The University of the State of New York

The State Education Department
State Review Officer
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No. 23-218

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

Appearances:
Liz Vladeck, General Counsel, attorneys for respondent, by Sarah M. Pourhosseini, 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 son'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 Tr. p. 35; Parent Exs. A at p. 1; C at p. 1).[1] On March

[1] Prior to the 2021-22 school year, second grade, the student attended a different nonpublic school (Tr. pp. 35, 42; compare Parent Ex. A at p. 1, with Parent Ex. B at p. 2).

27, 2019, a CSE convened, found the student eligible for special education as a student with a speech or language impairment, and developed an IESP for the student with recommendations for three periods per week of direct, group SETSS, two 30-minute sessions per week of individual speech-language therapy, one 30-minute session per week of group speech-language therapy, and two 30-minute sessions 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).[2] According to the parent, the district failed to thereafter develop "an updated IESP for the 2022-2023 school year" (Parent Ex. F ¶ 3).

On September 12, 2022, the parent entered into 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. C).[3]

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 two sessions of speech-language therapy services during the 2022-23 school year (Dist. Ex. 3).

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, she was forced to obtain private services from an agency "at enhanced rates" (id.). The parent also alleged that the district failed to implement the student's stay put services during a prior proceeding that was open from September 19, 2022 through January 19, 2023 when the prior proceeding was withdrawn without prejudice (id. at p. 2). 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," and to provide a bank of compensatory education to make up for any services not provided to the student during the 2022-23 school year (id.).

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 26, 2023 (Tr. pp. 1-63; 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 at the rate of $175.00 per hour pursuant to her contract, as well as compensatory education for the speech-language therapy and OT the

[2] 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]).

[3] 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).

student missed during the 2022-23 school year (Tr. pp. 7-8; see Parent Ex. F ¶¶ 7-8, 10). The parent also testified that she had not been able to pay any of the funds she owed to Benchmark (Parent Ex. F ¶ 9).

In a decision dated September 5, 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, 10). The IHO also found that, the district 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 p. 7). The IHO also found that the district waived the defense by agreeing at the hearing that the student was entitled to the services recommended in the March 2019 IESP and by providing for some related services during the 2022-23 school year (id. at pp. 7-8).

The IHO examined the relief sought as a request for compensatory education (see IHO Decision at pp. 9-10). Finding that the district did not articulate its position regarding an appropriate compensatory award or offer evidence regarding appropriate relief and noting that the parent presented evidence regarding the "certifications and qualifications" of the private provider from Benchmark and the agency's rate, the IHO determined that the student was entitled to the three sessions per week of SETSS and related services (id. at pp. 10-11). The IHO also noted that the district did not claim that the parent failed to cooperate with the district in any manner and, although the district "expressed a general objection to the rate charged by the Provider, it did not offer any evidence of an alternative reasonable rate for SETSS" (id. at p. 11). Therefore, the IHO found that the rate charged by the agency for the services delivered was "reasonable" and that no equitable considerations would warrant a denial of relief (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 at the contracted rate (IHO Decision at p. 12). In addition, the IHO ordered the district to directly fund compensatory education services consisting of a total of 80 half-hour sessions of OT and 118 half-hour sessions 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 in awarding reimbursement for the privately obtained services. In particular, the district argues that the IHO erred by failing to determine that the parent did not meet her burden of proving the privately obtained services were appropriate and in failing to determine that equitable considerations warranted a denial of relief. As to the appropriateness of the unilaterally obtained SETSS, the district asserts that the hearing record lacks any testimony from the student's SETSS provider and that the progress report only identified the student's present levels of performance and

recommended goals without specifying the services being provided or what progress the student was making. As to equitable considerations, the district asserts that the parent did not provide proper notice of her intent to obtain services unilaterally and that the parent was not legally obligated to pay for the cost of the SETSS delivered to the student.

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 the private provider was delivering the same SETSS as were recommended for the student in the March 2019 IESP, 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 initial due process complaint notice from the prior proceeding constituted a sufficient 10-day notice letter, that even if it were not sufficient, the IHO decided not to reduce the relief and it was within her discretion to make that determination, 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]).[4] "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

[4] 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 (id.).[5] 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

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."]).

[5] State guidance explains that providing services on an "equitable basis" means that "special education services are provided to parentally placed nonpublic school students with disabilities in the same manner as compared to other students with disabilities attending public or nonpublic schools located within the school district" ("Chapter 378 of the Laws of 2007–Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the Individuals with Disabilities Education Act (IDEA) 2004 and New York State (NYS) Education Law Section 3602-c," Attachment 1 at p. 11, VESID Mem. [Sept. 2007], available at http://www.p12.nysed.gov/specialed/publications/policy/nonpublic907.pdf). The guidance document further provides that "parentally placed nonpublic students must be provided services based on need and the same range of services provided by the district of location to its public school students must be made available to nonpublic students, taking into account the student's placement in the nonpublic school program" (id.).

The IHO treated the relief sought by the parent as compensatory education (IHO Decision at pp. 9-10). 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 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 acknowledged in her closing statement that she bore the burden of showing that the private provider was capable of enabling the student to make progress, which indicates 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 59-60).[6] 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.

[6] The parent, through her advocate, also stated in her opening statement and 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 SETSS (Tr. pp. 17-18, 60-61).

Dist., 554 F.3d 247, 252 [2d Cir. 2009]).[7] 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).

Initially, the district has not appealed from the IHO's determination that the district waived the requirement that the parent provide a written request for equitable services by June first of the school year preceding the school year at issue and 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 (see IHO Decision at pp. 2, 6-8, 10). Additionally, although the district cross-appeals asserting that equitable considerations warrant a denial of relief, that cross-appeal is limited to relief for the unilaterally-obtained SETSS, and is not applicable to the awarded compensatory education (see Answer & Cross-Appeal ¶¶ 8-10). Accordingly, the IHO's award of 80 half-hour sessions of OT and 118 half-hour sessions of speech-language therapy is not being challenged on appeal. Based on the above, 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]).

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

[7] 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]).

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 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

In this instance, the hearing record lacks current objective evidence of the student's educational needs, as the last IESP or other educational program developed for the student was the March 2019 IESP (see Parent Ex. B). However, as the district has essentially conceded that the student was entitled to equitable services for the 2022-23 school year, which the district failed to provide, and the district has not submitted any evaluative information or assessments of the student as evidence of the district's view of the student's special education needs—responsibility for the deficiency in evaluative information does not fall on the parents. Accordingly, to the extent that the SETSS provider assigned by Benchmark relied on reports or assessments of the student to identify the student's needs and develop the student's educational program, and those reports or assessments were not sufficiently accurate or complete for the purposes of determining the student's needs, the responsibility for such deficiency lies with the district and not the parent (see 34 CFR 300.305[c]; 8 NYCRR 200.4[b][5][iii]; A.D. v. Bd. of Educ. of City Sch. Dist. of City of New York, 690 F. Supp. 2d 193, 208 [S.D.N.Y. 2010]; Application of a Student with a Disability, Appeal No. 15-076; Application of a Student Suspected of Having a Disability, Appeal No. 15-038; Application of a Student with a Disability, Appeal No. 14-033; Application of a Student with a Disability, Appeal No. 14-028; Application of a Student Suspected of Having a Disability, Appeal No. 14-003; Application of the Dep't of Educ., Appeal No. 13-198; Application of the

Dep't of Educ., Appeal No. 13-072; Application of a Student with a Disability, Appeal No. 12-027).

Review of the March 2019 IESP shows that when the student was in preschool he presented with moderate-severe language delays, as well as mild speech delays, his poor attention negatively impacted his cognitive development, he had difficulty with participating in tasks independently and in turn taking skills, he had difficulties with higher thinking skills and understanding new concepts, his auditory listening skills were delayed, and he required "a lot of repetition and redirection" (Parent Ex. B at p. 2). Socially, the student presented with minor delays; he tended to engage in parallel play and needed reminders to express himself verbally (id. at p. 3). With respect to the student's physical development, the student demonstrated delays in fine motor coordination and hand function, he presented with low muscle tone in his trunk and upper and lower extremities, and his visual-perceptual skills were limited in understanding spatial orientation (id.).

The March 2019 IESP noted that the student's "language delays and attention difficulties warrant[ed] additional support in the general education curriculum" and identified that the student required review and repetition, praise and encouragement, and tasks broken down into smaller steps (Parent Ex. B at p. 4). To address the student's special education needs, the March 2019 IESP recommended that the student receive three periods per week of direct, group SETSS, two 30-minute sessions per week of individual speech-language therapy, one 30-minute session per week of group speech-language therapy, and two 30-minute sessions per week of individual OT (id. at p. 9).

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 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).[8, 9] The administrator also provided the name of the teacher who provided services to the student, indicating that she was a State-certified special education teacher (id. ¶ 4). For the provider named, the hearing record includes a document indicating that the provider held certifications in early childhood and to teach students with disabilities ages birth through sixth grade (compare Parent Ex. G ¶ 4, with Parent Ex. E).

[8] The administrator was not asked what the basis of her knowledge was; however she testified that she did not have any interactions with the provider regarding the student (Tr. p. 56).

[9] There is no evidence in the hearing record as to the length of a period. 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); however, the agency billed for SETSS at an hourly rate (see Parent Ex. G ¶¶ 4-5).

Regarding the SETSS delivered to the student during the 2022-23 school year, a January 2023 progress report was completed by the SETSS provider (Parent Ex. D at p. 2).[10] The progress report briefly identified the student's then-current level of functioning in math, reading, and writing (id. at p. 1). According to the report, in math, the student required steps and instruction repeated several times and he needed a lot of modeling and redirecting to complete assignments (id.). In reading, the student's skills were below grade level and he required modeling and prompting to decode multi-syllabic words and maintain proper fluency; however, he was also able to self-correct and use learned skills in decoding multi-syllabic words (id.). The report further indicated that the student's "limited vocabulary and receptive language skills impair[ed] his ability to comprehend what he [wa]s reading" (id.). The report specifically noted that the SETSS provider was using the Wilson reading system to address the student's reading deficits and she was teaching the student how to use context clues to understand what he was reading (id.). In writing, the student had difficulty organizing his thoughts, his handwriting skills were "poor," and his grammar, spelling, and punctuation were "weak" (id.). The SETSS provider was working on improving the student's "use of descriptive language and varied word choice to help enhance his writing skills" (id.).

The January 2023 progress report further noted that the student benefitted from pre and post teaching of new concepts, seating in close proximity to the board to minimize distractions, use of manipulatives in math with a warning that they could become more of a distraction than a help, and use of graphic organizers for writing assignments (Parent Ex. C at p. 1). As for recommended supports to address the student's needs, the progress report indicated that the student required a lot of prompting, repetition, and practice, and 1:1 assistance from his provider to learn new skills (id. at p. 2). The provider noted that the student was recommended for three hours per week of SETSS, as well as speech-language therapy, and OT services, but indicated the student should receive an increase in SETSS for the student to fully participate in the classroom routine and keep up with his classmates (id.). Finally, the progress report included goals to work on the student's attention during lessons, decoding multi-syllabic words, reading fluency, reading comprehension, language skills, writing skills, mathematics, and following directions (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

[10] Although identified as a "progress report," the report focuses on the student's then-current functioning and deficits and strategies that could be helpful in addressing the student's deficits; it does not identify progress the student made in any specific area or generally (see Parent Ex. D). However, 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). 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]).

[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 IESP. In addition, evidence such as service delivery

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. 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.,

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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.

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).

Here, the hearing record does not include a letter from the parent to the district stating the parent's intent to provide the student with services unilaterally during the 2022-23 school year. As noted above, according to the parent, she originally filed a due process complaint notice in this matter on September 19, 2022 (Parent Ex. A at p. 2). As the parent argues, the district took no action thereafter to correct the problem by convening a CSE and/or delivering SETSS and related services to the student.[12] The IHO did not discuss the lack of a notice of unilateral placement but did find that the district presented no claims or evidence during the hearing to suggest that the parent failed to cooperate with the district or interfered with the district's obligation to provide the student with a FAPE on an equitable basis for the 2022-23 school year (IHO Decision at p. 11). Based on the above and notwithstanding the lack of a 10-day notice, I am not inclined to disturb the IHO's discretionary finding that no equitable considerations warranted a reduction or denial of the awarded relief.

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 written contract regarding the hourly rate for SETSS. 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

[12] The two sessions of speech-language therapy delivered to the student during the 2022-23 school year occurred on September 12 and 19, prior to or contemporaneous with the reported date of the original due process complaint notice (see Dist. Ex. 3), and, therefore, it does not appear as thought the delivery of the services was triggered by the complaint.

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. F ¶¶ 7-8). 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 attempt to cross-examine the parent or the Benchmark administrator during the impartial hearing to challenge the accuracy of this testimony or the intent of the parties in entering into 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 or 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). As another SRO recently observed:

> 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.

(see Application of a Student with a Disability, Appeal No. 23-216). Nevertheless, given the continuing shift in authority within the District Court for the Southern District of New York in favoring direct payment and the 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 explain why it was prevented from doing so.

In addition to the above authority providing that direct payment may be appropriate notwithstanding a 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. F ¶ 9). 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 the 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 5, 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 three hours per week 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 29, 2023

SARAH L. HARRINGTON
STATE REVIEW OFFICER