The University of the State of New York

The State Education Department
State Review Officer
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No. 23-229

Application of a STUDENT WITH A DISABILITY, by his parents, 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 Ezra Zonana, 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. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which ordered the district to reimburse the parents for the costs of their 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 parents. 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 nonpublic school at the parents' expense (see Parent Exs. A at p. 1; B at p. 1). On June 10, 2021, 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 recommending 10 periods per week of group SETSS, two 30-minute sessions per week of individual speech-language therapy, and two 30-minute sessions per week of individual occupational therapy (OT) to be implemented for a student dually enrolled

in the public school (Dist. Ex. 2 at pp. 1, 10-11).[1] According to the parents, the district failed to thereafter develop "an updated IESP for the 2022-2023 school year" (sixth grade) (Parent Ex. F ¶ 3).

On September 12, 2022, the parents 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. A).[2]

According to the parents, they initially filed a due process complaint notice on September 18, 2022, but the matter was subsequently withdrawn on January 19, 2023 without prejudice (Dist. Ex. 1 at p. 2). The administrator from Benchmark indicated that the agency began delivering SETSS to the student "on or about September 18, 2022" (Parent Ex. E ¶ 3). In addition, service delivery records show that the student received some 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 parents, 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 Dist. Ex. 1 at pp. 1-2). The parents asserted that they had been unable to locate providers to deliver the student's services "at the regular [district]-published rates" and, therefore, obtained private services from an agency "at enhanced rates" (id. at p. 2). The parents also alleged that the district failed to implement the student's stay put services during that period of time between September 2022 and January 2023 when the prior due process complaint notice was pending (id.). For relief, the parents requested that the district be ordered to implement the student's program of SETSS and related services at "enhanced market rates," as well as compensatory education to make up for any services not provided during the 2022-23 school year (id.).

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, and August 1, 2023 (Tr. pp. 1-50; Pre-Hr'g Conf. Summ. & Order). In a decision dated September 13, 2023, the IHO indicated there was no dispute that the student was entitled to the services set forth in the June 2021 IESP for the 2022-23 school year and determined that the district failed to meet its burden to prove that it provided the student with the mandated services for the 2022-23 school year (IHO Decision at pp. 2, 5-7, 10). The IHO also found that, by its concession during the impartial hearing that the student was entitled to the services set forth in the June 2021 IESP and its actions in delivering some related services during the 2022-23 school year, the district waived the requirement for the parents to request equitable services from the district in writing before June 1

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

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

and, further, waived the defense relating to the June 1 deadline by not raising it in a timely manner in accordance with the IHO's prehearing conference summary and order (id. at pp. 7-9).

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, the IHO determined that the student was entitled to ten sessions per week of SETSS (id. at p. 10). In addition, the IHO found that the parents' witnesses credibly testified that the agency providers were "able to administer the special education services recommended on the IESP" and regarding the rate for the services (id. at p. 10). The IHO further found that the private providers were appropriately credentialed to deliver SETSS to the student (id. at pp. 6-7, 10). Finally, the IHO found no evidence that the rate for the services was excessive and noted that the district had not raised any other equitable considerations that would warrant a reduction or denial of relief (id. at pp. 10-11).

Based on the foregoing, the IHO ordered the district to reimburse the parents for the costs of the privately obtained SETSS delivered to the student during the 2022-23 school year (IHO Decision at p. 11).

IV. Appeal for State-Level Review

The parents, through the lay advocate, appeal from the decision of the IHO, alleging that she erred in ordering the district to reimburse them 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 parents' 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 parents' ability to pay for the privately-obtained services. As for its cross-appeal, the district alleges that the IHO erred in awarding any relief. In particular, the district alleges that the parents failed to meet their burden to prove the appropriateness of the SETSS delivered by Benchmark during the 2022-23 school year, arguing that the providers were not appropriately credentialed and noting a lack of evidence regarding Benchmark's provision of the services. The district further argues that the IHO should have denied the parents' requested relief on equitable grounds related to the lack of a 10-day notice letter and the lack of evidence regarding the parents' legal obligation to pay the costs of the SETSS delivered during the 2022-23 school year. The district also contends that the hourly rate for the SETSS was excessive.

In an answer to the cross-appeal, the parents respond to the district's material allegations and argue that they met their burden to prove that the privately-obtained services were appropriate and that equitable considerations supported their request for relief. In particular, the parents argue that the private provider was delivering the same SETSS as were recommended for the student in the June 2021 IESP, that the evidence showed that the providers were experienced State-certified teachers, and that a progress report from the private provider reflected the student's needs, strategies used by the provider, and goals for the student. The parents also argue that, although the parents did not provide a 10-day notice letter, the district was on notice of their claims by virtue of the prior due process complaint notice and took no action at that time or thereafter, and that, therefore, the lack of notice should not weigh against the parents. In addition, the parents assert

that they had a financial obligation to pay for the services delivered by Benchmark and that the district presented no evidence at the impartial hearing to dispute the reasonableness of the rate charged by the agency.

V. Applicable Standards

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

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

[3] State law provides that "services" includes "education for students with disabilities," which means "special educational programs designed to serve persons who meet the definition of children with disabilities set forth in [Education Law § 4401(1)]" (Educ. Law § 3602-c[1][a], [d]).

[4] State guidance explains that providing services on an "equitable basis" means that "special education services are provided to parentally placed nonpublic school students with disabilities in the same manner as compared to 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.).

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 parents do not seek tuition reimbursement from the district for the cost of the parental placement. Instead, the parents 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 they unilaterally obtained private services from Benchmark for the student without the consent of 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 parents are entitled to public funding of the costs of the private services. "Parents who are dissatisfied with their child's education can unilaterally change their child's placement . . . and can, for example, pay for private services, including private schooling. They do so, however, at their own financial risk. They can obtain retroactive reimbursement from the school district after the [IESP] dispute is resolved, if they satisfy a three-part test that has come to be known as the Burlington-Carter test" (Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 526 [2d Cir. 2020] [internal quotations and citations omitted]; see Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 14 [1993] [finding that the "Parents' failure to select a program known to be approved by the State in favor of an unapproved option is not itself a bar to reimbursement."]).

The IHO treated the relief sought by the parents 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 p. 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 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. 9-10), the parents' 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]).[5] 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, as neither party has appealed the IHO's determination that the district failed to meet its burden to prove that it provided the student appropriate special education services for the 2022-23 school year, that finding has become final and binding on the parties and will not be further discussed (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

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

[5] 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]).

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 v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

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

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

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

1. Student's Needs

Here, the only evidence of the student's needs leading up to the 2022-23 school year is the June 2021 IESP; however, the description of the student's needs therein is not materially in dispute (see Dist. Ex. 2). The June 2021 IESP indicated that the review was a "three-year re-evaluation" but that the CSE agreed to a "flexible assessment" and relied on "progress reports" to determine the student's needs (id. at p. 1). In particular, the IESP reflects information from a SETSS provider,

as well as a June 2021 speech-language progress report and a June 2020 OT progress report (id. at pp. 1-3).

In the area of reading and English language arts (ELA), the June 2021 IESP included information from a SETSS provider that the student's reading skills were "extremely weak" and that the student demonstrated deficits in comprehension, fluency, decoding, and inference skills (Dist. Ex. 2 at p. 1). The IESP reported that the student's "language deficits and his lack of attention" contributed to his reading difficulties (id. at p. 1). The IESP reported that the student's provider often "privately explain[ed]" lessons delivered by the teacher, and that the student required "constant prompting and redirection during class lessons" and questions rephrased and repeated (id. at pp. 1-2). In the area of writing, the IESP indicated that the student had trouble organizing his thoughts and understanding essay assignments, needed support for brainstorming and planning, and benefited from use of graphic organizers (id. at p. 2). For math, the IESP reported that the student struggled with understanding word problems and following directions, tended to rush through problem solving, and needed the provider to "repeat the steps" involved (id.).

Based on a June 2021 speech-language progress report, the IESP noted that the student "present[ed] with receptive language delays characterized by difficulties with reading and listening comprehension, following classroom instructions, understanding the main idea, and making inferences," as well as "expressive language delays characterized by difficulties expressing thoughts and feelings, writing, and replying to questions" (Dist. Ex. 2 at p. 2). The IESP also described that the student's "vocabulary [wa]s below age and grade level and his focus [wa]s limited" (id.).

The IESP also included information from a June 2020 OT progress report that the student "present[ed] with deficits in sensory processing/modulation, attention to task, handwriting, visual perceptual skills, visual-motor coordination, executive functioning skills, problem solving, and low muscle tone in his upper extremities," as well as difficulties "following multistep directions and staying focused on task" (Dist. Ex. 2 at p. 3).

To address the student's needs, the CSE recommended 10 periods per week of group SETSS, related services of speech-language therapy and OT, as well as supports for the student's management needs including refocusing and restructuring, frequent prompts, instruction broken down and repeated, positive reinforcement and encouragement, and visual and graphic organizers (Dist. Ex. 2 at pp. 3-4, 10-11).

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. A at p. 1).

The administrator from Benchmark testified by way of affidavit that the agency was providing the student with SETSS for the 2022-23 school year and that services had begun "on or about September 18, 2022" (Parent Ex. E ¶¶ 2-3). The administrator identified, by name, two individuals delivering the student's SETSS and indicated that they both held State certification to

teach students with disabilities (id. ¶¶ 4-5). For the first provider named, the hearing record includes documents indicating that the provider was a licensed speech-language pathologist and held a certification to teach students with speech and language disabilities (compare Parent Ex. E ¶ 4, with Parent Exs. C; G). The first provider also delivered speech-language therapy services to the student at district expense (compare Parent Ex. E ¶ 4, with Dist. Ex. 3). Service delivery records show that, typically, the first named provider delivered SETSS to the student for an hour and a half, three times per week (IHO Ex. I).[6] For the second provider named, the hearing record includes a document indicating that the provider held certifications in early childhood education and to teach students with disabilities ages birth through second grade (compare Parent Ex. E ¶ 5, with Parent Ex. D). While the district argues that the providers were not appropriately qualified, as noted above, the unilateral program need not be delivered by certified special education teachers (Carter, 510 U.S. at 13-14).

The hearing record indicates that the unilaterally obtained SETSS were delivered to the student at his school during the 2022-23 school year (Parent Ex. B at p. 1). According to the parent, the student received the SETSS both in class and as a pull-out service (Tr. p. 43; see also Parent Ex. B at p. 1).

A June 2023 progress report was completed by both of the SETSS providers (Parent Ex. B at p. 2). The progress report noted that the student struggled with expressive and receptive language and comprehension and, at the time of the report, was "slightly below the expected level" in math (id. at p. 1).

According to the progress report, the student "learn[ed] best with a mixture of auditory and visual modalities" and the providers supported the student by providing repetition and visual cues, one-to-one attention during class, working on problems step by step and by pulling the student "out of the classroom" to explain the teacher's lessons, and give visual cues (Parent Ex. B at p. 1). The progress report proposed annual goals for the upcoming school year (i.e., 2023-24 school year) but did not identify what goals the providers worked on with the student during the 2022-23 school year (id. at p. 2). The providers stated their view that the student required the same services going forward (id.).

Overall, while the evidence in the hearing record cannot be described as robust concerning the implementation of the privately obtained services,[7] there is sufficient evidence to show that the student received SETSS, which both parties agreed that the student required, and that the provider identified the student's specific needs and delivered instruction specially designed to meet those needs during the 2022-23 school year. The district did not successfully rebut the parent's evidence through cross-examination. Accordingly, the parents, minimally, met their burden to prove that the SETSS delivered by Benchmark during the 2022-23 school year were appropriate.

[6] The hearing record does not include service delivery records for the second named provider.

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

C. Equitable Considerations

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

1. 10-Day Notice

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

Here, the hearing record does not include a letter from the parents to the district stating the parents' intent to unilaterally obtain private services. As noted above, according to the parents, they originally filed a due process complaint notice in this matter on September 18, 2022 (Dist. Ex. 1 at p. 2). Thereafter, the district funded the student's speech-language therapy services (see. Ex. 4). Accordingly, in this instance, it would appear that notice from the parents prompted at least partial action by the district and an earlier notice may have resulted in an earlier response from the district. Nevertheless, to the extent the district was on notice that the parents were

unilaterally obtaining services as of September 18, 2022, only a slight five percent reduction of funding is warranted.

2. Parents' Financial Obligation

Next the district argues that the parents should be denied district funding for the costs of the privately-obtained services based on an insufficient showing of the parents' 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 parents 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. A 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 parents pursued an impartial hearing, Benchmark could agree to "delay invoicing" provided that the parents 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 contracted for services (Parent Ex. A 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. E ¶¶ 6-7). The district did not cross-examine the parent or the Benchmark administrator during the impartial hearing to rebut this testimony about the intentions of the parties to the contract.

Accordingly, there is no evidence in the hearing record to support the district's argument that the parents did not incur a contractual liability for the services provided by Benchmark.

3. Rate

Finally, the district argues that the rate charged by Benchmark for the SETSS delivered was excessive. Among the factors that may warrant a reduction in tuition under equitable considerations is whether the frequency of the services or the rate for the services were excessive

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

In his written testimony, the Benchmark administrator identified the hourly rate paid to each provider, as well as the hourly rate charged by the agency for the services, noting that the rate charged was billed only for services actually provided, was "within the range of market rates," and covered "all applicable direct and indirect costs . . . necessary for the implementation of the mandated services" (Parent Ex. E ¶¶ 4-5, 7). During the impartial hearing, the district did not raise any objection to the rate sought by the parents, did not present any documents, witnesses, or other evidence concerning whether the rate differed from the market rate charged for such services generally, and did not cross-examine the parent or the Benchmark administrator regarding the rate for the provided services. Accordingly, the district's argument that the rate charged by Benchmark for SETSS was excessive was not supported by the hearing record.

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 that parents lacked the financial resources to pay the costs of the nonpublic school tuition (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 the 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, proof of an actual financial risk being taken by parents tends to support a view that the costs of the contracted for program are reasonable, at least absent contrary evidence in the hearing record.

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). However, 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 [who] 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 shift in authority within the District Court for the Southern District of New York in favor of awarding direct payment, 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, arguing 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 SROs in recent years, thus far, the district has, for the most part, not presented sufficient evidence to show that schools or providers have artificially inflated their tuition or rates, or explained if or how it was prevented from presenting such evidence.

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 the parents had "not made any payments as of this time" and could not "afford to do so" (Parent Ex. F ¶ 10). While not supported by documentary evidence, the testimony about the parents' financial need 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 parents sustained their burden to demonstrate the appropriateness of the unilateral services they obtained for the student. Equitable considerations warrant a five percent reduction in an award for the costs of the services delivered by Benchmark for which the parents seek district funding. In addition, the parents are entitled to direct funding, rather than reimbursement, of the costs of the student's services delivered by Benchmark during the 2022-23.

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision, dated September 13, 2023, is modified by reversing those portions which required the district to reimburse the parents for, rather than directly fund, the costs of the SETSS delivered by Benchmark during the 2022-23, and which ordered district funding of the full amount of such services; and

IT IS FURTHER ORDERED that the district shall directly fund 95 percent of the costs of up to 10 hours of SETSS per week delivered by Benchmark during the 2022-23 school year upon submission of provider affidavits as to services rendered.

Dated: **Albany, New York**
January 29, 2024

STEVEN KROLAK
STATE REVIEW OFFICER