning such relief, administrative hearing officers retain the discretion to reduce or deny tuition funding or payment requests where there is collusion between parents and private schools or where there is evidence that the private school has artificially inflated its costs (769 F. Supp.2d at 430).

In light of this authority, SROs in the past have required parents seeking direct funding relief to show a lack of financial resources (see, e.g., Application of a Student with a Disability, Appeal No. 11-049; Application of the Dep't of Educ., Appeal No. 11-041). However, recently, the District Court for the Southern District of New York has ruled in certain cases that such proof is not required before direct funding may be ordered (see Cohen v. New York City Dep't of Educ., 2023 WL 6258147, at *4-*5 [S.D.N.Y. Sept. 26, 2023] [ruling that parents "are not required to establish financial hardship in order to seek direct retrospective payment"]; Ferreira v. New York City Dep't of Educ., 2023 WL 2499261, at *10 [S.D.N.Y. Mar. 14, 2023] [finding no authority requiring "proof of inability to pay . . . to establish the propriety of direct retrospective payment"]; see also Maysonet v. New York City Dep't of Educ., 2023 WL 2537851, at *5-*6 [S.D.N.Y. Mar. 16, 2023] [declining to reach the question of whether parents must show their inability to pay in order to receive an award of direct tuition funding but, instead, considering additional evidence proffered by the parents about their financial means to award direct tuition payment]). In Cohen, the court acknowledged the prior language in the decisions discussed above, noting that all of the courts which awarded direct funding "mentioned a parent's financial inability to pay tuition" (Cohen, 2023 WL 6258147, at *4, citing E.M., 758 F.3d 442 at 453 n.14, Mr. & Mrs. A, 769 F. Supp. 2d at 406, Connors, 34 F. Supp. 2d 795, and A.R., 2013 WL 5312537, at *11). However, the court found that language about parents' financial risk, arose in "cases where the Burlington prerequisites had not yet been satisfied," whereas in instances "where it has already been established that the district has failed to provide a child with a FAPE and (2) the private educational services obtained by the parents were appropriate, an award for direct retrospective payment would merely require the district to pay 'expenses that it should have paid all along and would have borne in the first instance had it developed a proper IEP'" (Cohen, 2023 WL 6258147, at *5, quoting E.M., 758 F.3d at 453 [internal quotations omitted]). The court further discussed the potential pitfalls of a different requirement, including "disparate requirements for parents of disabled children based on financial resources, notwithstanding the IDEA's requirement that all children with disabilities are entitled to a free education" (Cohen, 2023 WL 6258147, at *5 [emphasis in the original]).

With respect to financial risk (as opposed to parents' inability to pay), the court's decision in Cohen could be read broadly to overlook, in some instances, a parent's failure to establish financial risk if it was established that the district denied the student a FAPE and that the unilateral placement was appropriate (see Cohen, 2023 WL 6258147, at *5). However, such a broad reading would be contrary to longstanding precedent and would likely have problematic consequences for the process and the system.

In Burlington, the Court stated that "[p]arents who unilaterally withdraw their child from the public school and thereafter seek tuition reimbursement for the[ir] child's private placement do so at their own peril," because they bear the financial risk, both as to tuition and legal expense, and

the burden of demonstrating the appropriateness of their relief (471 U.S. at 373-74). Congress thereafter took action to emphasize the need for parents to be invested in the process of developing a public school placement for eligible students with disabilities by placing limitations on private school reimbursements under IDEA (20 U.S.C. § 1412[a][10][iii]). This statutory construct is a significant deterrent to false or speculative claims (see Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 543 [2007] [Scalia, J., dissenting] [noting that "actions seeking reimbursement are less likely to be frivolous, since not many parents will be willing to lay out the money for private education without some solid reason to believe the FAPE was inadequate"]).

When the element of financial risk is removed entirely and the financial risk is borne entirely by unregulated private schools or agencies that have indirectly entered the fray in a very palpable way in anticipation of obtaining direct funding from the district, it has practical effects because parents begin seeking the best private placements possible with little consideration given to what the child needs for an appropriate placement as opposed to "everything that might be thought desirable by 'loving parents.'" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]). As the First Circuit Court of Appeals noted, "[t]his financial risk is a sufficient deterrent to a hasty or ill-considered transfer" to private schooling without the consent of the school district (Town of Burlington v. Dep't of Educ. for Com. of Mass., 736 F.2d 773, 798 [1st Cir. 1984], aff'd, Burlington, 471 U.S. 359, 374 [1985] [noting the parents' risk when seeking reimbursement]; see also Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 247[2009] [citing criteria for tuition reimbursement, as well as the requirement of parents' financial risk, as factors that keep "the incidence of private-school placement at public expense . . . quite small"]). Further, the financial risk taken by the parents tends to support a view that the costs of the program are reasonable, at least absent contrary evidence in the hearing record.

On the other hand, as the court in Cohen noted, there may be disparate levels of access to tuition reimbursement relief based on parents' financial means (Cohen, 2023 WL 6258147, at *5). The approach of requiring proof of financial need to obtain direct funding of private school tuition, instead of reimbursement, seemed the middle ground that permitted more equitable access to this type of relief. But doing away with the requirement for showing financial need seems to most directly benefit parents that have financial means rather than broadening access to the relief to parents of less means as administrative hearing officers in due process proceedings were already routinely providing direct funding relief to those who lacked the resources to pay the tuition and seek reimbursement. Nevertheless, given the continuing shift in authority within the District Court for the Southern District of New York in favoring direct payment and large cadre of private schools and agencies operating withing the boundaries of the New York City Department of Education willing to absorb the risks that parents may not prevail in due process litigation involving unilateral placement, I find that appropriate equitable relief may under certain circumstances include direct funding notwithstanding a lack of evidence about a parent's financial need, so long as there is evidence of financial risk. The district explained its concerns to the Court in Mr. & Mrs. A that private schools and agencies who absorb the risks would artificially inflate costs beyond reasonable market rates and the Court responded that "where there is evidence that a private school has artificially inflated its tuition, hearing officers and courts are required to take this into account in determining an appropriate tuition award, whether that award constitutes prospective relief, retroactive reimbursement, or retroactive direct payment of tuition" (Mr. & Mrs. A, 769 F. Supp. 2d at 429-30). While the costs of private schools and special education services unilaterally

obtained by parents within this district do seem to have skyrocketed in cases before the undersigned in recent years, thus far, the district has made few efforts to come forward with arguments based on factual evidence in the manner described in Mr. & Mrs. A, or explained why it was prevented from doing so.

In addition to the above authority providing that direct payment may be appropriate notwithstanding lack of information about the parents' financial need, in the present matter, the parent did indicate in her affidavit testimony that she had "not made any payments as of this time" and could not "afford to do so" (Parent Ex. H ¶ 11). While not supported by documentary evidence, the parent's testimony about her financial need in this proceeding is unrebutted. Accordingly, the district will be required to fund the SETSS delivered by Benchmark for the 2022-23 school year by directly remitting payment to the agency.

VII. Conclusion

Based on the foregoing, the parent sustained her burden to demonstrate the appropriateness of her unilaterally-obtained services and no equitable considerations warrant a reduction or denial of an award for the costs of the services delivered by Benchmark during the 2022-23 school year. In addition, the parent is entitled to direct funding, rather than reimbursement, of the costs of the student's services delivered by Benchmark during the 2022-23 school year.

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's decision, dated September 8, 2023, is modified by reversing that portion which required the district to reimburse the parent for, rather than directly fund, the costs of the SETSS delivered by Benchmark during the 2022-23 school year; and

IT IS FURTHER ORDERED that the district shall directly fund the costs of up to 60 hours of SETSS delivered by Benchmark during the 2022-23 school year upon submission of provider affidavits as to services rendered.

Dated: **Albany, New York**
December 18, 2023

JUSTYN P. BATES
STATE REVIEW OFFICER