The University of the State of New York

The State Education Department
State Review Officer
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No. 23-217

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 Gail Eckstein, 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, among other things, ordered the district to reimburse the parent for the costs of her daughter's private special education teacher support services (SETSS) from Benchmark Student Services LLC (Benchmark) for the 2022-23 school year. 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]).

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 300.507[a][1]). First, after an opportunity to engage in a resolution process, the parties appear at an impartial hearing conducted at the local level before an IHO (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j]). An IHO typically conducts a trial-type hearing regarding the matters in dispute in which the parties have the right to be accompanied and advised by counsel and certain other individuals with special knowledge or training; present evidence and confront, cross-examine, and compel the attendance of witnesses; prohibit the introduction of any evidence at the hearing that has not been disclosed five business days before the hearing; and obtain a verbatim record of the proceeding (20 U.S.C. § 1415[f][2][A], [h][1]-[3]; 34 CFR 300.512[a][1]-[4]; 8 NYCRR 200.5[j][3][v], [vii], [xii]). The IHO must render and transmit a final written decision in the matter to the parties not later than 45 days after the expiration period or adjusted period for the resolution process (34 CFR 300.510[b][2], [c], 300.515[a]; 8 NYCRR 200.5[j][5]). A party may seek a specific extension of time of the 45-day timeline, which the IHO may grant in accordance with State and federal regulations (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5]). The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]).

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of

the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

The parties' familiarity with the facts and procedural history of the case and the IHO's decision is presumed and will not be recited here in detail. Briefly, the CSE convened on May 31, 2018 to develop an IESP for the student for the 2018-19 school year to be implemented on September 6, 2018 (Parent Ex. B at p. 1). At that time the student was parentally placed in a private religious school (id. at p. 2; see Parent Ex. A at p. 1). As per the present levels of performance section of the IESP, the student performed in the average range cognitively but demonstrated significant weaknesses in reading comprehension and some minor deficits in her ability to decode (Parent Ex. B at p. 2). The IESP also noted that the student's writing skills were "weak," and that although she was able to solve straightforward math computations using addition, subtraction, multiplication and division, she was "challenged" by word problems (id.). With respect to the student's functioning in the classroom setting, it was noted that she worked "at a slow pace" and "struggle[d] with directions (id.). It was further noted that the student "require[d] a good deal of 1:1 time with the teacher to understand information" and also struggled with transitions (id.). With respect to the student's social emotional development, the IESP stated that the student was a well-behaved and social child but experienced some issues with self-esteem due to her academic struggles (id. at p. 3). To address the student's special education needs, the CSE recommended that she receive five periods per week of special education teacher support services (SETSS) in a group for the 2018-19 school year (id. at p. 6).

Little information was provided in the evidence regarding the parties' actions over the next several school years. Approximately four years later, the parent entered into a contract dated September 12, 2022 with Benchmark to privately provide SETSS services to the student for the 2022-23 school year (Parent Ex. C).[1] In a due process complaint notice dated May 24, 2023 and filed by a lay advocate, the parent alleged that the district failed to implement the student's mandated SETSS for the 2022-23 school year and sought as relief an order "compelling the District to implement the student's program of SETSS, at enhanced market rates" and "provide a bank of compensatory education services for services not provided for during the 2022-2023 school due to the failure to assign a provider" (Parent Ex. A at pp. 1, 2).

As reflected in a prehearing order dated June 16, 2023, a pre-hearing conference was conducted before the IHO on June 15, 2023 and an impartial hearing thereafter convened before the Office of Administrative Trials and Hearings (OATH) on July 20, 2023 (Tr. pp. 1-59; Pre-Hr'g Conf. Summ. & Order). In a decision dated September 4, 2023, the IHO determined that the district failed to offer the student a free appropriate public education (FAPE) on an "equitable basis" for the 2022-23 school year and found that the student was entitled to compensatory education due to the district's failure to provide her with the mandated SETSS (IHO Decision at pp. 8, 10). The IHO cited numerous reasons that the district waived its defense that the parent failed to notify the district that she was seeking dual enrollment services for the student for the

[1] 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).

2022-23 school year and, further, that the district failed to otherwise show that it provided special education services to the student (IHO Decision at pp. 5-8). Although the parent sought an order from the IHO mandating that the district directly fund the services at Benchmark, as relief, the IHO ordered the district to reimburse the parent "for the cost of the SETSS services described above at the rate of $175 per hour, (provided from September 19, 2022, through June 27, 2023) within 35 days of submission of proof of payment and provider affidavits as to services rendered" (IHO Decision at p. 11).

IV. Appeal for State-Level Review

The parent, through a lay advocate, appeals from the IHO's decision. The parties' familiarity with the particular issues for review on appeal is also presumed and will not be recited here in detail. Briefly, the only issue appealed by the parent is whether the IHO erred by ordering reimbursement as opposed to direct funding for the costs of the special education services the parent unilaterally obtained for the student for the 2022-23 school year. In a cross-appeal, the district asserts that the IHO erred by finding that it had waived its June 1 notice defense and also erred by awarding reimbursement to the parent for the unilaterally obtained special education services because she did not meet her burden to show that the services were appropriate for the student or that she had a financial obligation to pay for the services.

V. Applicable Standards

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

However, under State law, parents of a student with a disability who have privately enrolled their child in a nonpublic school may seek to obtain educational "services" for their child by filing a request for such services in the public school district of location where the nonpublic school is located on or before the first day of June preceding the school year for which the request for services is made (Educ. Law § 3602-c[2]).[2] "Boards of education of all school districts of the state shall furnish services to students who are residents of this state and who attend nonpublic schools located in such school districts, upon the written request of the parent" (Educ. Law § 3602-c[2][a]). In such circumstances, the district of location's CSE must review the request for services and "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an [IEP]" (Educ. Law § 3602-c[2][b][1]). The CSE must "assure that special education programs and services are made available to students with disabilities attending

[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]).

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, 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

Initially, I note that 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 (IHO Decision at p. 8). Accordingly, this 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]).

A. Education Law § 3602-c and June 1 Defense

Turning to the cross-appeal and the district's claim the parent is not entitled to any relief because the IHO erred in her determination that the district waived its Education Law § 3602-c June 1 deadline defense, as noted by the IHO, the State's dual enrollment statute requires parents of a New York State resident student with a disability who is parentally placed in a nonpublic school and for whom the parents seek to obtain educational services to file a request for such services in the district where the nonpublic school is located on or before the first day of June preceding the school year for which the request for services is made (Educ. Law § 3602-c[2]).

However, the IHO determined that the district waived such defense in "three distinct ways" (IHO Decision at p. 7). First, the IHO found that the district waived this defense because it failed to comply with the IHO's June 16, 2023, prehearing conference summary and order which required

[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 https://www.nysed.gov/sites/default/files/special-education/memo/chapter-378-laws-2007-guidance-on-nonpublic-placements-memo-september-2007.pdf). The guidance document further provides that "parentally placed nonpublic students must be provided services based on need and the same range of services provided by the district of location to its public school students must be made available to nonpublic students, taking into account the student's placement in the nonpublic school program" (id.).

the parties to articulate any known or knowable affirmative defenses within 10-days of the date of such order (IHO Decision at p. 7). Second, the IHO reasoned that because the district representative initially stated at the impartial hearing that the student was entitled to services recommended in the IESP and only later raised the issue of the June 1 deadline for the first time during its closing argument,[4] this constituted a waiver (id. at p. 8). Third, the IHO reasoned that because the district partially provided related special education services to the student during the 2022-23 school year, this also constituted a waiver of the June 1 notice defense (id.). More specifically, the IHO determined that if an IESP was developed less than a year before the June 1 deadline in question, and the services were to be implemented, as in this matter, for one year, the district made "the conscious choice to proceed after the June 1 deadline" and waived the defense (id.).

Accordingly, the parties' dispute in this case centers on whether the IHO erred in finding that the district waived its June 1 defense procedurally asserting the defense for the first time at the impartial hearing and not within 10-days of the June 16, 2023 prehearing conference summary and order.

The issue of the June 1 deadline is similar to other affirmative defenses, such as the defense of the statute of limitations, which are required to be raised at the initial hearing (see M.G. v. New York City Dep't of Educ., 15 F. Supp. 3d 296, 304, 306 [S.D.N.Y. 2014] [holding that the limitations defense is "subject to the doctrine of waiver if not raised at the initial administrative hearing" and that where a district does "not raise the statute of limitations at the initial due process hearing, the argument has been waived"]; see also R.B. v. Dep't of Educ. of the City of New York, 2011 WL 4375694, at *4-*6 [S.D.N.Y. Sept. 16, 2011] [noting that the IDEA "requir[es] parties to raise all issues at the lowest administrative level" and holding that a district had not waived the limitations defense by failing to raise it in a response to the due process complaint notice where the district articulated its position prior to the impartial hearing]; Vultaggio v. Bd. of Educ., Smithtown Cent. Sch. Dist., 216 F. Supp. 2d 96, 103 [E.D.N.Y. 2002] [noting that "any argument that could be raised in an administrative setting, should be raised in that setting"]). "By requiring parties to raise all issues at the lowest administrative level, IDEA 'affords full exploration of technical educational issues, furthers development of a complete factual record and promotes judicial efficiency by giving these agencies the first opportunity to correct shortcomings in their educational programs for disabled children.'" (R.B. v. Dep't of Educ. of the City of New York, 2011 WL 4375694, at *6 [S.D.N.Y. Sept. 16, 2011], quoting Hope v. Cortines, 872 F. Supp. 14, 19 [E.D.N.Y. 1995] and Hoeft v. Tucson Unified Sch. Dist., 967 F.2d 1298, 1303 [9th Cir. 1992]; see C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at *12 [S.D.N.Y. Sept. 22, 2011]).

Moreover, unless specifically prohibited by regulation, IHOs are provided with broad discretion, subject to administrative and judicial review procedures, in how they conduct an impartial hearing, so long as they "accord each party a meaningful opportunity" to exercise their rights during the impartial hearing (Letter to Anonymous, 23 IDELR 1073 [OSEP 1995]; see Impartial Due Process Hearing, 71 Fed. Reg. 46,704 [Aug. 14, 2006] [indicating that IHOs should

[4] It appears that contrary to the IHO's finding, the district raised the June 1 defense in both its opening and closing statements (Tr. pp 14-15, 56-57). However, as further discussed herein, the district does not argue on appeal that the IHO erred in finding that the district did not comply with the June 15 prehearing conference order with respect to the timing of its assertion of the June 1 defense.

be granted discretion to conduct hearings in accordance with standard legal practice, so long as they do not interfere with a party's right to a timely due process hearing]). An IHO must provide all parties with an opportunity to present evidence and testimony, including the opportunity to confront and cross-examine witnesses (34 CFR 300.512[a][2]; 8 NYCRR 200.5[j][3][xii]).

In this instance, the hearing record includes a prehearing conference summary and order dated June 16, 2023 which reflects that representatives for the parties and the IHO discussed the process for how the impartial hearing would be conducted (see June 16, 2023 Pre-Hr'g Conf. Sum. and Order). According to the prehearing conference summary and order, the parties were required to articulate any known or knowable affirmative defense within 10 calendar days of the date of the prehearing conference summary and order, which included but was not limited to statute of limitations and the June 1 deadline pursuant to Education Law § 3602-c (June 16, 2023 Pre-Hr'g Conf. Sum. and Order ¶ 15). There is no evidence in the hearing record that the district raised the June 1 deadline defense within10 days after June 16, 2023 prehearing order. Moreover, the IHO was well within her authority to manage the proceeding through the prehearing order and went so far as to specifically mention the June 1 notice provision among the nonexclusive list of potential defenses. Notably, the district is silent with regard to the IHO's reasoning related to the prehearing order and its failure to comply with the affirmative defenses portion of the order. Rather, the district argues that although "it would have been preferable for the [district] to have raised the June 1 issue more specifically at an earlier stage, the [district] did raise it at the initial hearing level and the Parent had the opportunity to respond to the defense" (Dist. Ans. and Cross-App. ¶ 12). The district further notes that "the advocate for the Parent addressed the June 1 deadline at hearing by statin[g] that the [district] should have raised it earlier in the process, but did not assert that the Parent sent a letter by June 1st" (id.).

In support of its argument that it was sufficient to raise the June 1 defense during the impartial hearing, the district cites to two prior SRO decisions to argue that the June 1 deadline is an affirmative defense that can be preserved until the time that the evidentiary phase of the impartial hearing begins and is considered timely if it is raised at some point during the impartial hearing (see Application of a Student with a Disability, Appeal No. 23-162; Application of a Student with a Disability, Appeal No. 23-114). However, the district misapplies both of those authorities because no prehearing order was issued by the IHO to manage either of those proceedings (id.). In Application of a Student with a Disability, Appeal No. 23-114, three prehearing conferences took place, all of which the district failed to attend, but unlike this proceeding, there were no prehearing orders in the administrative record that specified parties needed to raise any affirmative defenses within a certain time period (Application of a Student with a Disability, Appeal No. 23-114 at p. 3, n. 3). Moreover, in Application of a Student with a Disability, Appeal No. 23-162, no prehearing order was issued and no prehearing conference of any kind took place and the undersigned indicated that it would have been preferable if the district representative raised the June 1 deadline at a prehearing conference (that is earlier, not later), thus the June 1 issue escaped earlier detection in the hearing process only because the IHO in that matter did not attempt to clarify the disputed issues at an earlier point using prehearing procedures designed to clarify the issues in accordance with the IHO's authority in State regulation (Application of a Student with a Disability, Appeal No. 23-162 at p. 7; see 8 NYCRR 200.5[j][3][xi][a], [e]). The case stood as an example of what a hearing officer should not do (i.e. delay clarification of issues due to a lack of prehearing conferences and orders) which only further undermines the district's argument in this proceeding. Thus, the district's reliance on Application

of a Student with a Disability, Appeal No. 23-162 and Application of a Student with a Disability, Appeal No. 23-114 to evade the requirements of the IHO's prehearing order is without merit.

Thus, it was well within the IHO's authority to require parties to raise any known or knowable affirmative defenses within 10 days of the prehearing conference summary and order. The district has not put forth an argument as to why such an affirmative defense as the June 1 notice deadline was not known or could not be raised within such time period, and in these circumstances it is difficult to imagine how the district could have missed it other than through its own failure to keep or examine its own records regarding the student. Moreover, the IHO provided the parties with an opportunity to raise concerns or objections to the IHO's prehearing order, and apparently the district failed to avail itself of that opportunity as well (Pre-Hr'g Conf. Summ. & Order at ¶ 4). Therefore, the IHO was correct in her determination that the district procedurally waived the defense by not raising it within the 10-day deadline pursuant to the June 16, 2023 prehearing conference summary and order.[5] I will now turn to the parties' arguments regarding the relief fashioned by the IHO.

B. 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 failed to implement the student's mandated public special education 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 that 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."]).

[5] It is unnecessary for the undersigned to consider the IHO's remaining determinations as to why she found that the district waived the June 1 deadline at length given the determination above; additionally, the district only specifically cross-appealed the IHO's determination that it waived the June 1 deadline defense due to its assertion of the defense for the first time at the impartial hearing. I note that the IHO concluded that the district provided speech-language therapy for the student during the 2022-23 school year, but does not cite to any evidence in the record to support that conclusion, and the lay advocate indicated during the impartial hearing that although the student had been evaluated for potential speech language services "she did okay" and the CSE did not add them to the student's programming (IHO Decision at p. 8; Tr. p.13).

In the May 2023 due process complaint notice, the parent did not mention that she had already entered into a contract with Benchmark in September 2022, and it was only at the impartial hearing did the lay advocate make clear that seeking funding for the costs for the amount that the parent identified as part of her private contract with Benchmark (see Tr. p. 19; Parent Exs A; C) The IHO treated the relief sought by the parent as compensatory education (IHO Decision at pp. 8-10), which is how the parent described the relief she sought in the due process complaint notice, namely to have the "district" implement the student's program "at enhanced market rates" and, further, to provide a "bank" of compensatory education services (Parent Ex. A at p. 2). However, contrary to the relief sought in the due process complaint notice, at the time of the impartial hearing it was clear that the parent was not seeking to have the district personnel provide special education services to the student, and the parent was only seeking financing for the services that the parent had unilaterally obtained for the student from Benchmark. 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 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.

Accordingly, although the IHO viewed the relief sought as a request for compensatory education (see IHO Decision at pp. 8-10), 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]). 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).

C. Unilaterally Obtained Services

In its cross-appeal, the district argues that the hearing record "lacks consistent information about the level of services [the student] received and does not explain how the services addressed [the student's] identified needs, or progress made during the school year" (Ans. and Cross-App ¶ 7).

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 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, 773 F.3d at 386; 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 description of the student in the May 2018 IESP which are not in dispute (see Parent Ex. B). The May 2018 IESP noted that the student performed in the average range cognitively but demonstrated significant weaknesses in reading comprehension and some minor deficits in her ability to decode (Parent Ex. B at p. 2). The IESP also noted that the student's writing skills were "weak" and she struggled with word problems in math (id.). With respect to the student's functioning in the classroom setting, it was noted that she worked "at a slow pace" and "struggle[d] with directions" (id.). It was further noted that the student "require[d] a good deal of 1:1 time with the teacher to understand information" and also struggled with transitions (id.). With respect to the student's social emotional development, the IESP stated that the student was a well-behaved and social child but experienced some issues with self-esteem due to her academic struggles (id. at p. 3). To address the student's special education needs, the CSE recommended that she receive five periods per week of special education teacher support services (SETSS) in a group (id. at p. 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. C at p. 1).

The administrator from Benchmark provided direct testimony by affidavit that the agency was providing the student with five periods per week of SETSS for the 2022-23 school year and that services had begun "on or about September 19, 2022" (Parent Ex. F ¶¶ 2-3). Although the lay advocate sought up to 200 hours of unilaterally obtained SETSS services for the student, during the impartial hearing, the administrator testified that, for the 2022-23 school year, Benchmark actually delivered 154 and one third hours of SETSS from September 2022 to June 2023 (Tr. p. 38). In her affidavit, the administrator identified, by name, the individual delivering the student's SETSS and indicated that she held State certification to teach students with disabilities (Parent Ex. F ¶ 4). For the provider named, the hearing record includes a document indicating that the provider held a certification in childhood education (grades 1-6) along with certifications to teach students with disabilities ages birth through sixth grade (compare Parent Ex. F ¶ 4, with Parent Ex. E).

Regarding the SETSS delivered to the student during the 2022-23 school year, a June 2023 progress report was completed by the SETSS provider (Parent Ex. D at p. 1). The progress report noted that the student "require[d] some assistance to strengthen her executive functioning skills. and "display[d] some processing deficiencies" (id.). With respect to the student's reading, the progress report stated that she struggled with reading comprehension and display[ed] difficulty with content and factual questions . . . related to a text (id.) It was also noted that the student's ability to "[d]etermin[e] themes or main ideas of a text [was] also a struggle" and she "show[ed] significant difficulty with her inferential comprehension" (id.). The progress report also stated that the student was "unable to determine the meaning of words and phrases and it [was] hard for her to identify various literary components such as mood" (id.).

Concerning the student's writing abilities, the progress report noted that "she continue[d] to need help organizing her thoughts, as well as expanding her work into sophisticated sentences" Parent Ex. F at p. 1). The progress report further noted that the student "continue[d] to work on producing clear and coherent writing in which the development, organization, and style are appropriate to task" but "[h]er written work [was] lacking in detail and richness due to her difficulty with spelling as well as a lagging word fund" (id.) With respect to the writing skills the student was working on with the SETSS provider, the progress report stated that she was "working on using appropriate and varied transitions to create cohesion and clarify the relationships among ideas and concepts" and was also "working with provider on providing a concluding statement or section that follows from and supports the information or explanation presented" (id.).[6]

The progress report also noted that the student "learn[ed] through visual and auditory modalities" and was "able to learn when the lessons [we]re broken down into smaller chunks" (Parent Ex. D at p. 1). The progress report described the student as an "extremely happy and social girl" and "motivated and interested in her studies" (id.) The progress report also noted that the student "participate[d] regularly in class and [was] able to add relevant information to class discussions" (id.) The progress report further described the student as "an avid member of the [school] community," who "follow[ed] the rules" and "ha[d] a good amount of confidence" (id. at p. 2).

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

[6] The progress report notes that the provider did not evaluate the student with respect to math and there is no indication from the report that the provider was working on math with the student.

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]).

With respect to whether the above evidence in the hearing record demonstrated that the parent met her burden to show that the unilaterally obtained services met the student's unique needs with specially designed instruction, I find that while the evidence admitted at the hearing cannot be described as robust concerning the implementation of the privately obtained services and the student's progress, 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. While the May 2018 IESP relied on in part to demonstrate the student's needs, was developed when the student was in third grade and there has since been three intervening school years between the school year during which it was to be implemented (fourth grade, 2018-19) and the school year for which relief is sought (eighth grade, 2022-23), the evidence concerning the student's needs as identified by the SETSS provider does not differ to any great degree from the description of the student in the May 2018 IESP created by the CSE. Moreover, it is relevant that the student appears to have grown in confidence with no indications of self-esteem issues despite her learning challenges, was noted to participate actively in the classroom and was able to learn when provided with instruction that presented classroom lessons in smaller chunks. The administrator's testimony about the number of hours of services delivered is sufficiently explained in the testimony and the district made little effort to 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.

D. Equitable Considerations

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 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. 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"]).

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 IEP or IESP" (Parent Ex. C 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. C 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. G ¶ 7). In addition, the Benchmark administrator testified to the parties' obligations under the contract and the hourly rate for the services (Parent Ex. F ¶ 5). The district did not successfully rebut the testimony of the parent or the Benchmark administrator during the impartial hearing concerning 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.

Furthermore, I note that the hearing record lacks a 10-day notice of unilateral placement indicating that the parent intended to reject services offered by the district and would seek the costs of the unilateral services obtained from Benchmark from the district. However, balanced against that is the fact that there was no proposed programming from the CSE for the 2022-23 school year for the parent to reject since it appears that the district stopped convening the CSE sometime after the 2018-19 school year. Accordingly, as a matter within my discretion, I do not find it necessary to reduce or deny funding on the equitable basis that the parent failed to provide a 10-day notice. Based on the foregoing, no equitable considerations warrant a reduction in the costs or complete denial of the relief sought by the parent.

E. 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 (Burlington, 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 within 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. G ¶ 10). 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 Benchmark. As the evidence of the delivery of services by Benchmark was obtained through the witness' inspection of documents during live testimony, but which documents were not made part of the hearing record, the parent shall be required to submit the documents from Benchmark's business records in the "Caseload" system regarding the SETSS services delivered to the student by Benchmark during the 2022-23 school year (see Tr. p. 37-38).

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 4, 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 154 and one third hours of SETSS delivered to the student by Benchmark during the 2022-23 school year upon the parent's submission of proof of attendance from September 2022 through June 2023.

Dated: **Albany, New York**
January 22, 2024

JUSTYN P. BATES
STATE REVIEW OFFICER