



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 24-105

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

### **Appearances:**

Liz Vladeck, General Counsel, attorneys for respondent, by Thomas W. MacLeod, 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) issued after remand which denied her request that respondent (the district) fund the costs of her daughter's privately-obtained special education services delivered by Benchmark Student Services LLC (Benchmark) for the 2022-23 school year and denied, in part, her request for compensatory education. Respondent (the district) cross-appeals from that portion of the IHO's decision which ordered it to reevaluate the student and convene a Committee on Special Education (CSE). The appeal must be sustained. The cross-appeal must be sustained.

### **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 programming for students with disabilities under the IDEA (20 U.S.C. §§ 1400-1482), namely a local CSE that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law §§ 3602-c; 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 related to IESPs, State law provides that "[r]eview of the recommendation of the committee on special education may be obtained by the parent or person in parental relation of the pupil pursuant to the provisions of [Education Law § 4404]," which effectuates the due process provisions called for by the IDEA (Educ. Law § 3602-c[2][b][1]). Incorporated among the procedural protections of the IDEA and the analogous State law provisions is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

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

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

### III. Facts and Procedural History

The student, as part of the same due process proceeding, has been the subject of a prior State-level administrative appeal, which remanded the matter to the IHO for further proceedings (see Application of a Student with a Disability, Appeal No. 23-225). The current appeal arises from the IHO's decision after remand based on the same hearing record that was available at the time of the initial appeal; accordingly, the parties' familiarity with the facts and procedural history through the prior administrative appeal is presumed and will only be repeated as relevant to this appeal.<sup>1</sup>

Briefly, the hearing record in this matter includes IESPs developed on May 16, 2017 and May 27, 2021 that recommended three periods per week of group special education teacher support services (SETSS), as well as speech-language therapy and counseling services (Parent Ex. B; Dist. Ex. 2). For the 2022-23 school year, on September 14, 2022, the parent notified the district that, because the district had not implemented services set forth in the May 2017 IESP, the parent intended to continue to obtain the services unilaterally from a private agency (Parent Ex. C). The parent entered a contract with Benchmark for provision of SETSS to the student for the 2022-23 school year (Parent Ex. D). A CSE convened and developed an updated IESP on February 6, 2023 (Dist. Ex. 3). The parent, through a lay advocate, filed a due process complaint notice dated May 24, 2023 alleging that the district failed to evaluate the student, offer a program of services for the student for the 2022-23 school year, or implement the student's previously mandated services (Parent Ex. A). The parent requested that the district fund the student's private services from Benchmark and provide a bank of compensatory education services (id. at p. 2).

An impartial hearing convened on July 26, 2023 before an IHO with the Office of Administrative Trials and Hearings (OATH) and, in a decision dated September 8, 2023, the IHO determined that the district met its burden to prove that it offered the student a free appropriate public education (FAPE) for a portion of the 2022-23 school year from September 12, 2022 to February 23, 2023, but that it did not meet its burden to prove that it offered the student a FAPE from February 23, 2023 to June 27, 2023; that Benchmark was an appropriate unilateral service provider; and that equitable considerations weighed in favor of an award of district funding for the unilaterally obtained services from February 23, 2023 to June 27, 2023, as well as an award of compensatory education consisting of speech-language therapy and counseling services for the same timeframe (see Tr. pp. 1-35; Sept. 8, 2023 IHO Decision). The parent appealed and the district cross-appealed the IHO's September 8, 2023 decision. An SRO issued a decision on the parties' appeals on January 2, 2024, remanding the matter to the IHO to address the parent's claims using the Burlington/Carter legal standard to determine the extent to which the parent was entitled to the requested relief (Application of a Student with a Disability, Appeal No. 23-225).

On January 10, 2024, the IHO sent an email to the parties limiting the remanded proceedings to "[p]rong II" issues, which the parent had the burden to prove (Feb. 12, 2024 IHO Decision at pp. 2, 6). The January 10, 2024 email indicated that disclosures would be due five days before the scheduled hearing date and that the procedures set forth in a June 16, 2023

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<sup>1</sup> The IHO incorporated all previously submitted evidence including documents, testimony, and cross-examination into the record on remand (IHO Decision at p. 2; see also Tr. pp. 38-39).

prehearing conference summary and order issued in the matter before appeal remained in effect for the remand hearing (*id.* at p. 2; *see* IHO Ex. I). The remand hearing was held on February 7, 2024 (Feb. 12, 2024 IHO Decision at p. 2). No additional evidence was admitted into the record (*see* Tr. pp. 37-50).

In a decision, dated February 12, 2024, the IHO set forth her view that the Burlington/Carter legal standard should not apply but went on to make the factual findings as directed by the SRO in the decision remanding the matter (Feb. 12, 2024 IHO Decision at pp. 3-11). The IHO reiterated that the district failed to meet its burden at the initial impartial hearing that it offered the student a FAPE for at least the portion of the 2022-23 school year after February 23, 2023 (*id.* at pp. 3, 6). Next, the IHO made findings of fact regarding the appropriateness of the SETSS privately-obtained by the parent (*id.* at p. 7). The IHO found that the parent contracted with an agency to provide SETSS to the student for the 2022-23 school year in September 2022 (*id.*). The IHO held that the contract provided no information as to who the agency was, how it located providers, or how the services were specifically implement and tailored to meet the student's needs (*id.*). The IHO found the agency's contract did not contain any further information into the program or how it "was reasonably calculated to enable the child to receive educational benefits" (*id.*). Moreover, the IHO found the progress report lacked "specificity and details" as to what individualized services were provided, how they were provided, where, and "in what way the services contributed if at all to the Student's progress" (*id.*). The IHO found that the hearing record lacked information about how or when the services were delivered or "what modalities" the provider used (*id.* at p. 8). Accordingly, the IHO held that the parent did not meet her burden of persuasion as to the appropriateness of the parentally-obtained services (*id.*). Regarding equitable considerations, the IHO "did not find Parent's testimony with regards to cooperativeness in the process or forthcomingness with the District to be sincere" and, therefore, found that, even if the parent had met her burden regarding the appropriateness of the privately-obtained services, relief would be denied on equitable grounds (*id.* at p. 9). The IHO reiterated her findings underlying the award of compensatory education in the form of speech-language therapy and counseling services (*id.* at pp. 9-12).

Based on the foregoing, the IHO denied the parent's request for direct funding to Benchmark for private SETSS delivered during the 2023-24 school year (IHO Decision at p. 12). The IHO ordered the district to conduct new evaluations of the student at reconvene the CSE to develop an individualized education plan (IEP) or an IESP (*id.*). Finally, the IHO ordered the district to fund compensatory speech-language therapy and counseling services equal to the number of sessions the student was mandated to receive between February 23, 2023 and June 30, 2023 (*id.*).

#### **IV. Appeal for State-Level Review**

The parent appeals and asserts that the IHO erred in her decision and improperly denied the parent's request for district funding of the costs of SETSS delivered by Benchmark during the 2022-23 school year. Initially, the parent asserts that the IHO erred in not finding that the district denied the student a FAPE or equitable services for the entirety of the 2022-23 school year. Regarding the unilaterally-obtained services, the parent asserts that the IHO erred in finding the parent did not meet her burden, arguing that the hearing record shows that SETSS were mandated for the entire 2022-23 school year, that a qualified State-certified teacher provided services in

accordance with the student's needs, and that the student made progress. Next, the parent contends that the IHO erred in finding equitable considerations weighed against an order of district funding for the costs of the SETSS delivered by Benchmark during the 2022-23 school year. Finally, the parent asserts that the IHO erred in denying compensatory education to remedy lapses in the delivery of the student's pendency services. For relief, the parent seeks an order requiring the district to directly fund the unilaterally-obtained SETSS delivered to the student during the 2022-23 school year "at the rate contracted for by the parent," as well as compensatory speech-language therapy and counseling services "for the entirety" of the 2022-23 school year.

In its answer with cross-appeal, the district seeks to vacate the IHO's decision to the extent it directed the district to reevaluate the student and reconvene a new CSE meeting. Additionally, the district asserts the parent's appeal should be dismissed, arguing that the IHO correctly determined that the parent failed to sustain her burden of persuasion regarding the appropriateness of the SETSS delivered by Benchmark. The district also argues that equitable considerations did not weigh in favor of an award of district funding for the SETSS for the entire school year. Regarding compensatory education, the district concedes that the IHO may have erred in her calculation of compensatory education services and does not object to an award to the parent for speech-language therapy and counseling for the entire school year.

## **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 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]).<sup>2</sup> "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

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<sup>2</sup> 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]).

education programs and services provided to other students with disabilities attending public or nonpublic schools located within the school district (*id.*).<sup>3</sup> 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. Scope of Review/Equitable Services**

As for the IHO's determination that the district met its burden with respect to the provision of equitable services between September 12, 2022 and February 23, 2023, closer review of the IHO's decision indicates that the IHO reached this outcome due to a weighing of equitable considerations and not due to the district having met its burden of production or persuasion on the issue of its offer or delivery of equitable services to the student for the first part of the 2022-23 school year (see Sept. 8, 2023 IHO Decision at pp. 2, 6-7). In the decision before remand, the IHO stated:

The [district] did not provide proof that services were provided, and the [district] challenges the delivery and appropriateness of the services provided privately but did not dispute the enhanced rate charged by the providers. However, I do not find that Parent acted in good faith with respect to requesting services and contracting with Agency prior to the 2023 IESP.

(Sept. 8, 2023 IHO Decision at p. 7). In reviewing the IHO's September 2023 decision, the SRO in Application of a Student with a Disability, Appeal No. 23-225, treated the IHO's finding in this regard as an equitable consideration, and directed the IHO to revisit equitable considerations, noting that "it [wa]s not clear if the IHO, when finding that the parent acted in "bad faith," reduced

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<sup>3</sup> 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 (Questions and Answers), 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 guidance has recently been reorganized on the State's website and the paginated pdf versions of the documents previously available do not currently appear there, having been updated with web based versions.

an award due do a late notice of unilateral placement (which [is] discretionary), whether the IHO believed the parent failed to cooperate with the district or an effort to implement services, or whether the parent was somehow colluding with Benchmark [or] another entity for an improper purpose" (Application of a Student with a Disability, Appeal No. 23-225, at pp. 18-19).

In the decision after remand, the IHO again referred to the district having met its burden with respect to the period of September 2022 through February 2023 (IHO Decision at p. 3); however, the IHO also found that the district "failed to meet its burden, at the initial hearing" (*id.* at p. 6). The IHO then went on to address equitable considerations, finding that they did not weigh in favor of the relief sought (*id.* at p. 9). Absent further rationale or explanation for a finding that the district met its burden to prove that it offered and/or provided appropriate services to the student for the period of September 2022 through February 2023, I will treat the IHO's reference to this timeframe as relevant to equitable considerations, which I will discuss below. As the district did not appeal the IHO's determination that it failed to meet its burden to proof with respect to the offer or provision of equitable services to the student for the 2022-23 school year, the IHO's finding in that regard is final and binding on the parties and will not be reviewed on appeal (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**

In the prior State-level administrative review decision remanding this matter, the SRO discussed the appropriate legal standard to be applied to the parent's request for services obtained for the student during the 2022-23 school year. As the SRO in the prior decision noted, in this matter, the student has been parentally placed in a nonpublic school and the parent does not seek tuition reimbursement for the cost of the student's attendance there. The parent alleged that the district did not implement the student's equitable services for the 2022-23 school year and, as a self-help remedy, she unilaterally obtained private SETSS 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 (see Parent Ex. A). 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 SETSS the parent obtained for the student during the 2022-23 school year. "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 parent's request for privately-obtained services must be assessed under this framework. That is, 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; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 252 [2d Cir. 2009]). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

### **1. Appropriateness of SETSS Delivered by Benchmark**

Turning to a review of the appropriateness of the unilaterally obtained services, the federal standard is instructive. A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school 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]). Citing the Rowley standard, the Supreme Court has explained that "when a public school system has defaulted on its obligations under the Act, a private school placement is 'proper under the Act' if the education provided by the private school is 'reasonably calculated to enable the child to receive educational benefits'" (Carter, 510 U.S. at 11). 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 (id. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (id. at 13-14). 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] ["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).

Although the student's needs are not in dispute, a brief description is necessary to resolve the issue on appeal regarding the appropriateness of the parentally obtained services. According to the May 2021 IESP, the student was classified as a student with a speech-language impairment and was recommended to receive three periods per week of SETSS in a group, and related services of three 30-minute sessions per week of individual speech-language therapy and one 30-minute sessions per week of individual counseling (Dist. Ex. 2 at pp. 1, 7-8). At the time of the May 2021 CSE meeting, the student's SETSS and speech-language therapy progress reports were not available, however, the student's classroom teacher participated in the meeting and provided input (id. at pp. 1, 11).

According to the May 2021 IESP, the classroom teacher reported that the student had made gains (Dist. Ex. 2 at p. 1). However, the student's reading comprehension was not on grade level, and her writing was "still a major issue" as she had difficulty organizing sentences (id.). The student's spelling skills were described as "poor" and render[ed] her writing illegible," but her math skills were "adequate" (id.). The IESP characterized the student as "bright" and stated that she performed well in math, science, and social studies (id. at p. 2). Still, the teacher reported that the student required substantial feedback from her classroom teacher and SETSS provider (id. at p. 1). She stressed that if left on her own the student would have a great deal of difficulty (id.).

Although a speech-language progress report was not available at the time the May 2021 IEP was developed, the IESP indicated that a review of the records suggested that the student exhibited receptive and expressive language delays as well as reduced auditory/listening skills (Dist. Ex. 2 at p. 1).

With regard to social development, the May 2021 IESP described the student as intelligent, caring, friendly, and well liked but noted that she had difficulty with expressing and regulating her emotions when upset and struggled with a lack of self-confidence (Dist. Ex. 2 at p. 2). The IESP noted that the student would benefit from learning relaxation and problem-solving skills to help her cope with difficult situations appropriately, as well as strategies to help improve her self-

esteem (id.). The IESP indicated that there were no concerns with regard to the student's physical development (id.).

The May 2021 IESP identified the resources and strategies needed to address the student's classroom management needs including praise and encouragement, multisensory instruction, review and repetition, feedback, graphic organizers, scaffolding, part-time small group instruction, speech therapy and counseling (Dist. Ex. 2 at p. 3). The May 2021 IESP featured nine annual goals in the areas of social/emotional development, reading, writing, speech-language development, and executive functioning (id. at pp. 4-7).

Following the parent's withdrawal of her original due process complaint notice on January 19, 2023, the student underwent a psychoeducational evaluation on January 26, 2023 which was subsequently reviewed at a February 6, 2023 CSE meeting (Dist. Exs. 3, 4). The IESP created as a result of the February 2023 CSE meeting indicated that the student was assessed using the Wechsler Abbreviated Scale of Intelligence-Second Edition (WASI-II) and the "Wechsler Individual Achievement Test-Third Edition (WIAT-IV)" (Dist. Exs. 3 at p. 1; 4 at p. 1).<sup>4</sup> On the WASI-II the student's verbal comprehension score of 103, perceptual reasoning score of 96, and full-scale IQ of 100 all fell in the average range (Dist. Ex. 3 at p. 1). On the WIAT-IV the student attained standard scores (SS) in the average on subtests measuring reading comprehension (SS 105), math problem solving (SS 90), and math fluency for multiplication (SS 90) (id. at pp. 1-3). In addition, the student attained standard scores in the low average range on subtests measuring word reading (SS 85), numerical operations (SS 83), and math fluency for addition (SS 86) and subtraction (SS 87) (id.). The student performed less well on measures of spelling (SS 77) and pseudoword decoding (SS 68), which fell in the very low and extremely low ranges, respectively (id.).

The February 2023 IESP indicated that the student struggled to understand sound-letter relationships (Dist. Ex. 3 at p. 2). In addition, although the student reportedly performed in the average range on an oral reading fluency subtest, she made an unusually high number of errors compared to her same-age peers and often added words that were not present or misread presented words (id.). The IESP noted that on math subtests the student was able to add and subtract single-digit numbers but struggled with simple multiplication and division (id.). The student did not appear to understand probability or fractions and also struggled with multiplication word problems (id.). With regard to writing, the IESP stated that the student struggled to spell grade level words (id. at p. 3). In terms of speech-language development, the IESP stated that the student continued to struggle with phonemic awareness and exhibited delayed expressive and receptive language skills (id.). Specifically, the student had difficulty organizing her thoughts and developing coherent narratives during writing activities, and her writing lacked cohesiveness and detail (id.). According to the IESP, the student's reading comprehension, vocabulary, written expression, grammar, and ability to organize information had improved, but she still required support to complete classwork (id.).

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<sup>4</sup> For purposes of this decision, the test administered will be referred to with the abbreviation noted in the IESP ("WIAT-IV"), notwithstanding reference to the third edition in the name of the test as written out (Dist. Ex. 3 at p. 1).

The description of the student's social and physical development in the February 2023 IESP remained essentially same as in the prior IESP (compare Dist. Ex. 2 at p. 2, with Dist. Ex. 3 at pp. 3-4). In terms of her social/emotional development the IESP described the student as bright, friendly, and well liked, but noted she struggled with expressing emotions, coping with anxiety, and a lack of self-confidence (Dist. Ex. 3 at p. 3). The student tended to shut down when faced with challenging situations (id.). The IESP stated that the student would benefit from learning coping and problem-solving skills to express and regulate her emotions (id.). It also noted that the student had made progress but that she would benefit from continued counseling (id.). No concerns were noted regarding the student's physical development (id. at pp. 3-4).<sup>5</sup>

The February 2023 IESP described the resources and strategies needed to address the student's classroom management needs including praise and encouragement, multisensory instruction, review and repetition, feedback, graphic organizers, instruction broken down, visual aids, and scaffolding (Dist. Ex. 3 at p. 4). The February 2023 IESP featured nine annual goals for the student to achieve in the areas of social/emotional development, reading, writing, language development, spelling, and math word problems (Dist. Ex. 3 at pp. 5-8).

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]" to be delivered "in a location consistent with the IEP/IESP mandate" (Parent Ex. D at p. 1).

An administrator from Benchmark provided direct testimony by 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 12, 2022" (Parent Ex. H at ¶¶ 2-3). In her affidavit, the administrator identified, by name, the individual delivering the student's SETSS and indicated that she held State certification to teach students with disabilities (id. at ¶ 4). For the provider named, the hearing record includes a document indicating that the provider held a certification in childhood education (grades 1-6) and certifications to teach students with disabilities ages birth through sixth grade (Parent Ex. F).

In a June 18, 2023 SETSS progress report, the private provider described the student as insightful, enthusiastic, and perceptive (Parent Ex. E at p. 1). In the area of math, provider reported that according to the student's teacher, the student excelled at operations with rational numbers (id.). The student tended to doubt herself when faced with challenges but was "always quick to succeed" (id.). The provider reported that, in reading, the student was working on determining a theme or central idea of a text, analyzing and summarizing text, and analyzing the interactions between individuals, events, and ideas in text (id.). In the area of vocabulary, the student was working on her ability to determine meanings of words and phrases that were unknown or had

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<sup>5</sup> The IESP indicated that the student's weak language skills impacted her comprehension of written and orally presented texts and stated that speech-language therapy would target the student's language needs including communication of thoughts and ideas, comprehension, and conversation skills (Dist. Ex. 3 at p. 4). The IESP further stated that SETSS would provide the student with reinforcement of the concepts with which she struggled, and that the student would receive support within the classroom consisting of repetition, instructions broken down, and visual aids (id.). The IESP indicated that the student's social needs would be addressed through counseling and exposure to peer models (id.).

multiple meanings (id.). In terms of writing, the provider reported that the student's writing skills had "greatly" improved (id.). The student was better able to develop her written ideas, in contrast with the start of the year (id.). The student continued to benefit from support in organizing her thoughts and ideas, as well as encouragement to participate due to her lack of confidence (id.). The student continued to work on using language conventions in writing, speech, reading, and listening (id.). With respect to learning style, the provider reported that the student benefitted from multimodal and hands on instruction, frequent repetition, and breaking down directions into smaller chunks (id.). The student enjoyed socializing with her peers and exhibited increased motivation to succeed academically and in extracurricular activities (id.). Turning to social development, the provider reported that the student was able to follow school rules and was respectful towards others (id.). She noted that the student needed reminders to take a deep breath when overwhelmed (id.).

In finding that the progress report insufficient to demonstrate specially designed instruction, the IHO found that the report lacked "specificity and details" about the services provided and how the services contributed to the student's progress (IHO Decision at pp. 7-8). While I agree with IHO that the evidence is not robust, overall, the evidence concerning the student's needs as identified by the SETSS provider did not differ to a great degree from the description of the student in the February 2023 IESP created by the CSE (compare Dist. Ex. 3, with Parent Ex. E). For example, both the February 2023 IESP and the June 2023 SETSS progress report indicate that the student needed encouragement, repetition, instructions broken down, and visual aids (compare Dist. Ex. 3 at p. 4, with Parent Ex. E at p. 1). The February 2023 IESP noted that the student would benefit from learning coping skills to help regulate her emotions, which the June 2023 SETSS progress report addressed with reminders for the student to take a deep breath when feeling overwhelmed (compare Dist. Ex. 3 at p. 3, with Parent Ex. E at p. 1). The February 2023 IESP noted that, during writing activities, the student required prompts to organize information, and the June 2023 SETSS progress report noted that she benefitted from support to organize her thoughts and ideas (compare Dist. Ex. 3 at p. 3, with Parent Ex. E at p. 1). Similar to the February 2023 IESP, the June 2023 SETSS progress report identified goals for the student to achieve in the areas of reading, writing, language, and math word problems (compare Dist. Ex. 3 at pp. 5-8, with Parent Ex. E at p. 2). Under the circumstances, I find that the progress report, coupled with the testimony of the administrator that the services were delivered, and information in the February 2023 IESP developed during the school year at issue that paralleled information in the progress report, is sufficient to support a finding that the parent met her burden of proof with respect to the specially designed instruction delivered by the provider from Benchmark.

Based on the foregoing, I find that there is sufficient evidence to show that the student received SETSS, which both parties agreed that the student required, and it further shows that the provider identified the student's specific needs and delivered instruction specially designed to meet those needs during the 2022-23 school year. Accordingly, I find the parent met her burden to prove that the SETSS delivered by Benchmark during the 2022-23 school year were appropriate.

## **2. Equitable Considerations**

Turning to a review of equitable considerations, the final criterion for a reimbursement award, the federal standard for adjudicating these types of disputes is instructive. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E.,

694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]; L.K. v. New York City Dep't of Educ., 674 Fed. App'x 100, 101 [2d Cir. Jan. 19, 2017]). With respect to equitable considerations, the IDEA 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"]).

In the decision after remand, the IHO found the parent's testimony relevant but not credible "due to inconsistencies with regards to the creation of key documents, attendance at CSE meetings, timeline of requests, service implementation and contractual signature" and further determined that the "[p]arent's testimony with regards to cooperativeness in the process, or forthcomingness with the District" was not "sincere" (Feb. 12, 2024 IHO Decision at p. 9).

Generally, an SRO gives due deference to the credibility findings of an IHO, unless non-testimonial evidence in the hearing record justifies a contrary conclusion or the hearing record, read in its entirety, compels a contrary conclusion (see Carlisle Area Sch. v. Scott P., 62 F.3d 520, 524, 528-29 [3d Cir. 1995]; P.G. v. City Sch. Dist. of New York, 2015 WL 787008, at \*16 [S.D.N.Y. Feb. 25, 2015]; M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 330 [E.D.N.Y. 2012], aff'd 725 F.3d 131 [2d Cir. 2013]; Bd. of Educ. of Hicksville Union Free Sch. Dist. v. Schaefer, 84 A.D.3d 795, 796 [2d Dep't 2011]; Application of a Student with a Disability, Appeal No. 12-076).

While I defer to the IHO's credibility finding, there is no evidence, testimonial or otherwise, that goes directly to the parent's participation, cooperation, or actions that would suggest she acted inappropriately or with any intent to frustrate the district's ability to develop an IESP for the student prior to the beginning of the 2022-23 school year or to ensure the student received her recommended services (see C.L., 744 F.3d at 840). For example, the IHO noted the parent's testimony that no CSE meeting had been held since May 2017, compared to evidence and the parent's subsequent testimony that the parent attended the May 2021 CSE meeting (see Feb. 12, 2024 IHO Decision at p. 9; compare Parent Ex. G at ¶¶ 2-7, with Tr. pp. 17-22, and Dist. Ex. 2 at p. 11). However, whether the last IESP was developed in 2017 or 2021, there is no indication that the parent prevented the district from conducting an annual review prior to the 2022-23 school year.

The IHO also referenced the parent's timelines of events (Feb. 12, 2024 IHO Decision at p. 9). During cross-examination, the parent indicated she was unsure in response to the district

attorney's question as to whether it was correct that the September 2022 10-day notice letter indicated the parent's intent to find service providers, whereas, according to the provider's records, the student had already begun receiving services (Tr. p. 20). This line of inquiry relates to the question of the timing of notice to the district of a parent's intent to engage in self help by privately securing services. Under the IDEA, 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., 348 F.3d at 523-24; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G., 459 F.3d at 376; Voluntown Bd. of Educ., 226 F.3d at 68).

Putting aside the parent's testimony, the evidence in the hearing record indicates that Benchmark began providing the student services for the 2022-23 school year "on or about September 12, 2022" and that the 10-day notice letter was dated September 14, 2022, less than 10 days prior to the student's receive of the private services (compare Parent Ex. H at ¶ 3, with Parent Ex. C).<sup>6</sup> While the parent's 10-day notice was not timely, absent evidence that the district would have taken action to implement the services had it received the notice or other compounding factors, the timing of the letter alone does not warrant the IHO's denial of more than half of the relief sought by the parent. The district does not point to other equitable factors that would support a reduction or denial of relief. Accordingly, the evidence in the hearing record does not support a finding that the parent's request for district funding of services delivered by Benchmark during the 2022-23 should be reduced or denied on equitable grounds.

### **C. Compensatory Education**

For the same reasons stated above for the finding that the IHO erred in the equitable determination, there are also no grounds or articulation for the limited award of compensatory education.

Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). The purpose of an award of compensatory education is to provide an appropriate remedy for a denial of a FAPE (see E.M., 758 F.3d at 451; P. v. Newington Bd. of Educ., 546 F.3d 111, 123 [2d Cir. 2008] [holding that compensatory education is a remedy designed to "make up for" a denial of a

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<sup>6</sup> It is unclear what provider records the district's attorney was referencing in this cross-examination (see Tr. p. 20).

FAPE]; see also Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 456 [2d Cir. 2015]; Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005] [holding that, in fashioning an appropriate compensatory education remedy, "the inquiry must be fact-specific, and to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"]; Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1497 [9th Cir. 1994]). Accordingly, an award of compensatory education should aim to place the student in the position he or she would have been in had the district complied with its obligations under the IDEA (see Newington, 546 F.3d at 123 [holding that compensatory education awards should be designed so as to "appropriately address[] the problems with the IEP"]; see also Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1289 [11th Cir. 2008] [holding that "[c]ompensatory awards should place children in the position they would have been in but for the violation of the Act"]; Bd. of Educ. of Fayette County v. L.M., 478 F.3d 307, 316 [6th Cir. 2007] [holding that "a flexible approach, rather than a rote hour-by-hour compensation award, is more likely to address [the student's] educational problems successfully"]; Reid, 401 F.3d at 518 [holding that compensatory education is a "replacement of educational services the child should have received in the first place" and that compensatory education awards "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA"]).

The IHO found that the student was entitled to compensatory services for speech-language therapy and counseling to remedy the district's failure to deliver services mandated in the February 2023 IESP between February 23, 2023 through June 2023 (IHO Decision p. 10). Although the district did not defend the lack of delivery of services for the beginning of the 2022-23 school year, the IHO, without stating her rationale, limited relief to the period of February 2023 through June 2023.<sup>7</sup> The district indicates in its answer that it "would not object" if the SRO modified the compensatory speech-language therapy and counseling the IHO awarded to include funding for those services from the start of the 2023-24 school year as requested by the parent.

Thus, the district's failure to deliver equitable services is undisputed, the district has not alleged that compensatory education would be an inappropriate form of relief in addition to the funding of privately-obtained services, and the district, in fact, does not object to an award of compensatory education that awarded related services based on the full 10-month school year. Because the IHO did not articulate a rationale for not awarding compensatory education for the full school year and the district essentially concedes that the IHO may have erred in the compensatory education award, I will modify the IHO's award accordingly. Neither the district nor the parent has challenged other aspects of the IHO's award of compensatory education, such as the requirement for an agency to submit documentation to the district to obtain funding or the one year expiration. Accordingly, the IHO's compensatory award is modified only with respect to

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<sup>7</sup> In the decision remanding the matter, the SRO in Application of a Student with a Disability, Appeal No. 23-225 directed the IHO to explain her reasoning with respect to the computation of the hours of compensatory education for the speech language therapy and counseling; however, the IHO did not elaborate on her rationale for the award in her decision after remand (compare Feb. 12, 2024 IHO Decision at p. 10, with Sept. 8, 2023 IHO Decision at p. 10).

the amount of hours awarded. Thus, based on a 36-week school year, the district shall be required to fund up to 54 hours of speech-language therapy services and 18 hours of counseling services.<sup>8</sup>

#### **D. Order to Reevaluate**

As a final matter, the district cross-appeals the IHO's order for the district to reevaluate the student and reconvene a new CSE meeting, arguing that the parent did not request relief in this form and that the order circumvented the CSE process. Federal and State regulations require that a district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). In addition, the district is required to review the IEP, or IESP as the case may be, of a student with a disability at least annually or as necessary to address "[i]nformation about the child provided to, or by, the parents" during the course of a reevaluation of the student (34 CFR 300.324[b][1][ii][C]; 8 NYCRR 200.4[f][2][ii]).

According to the hearing record, the district conducted a psychoeducational evaluation of the student in January 2023 (Dist. Exs. 3 at pp. 1-2; 4 at p. 2). Further, the parties generally appear to be in agreement regarding the student's needs. Thus, there is no basis in the hearing record to order the district to conduct new evaluations in excess of the existing regulatory requirements. Accordingly, I will vacate that portion of the IHO's order. The district should evaluate the student and convene the CSE as required by State law and regulations.

#### **VII. Conclusion**

Having determined that the evidence in the hearing record does not support the IHO's finding that the parent's unilaterally-obtained SETSS were not appropriate, and having found that the equitable considerations do not warrant a reduction or denial of relief, the IHO's denial of relief in the form of district funding for services delivered by Benchmark during the 2022-23 school year is reversed. In addition, the IHO's order for compensatory education is modified as described above, and the IHO's order for the district to reevaluate the student is vacated.

I have considered the parties' remaining contentions, including the parent's allegation that the IHO erred in failing to provide relief for lapses in the district's delivery of pendency services, and find it unnecessary to address them in light of my determinations above.

**THE APPEAL IS SUSTAINED.**

**THE CROSS-APPEAL IS SUSTAINED.**

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<sup>8</sup> The 10-month school year consists of approximately 36 weeks (180 school days divided by 5 days per week) (see Educ. Law § 3604[7]; 8 NYCRR 175.5[a], [c]; 200.1[eee]).



**IT IS ORDERED** that, that the IHO's decision dated February 12, 2024 is modified by reversing those portions which found that the district met its burden with respect to the provision of equitable services between September 12, 2022 and February 23, 2023, that the parent did not meet her burden to prove that unilaterally-obtained services from Benchmark were appropriate, and that equitable considerations did not support the parent's request for relief, and which denied the parent's request for the district to fund unilaterally-obtained SETSS delivered by Benchmark during the 2022-23 school year, denied, in part, an award of compensatory speech-language therapy and counseling services amounting to the number of sessions for each week in the 2022-23 school year, and ordered the district to conduct new evaluations and reconvene the CSE;

**IT IS FURTHER ORDERED** that, upon proof of delivery, the district shall directly fund the costs of up to three periods per week of SETSS delivered to the student by Benchmark during the 2022-23 school year; and

**IT IS FURTHER ORDERED** that, upon submission of an affidavit from an agency stating dates and totals of services provided, along with credentials and licenses of the provider of the parent's choosing, the district shall fund as compensatory education up to 54 hours of speech-language therapy services and 18 hours of counseling services; provided that, the bank of hours shall expire one year from the date of this decision.

**Dated:**           **Albany, New York**  
                          **May 6, 2024**

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**SARAH L. HARRINGTON**  
**STATE REVIEW OFFICER**