The University of the State of New York

The State Education Department
State Review Officer
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No. 24-219

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

Appearances:
Law Office of Anton G. Cohen, PC, attorneys for petitioner, by Sandra Robinson, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Nate Munk, 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 for respondent (the district) to fully fund the costs of her son's unilaterally obtained special education teacher support services (SETSS) for the 2023-24 school year. The appeal must be sustained.

II. Overview—Administrative Procedures

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

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

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

III. Facts and Procedural History

This appeal arises from an IHO's decision issued after a remand by an SRO for the IHO to make factual findings with regard to the services the student was receiving at the nonpublic school, in order to determine whether the services unilaterally obtained by the parent addressed the student's needs (see Application of a Student with a Disability, Appeal Nos. 23-274). As the parties' familiarity with this matter is presumed, the student's educational history and the procedural history of this matter will not be recited here in detail except as relevant to the instant appeal.

The student was initially evaluated and found eligible for special education in kindergarten and, for that school year, the student received the support of integrated co-teaching services (Parent

Exs. F at ¶ 2; S at ¶ 4).[1] According to the parent, the student began receiving five hours per week of SETSS after school in the middle of his first grade school year; the student was moved to a 12:1 special class in his third grade school year, and, according to the parent's testimony, the parties have engaged in impartial hearings and settlement agreements whereby the student received 10 hours per week of at home "supplemental SETSS" in addition to his school-based programming (Parent Exs. C at p. 2; F at ¶ 3; S at ¶¶ 4-5). After remand, the parent submitted evidence showing the student began receiving 10 hours of SETSS pursuant to an IHO decision regarding the 2016-17 school year (Parent Exs. Q; S at ¶ 5). The student continued to receive instruction at district schools through eighth grade (2021-22 school year) while also receiving 10 hours per week of home-based SETSS (Parent Exs. C at pp. 2-3; F at ¶¶ 2, 3; S at ¶6).

According to a December 2022 IHO decision issued in a prior proceeding regarding the student's programming for the 2022-23 school year, on May 10, 2022, a CSE convened and, finding the student eligible for special education as a student with a speech or language impairment, developed an IEP for the 2022-23 school year (ninth grade) (Parent Ex. B at p. 6).[2] The May 2022 CSE recommended 12-month programming for the student consisting of a 12:1+1 special class placement in an approved nonpublic school, the Ryken Educational Center at Xaverian High School (Ryken), with three 30-minute sessions per week of group speech-language therapy (id.).[3, 4] The parent rejected the program recommendation set forth in the May 2022 IEP because it did not provide the student with 10 hours per week of home-based SETSS (Parent Ex. F at ¶ 4).[5]

The parties proceeded to an impartial hearing concerning the student's 2022-23 school year, and in a decision dated December 21, 2022, the IHO in that matter held that the district denied the student a free appropriate public education (FAPE) and the evidence established that the student

[1] A supplemental affidavit of the parent was admitted into evidence after remand (compare Parent Ex. F, with Parent Ex. S).

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

[3] During the initial impartial hearing, and after remand as well, neither party offered the May 10, 2022 IEP into evidence. The parties agree that the student was recommended to receive 12-month services during the 2022-23 school year (Tr. pp. 149-52). The school psychologist from Ryken testified that Ryken did not offer 12-month special education services but offered summer school; however, he did not specify the school year about which he was testifying (Tr. pp. 152-53). According to the parent's request for review, the student attended "Ryken's 10-month program for the 2022-2023 school year," which would also tend to indicate that Ryken did not provide for 12-month services (Req. for Rev. ¶ 10).

[4] According to the December 21, 2022 IHO's decision from the prior proceeding, a CSE also convened on September 28, 2022 and continued to recommend 12-month services consisting of a 12:1+1 special class in a State-approved nonpublic school (Parent Ex. B at p. 9). This IEP was also not offered into evidence at the impartial hearing in the present matter. Notably, no substantive findings have been made related to the May 2022 IEP or the September 2022 IEP (Parent Ex. B at p. 16). The district was found to have denied the student a FAPE for the 2022-23 school year as a result of its failure to mount a defense of its IEPs (id.).

[5] The parent stated that she "rejected the recommended program" in her closing brief (Parent Post-Hr'g Br. at p. 4).

required 10 sessions per week of after-school SETSS; accordingly, the IHO ordered the district to fund 10 sessions per week of after-school SETSS for the 12-month, 2022-23 school year (see Parent Ex. B).

The executive director of the agency from which the student received SETSS testified that in January or February 2023, the student began to receive 10 hours per week of SETSS from LMI Consulting Solutions, Inc. (LMI) (Tr. p. 71). According to the parent, the student struggled during the 2022-23 school year and "was on the verge of getting expelled from Ryken" until he began receiving after-school SETSS from a high school certified special education teacher through LMI (Parent Ex. F at ¶¶ 6, 7).

The hearing record reflects that the CSE did not convene to develop an IEP for the student for the 2023-24 school year (tenth grade) (Parent Exs. A at p. 2; F at ¶ 4). During that school year, the student attended Ryken as had been recommended by the May 2022 CSE and continued to receive SETSS from LMI (Parent Exs. F at ¶¶ 4, 6, 7; G at ¶ 4; I). In a due process complaint notice dated June 30, 2023, the parent alleged that the district failed to offer the student a FAPE for the 2023-24 school year (see Parent Ex. A). Also on June 30, 2023, the parent signed a contract with LMI for the company to provide 1:1 SETSS to the student beginning on July 1, 2023 through June 30, 2024 (Parent Ex. H).

Prehearing conferences were held on August 3, 2023 and September 5, 2023 (Tr. pp. 1-21; see Preh'g Conf. Summ. & Order at p. 1; IHO Decision at p. 2).[6] An impartial hearing convened before the Office of Administrative Trials and Hearings (OATH) on September 28, 2023 and concluded the same day (Tr. pp. 28-88). During the impartial hearing, the district confirmed that it would be "waiving Prong I," thereby conceding that the district failed to offer the student a FAPE for the 2023-24 school year (Tr. pp. 28, 81). In a decision dated October 27, 2023, the IHO determined that the district failed to offer the student a FAPE for the 2023-24 school year before denying the parent's request for reimbursement or direct payment of the student's SETSS (IHO Ex. I at pp. 5, 9). The IHO determined that the parent had failed to meet her burden to prove that the privately obtained SETSS met the student's educational needs (id. at pp. 7-8). The IHO additionally found that equitable considerations did not favor the parent because there was no 10-day notice of the parent's intent to privately obtain services, or a clear contract between the parent and the SETSS provider (id. at pp. 8-9). The parent appealed the IHO's October 27, 2023 decision.

Another SRO issued a decision on the parent's appeal on February 8, 2024, remanding the matter to the IHO "to make factual findings with regard to the services the student [wa]s receiving at the nonpublic school, in order to determine whether the services unilaterally obtained by the parent appropriately addressed the student's needs" during the 2023-24 school year (IHO Ex. II at pp. 11-12). The SRO directed that the IHO "review the totality of the circumstances in determining whether the services obtained for the student, including the school placement and after school services, were reasonably calculated to serve the student's individual needs" (id. at p. 12). If the IHO determined that the parent's unilaterally obtained services were appropriate, the SRO directed

[6] During the September 5, 2023 prehearing conference, the district confirmed that the district and the parent had agreed to the student's pendency services (Tr. p. 16).

that "the IHO may then determine whether the after school services exceeded the level that the student required to receive a FAPE" (id.).

Upon remand, the IHO notified the parties that the matter was remanded for further development of the hearing record regarding the student's in-school performance during the 2023-24 school year and encouraged both parties to present evidence regarding the program and services offered to the student by the nonpublic school, the student's performance, and any other relevant evidence (IHO Ex. III). A hearing then reconvened for two additional hearing dates on March 26, 2024 and April 5, 2024 (Tr. pp. 89-208). During the hearing after remand, the parent resubmitted the evidence from the initial hearing as well as additional documentary evidence and the testimony of three witnesses (Parent Exs. A-S; see Tr. pp. 110-19, 136-68, 181-91; Parent Exs. K-S).

In a decision dated April 26, 2024, the IHO discussed the SRO's findings, noting that the purpose of remand was to make factual findings "with regard to the services [the s]tudent [wa]s receiving at [Ryken] and review the totality of the circumstances in determining whether the services obtained were reasonably calculated to serve [the s]tudent's individual needs and whether the afterschool services exceeded the level that [the s]tudent required to receive a FAPE" (IHO Decision at p. 3). The IHO found that "little new evidence was offered regarding [the s]tudent's performance during the 2023-2024 school year or the program and services offered by [Ryken]" (id. at p. 9). The IHO determined that "the new evidence submitted" after remand established that Ryken was appropriate to meet the student's special education needs and the additional 10 hours per week of SETSS obtained by the parent "exceeded the level that [the s]tudent require[d] to receive a FAPE (id. at p. 11). Turning to equitable considerations, the IHO found that the parent failed to establish that she incurred a financial obligation for the SETSS and further failed to provide the district with 10-day written notice (id. at pp. 11-12). The IHO stated that "[i]f [the p]arent had established the appropriateness and necessity of the SETSS, and established a true financial/contractual obligation, [he] [would] find that a nominal 10% reduction of the rate would be warranted for [the p]arent's failure to give [the d]istrict adequate notice" (id. at p. 12). For those reasons, the IHO denied the parent's request for direct funding of SETSS for the 2023-24 school year (id.).

IV. Appeal for State-Level Review

The parent appeals and argues that the IHO committed legal error in misallocating the burden of proving the appropriateness of after-school 1:1 SETSS to the parent; that the IHO erred in failing to determine whether the student's after-school 1:1 SETSS were appropriate; that the IHO erred in finding that after-school 1:1 SETSS were excessive; that the IHO erred in finding the parent failed to establish financial liability under the LMI contract; and that the IHO "committed factual and legal error in rendering arbitrary and capricious adverse credibility determinations" with respect to the parent's witnesses. As relief, the parent requests funding for 10 hours per week of after-school 1:1 SETSS provided by LMI at a specified hourly rate for the 12-month 2023-24 school year.

In an answer, the district argues that the IHO correctly found that Ryken met the FAPE standard without the provision of after-school SETSS and that the IHO correctly found that if the parent had met her burden, equitable considerations would demand a reduction.

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. 386, 399 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 580 U.S. at 404). The statute ensures an "appropriate" education, "not one that provides 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]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 580 U.S. at 403 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132)

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).[7]

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 (Florence County Sch. Dist. Four v. 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., 554 F.3d at 252). 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, 489 F.3d at 111; Cerra, 427 F.3d at 192). "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).

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., 694 F.3d at 184-85).

[7] The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 580 U.S. at 402).

VI. Discussion

A. Unilaterally Obtained Services

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, 142 F.3d at 129). 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; see Rowley, 458 U.S. at 203-04; Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see also 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 parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (id. 510 U.S. 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., 459 F.3d at 364; see Rowley, 458 U.S. at 207). 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).. 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).

A parent may obtain outside services for a student in addition to a private school placement as part of a unilateral placement (see C.L., 744 F.3d at 838-39 [finding the unilateral placement appropriate because, among other reasons, parents need not show that a "'private placement furnishes every special service necessary'" and the parents had privately secured the required related services that the unilateral placement did not provide], quoting Frank G., 459 F.3d at 365).[8]

The parent seeks funding for 10 hours per week of after-school 1:1 SETSS. The prior SRO decision addressed several matters that have now become law of the case and will not be further discussed. For example, although the parent argues that she should not have been deemed to have carried a burden of proof in this matter, the prior SRO decision addressed the legal standard to be applied and I decline to further discuss that question. In addition, the prior SRO noted that the "the hearing record lack[ed] any evidence about the nonpublic school's academic and special education instruction and related services, how the nonpublic school addressed the student's special education needs, or progress at the nonpublic school, which presumably comprised the majority of the student's special education programming" and that the evidence available only addressed the student's performance at the nonpublic school during the 2022-23 school year, rather than the school year at issue (IHO Ex. II at p. 11). The prior SRO decision found that evidence regarding the SETSS delivered to the student, alone, was insufficient to meet the student's burden of proof and remanded this matter for the parent to provide evidence of the educational program provided to the student at Ryken as well as evidence of how the off-site instruction the student received enabled him to access the curriculum at Ryken through specially designed instruction.

Review of the IHO's decision shows that the IHO addressed the narrow issue presented on remand and found "little in the way of new evidence" on the remanded issue and, instead, noted that the parent presented more evidence regarding the unilaterally obtained SETSS (IHO Decision at p. 5). The IHO went on to explain the weight accorded evidence presented by the parent (id. at pp. 5, 7-10).

The hearing record following remand indicated that the student struggled academically at the beginning of the 2022-23 school year (Parent Exs. F at ¶ 7; M at p. 1; O at ¶ 23; S at ¶ 9). According to the Ryken school psychologist's testimony, the student was "at risk of being deferred

[8] Although the hearing record indicates that the student attended Ryken for the 2023-24 school year, it is not entirely clear as to whether the district or parent was responsible for placing the student at Ryken for that school year. The parent states in her recitation of the procedural and factual background in her request for review that the district placed the student "for a second year in a 10-month special education class with 12:1+1 student to teacher ratio at [Ryken]" for the 2023-24 school year (Req. for Rev. ¶ 4). However, the hearing record reflects that the district did not convene a CSE or develop an IEP for the student for the 2023-24 school year (Parent Exs. A at p. 2; F at ¶ 4). In a footnote, the parent states that, in failing to convene a CSE for the 2023-24 school year, the district placed the student at Ryken for the 2023-24 school year (Req. for Rev. ¶ 4 n.2). Yet, according to a pendency implementation form offered into evidence after remand, neither placement at Ryken, nor even placement at a State-approved nonpublic school, was identified as part of the student's pendency program (Parent Ex. L).

back to [the district] for an alternative placement that could provide more . . . individualized [one-to-one] teaching instruction" (see Parent Exs. M; O at ¶ 23). In a letter dated November 1, 2023, the Ryken assistant to the dean of specialized studies noted that in an October 7, 2022 communication, Ryken had stated "significant concerns" with the student's academic struggles and related that students who "failed more than three subjects in a school year would be subject to retention (left back) and/or transfer into alternative placement" (Parent Ex. M at p. 1). The letter noted that at the time Ryken had communicated to the parent that it was "imperative that [the student] seek additional after-school help to remediate in the subjects he was failing" (id.). The letter additionally related that, at the time of the October 2022 communication, the parent had advised Ryken that she was looking for another after-school SETSS provider for the student, as his then-current SETSS provider had not worked with high school students before (id.). According to the parent's testimony, the student's then-current provider continued to provide the student's SETSS in October and November 2022 (Parent Ex. S at ¶ 9).

A provider from LMI began providing the student with SETSS in February 2023 (Tr. pp. 60-62; Parent Ex. S at ¶ 11). The LMI director testified that when SETSS providers from LMI started working with the student he was on the verge of being discharged from Ryken "due to his failing and due to his number of deficiencies," including "a very short attention span, very poor organizational skills, his language disorder, other disabilities, reading, decoding, mostly comprehension" (Tr. pp. 47, 63). The school psychologist testified that the student improved academically and socially during the second half of the 2022-23 school year, passing all of his classes with the "additional SETSS support" (Parent Ex. O at ¶ 23). When asked what changed the student's performance in the middle of the 2022-23 school year, the school psychologist testified that it was "the SETSS provider and spending . . . . a lot of time with [the student] after school," and added that the student wanted to succeed, tried hard and left school exhausted (Tr. p. 143).

During the 2023-24 school year, which is at issue in this proceeding, the student was in a 12:1+1 special class at Ryken where he received instruction in reading, writing, and mathematics (Parent Ex. O at ¶ 24). The student's other classes included living environment, global history, Spanish, STEM/literacy skills, and gym (id.).[9]

The student continued to receive 10 hours of one-to-one SETSS per week in addition to his special education program at Ryken (Parent Exs. G at ¶ 4; K at pp. 1-11). The LMI director testified that the student's SETSS provider during the 2023-24 school year was a certified special education teacher and "reading specialist" who was "certified in Orton-Gillingham" and could address the student's dyslexia and decoding difficulties (Parent Ex. G at ¶ 10; see Tr. pp. 49-50). The LMI director testified that the student's after-school SETSS targeted his significant academic delays in reading comprehension, written expression, and math problem solving (Parent Ex. G at ¶ 9). According to the LMI director, the "principal goal" of the student's SETSS was to "promote,

[9] The school psychologist testified that the student's literacy skills class was "designed to review and reinforce foundational skills, enhance previously learned skills and concepts, and instruct on new, more complex skills . . . and developing a clear and precise method of writing, revising, and editing multiple-paragraph essays" to prepare the student for the global history and living environment Regents examinations (Parent Ex. O at ¶ 26). The literacy skills class also "heavily emphasized building vocabulary as students get ready for the SAT and/or ACT examinations" (id.).

generalize, and increase his academic skills learned in school and transfer newly acquired learning skills and working habits" to be used in school, complete homework assignments, and prepare for algebra 1, global history, and geography and living environments Regents examinations (id. at ¶ 13). The LMI director further testified that the student received "multiple individual strategies to comprehend and benefit from homework assignments" which included "clarification of written instructions, explicit modeling, use of graphic organizers, constant prompting and redirection, frequent breaks and positive reinforcement, sentence frames, step by step modeling, defining new vocabulary words and visuals, oral rehearsal and identification of significant text details" (id. at ¶ 14).

The parent testified that, during the 2023-24 school year, the student needed after-school SETSS "more than ever" because Ryken was a more academically intensive program than his public school programs and he would be taking three Regents examinations during the 2023-24 school year (Parent Ex. F at ¶ 7). The Ryken school psychologist testified that the 12:1+1 special class at Ryken had been beneficial to the student and he had formed positive relationships with his classmates but noted that while Ryken offered the small special education class that the student needed, reading instruction was "only conducted in small groups, not on a [one-to-one] basis, and only for a portion of the class" (Tr. p. 144; Parent Ex. O at ¶¶ 31-32). The school psychologist opined that, given the student's significant reading deficits and the "obvious and noticeable progress" the student made in his classes when he received afterschool SETSS during the 2022-23 school year, it was "imperative that [the student] continue to receive 10 hours per week of after school SETSS to maintain his progress at Ryken" and to prepare him to take two Regents examinations in June 2024 (Parent Ex. O at ¶ 32). When asked on redirect examination why he thought this, the school psychologist testified that, given the student's deficits in reading and writing and the fact that the student had the living environments and global studies Regents examinations in June 2024, it was a lot of information for the student and they were "just trying to break it down as much as possible" (Tr. pp. 142-43). He added that the student was "a great fit," was hard-working, and got along with everyone, and they wanted to give him "the best chance to succeed" (Tr. p. 143). The school psychologist further testified that the student required one-on-one remediation instruction, and, when asked if the student required 10 hours of after-school SETSS in addition to his special education program at Ryken, he responded "unequivocally" (Tr. pp. 144-45).

The school psychologist further testified that, when the student was struggling in the fall of the 2022-23 school year, Ryken recommended that the student attend after-school reviews at Ryken where they would "have math and English reviews" and receive assistance with homework (Tr. pp. 160-61). According to the school psychologist, the student was already attending after-school review sessions and did both the Ryken after-school reviews and then went to after-school SETSS because the "homework" support by itself was not enough (Tr. pp. 161-62). The November 1, 2023 letter noted the student's academic struggle at the beginning of the 2022-23 school year and subsequent improvement during the second half of the school year (Parent Ex. M at p. 1). The letter further stated that, for the 2023-24 school year, it was "essential" that the student's after-school SETSS continue to "allow him to develop not only subject skillset but to acquire strategies in study skills that [were] an integral part of maintaining his progress going forward and to build on his academic success and self-confidence (id. at p. 2).

The neuropsychologist who completed the student's March 2022 neuropsychological evaluation testified that he made "numerous recommendations, taking into consideration the fact that [the student] had been receiving intensive academic remediation in and out of school without displaying appropriate gains in reading, decoding, and writing skills" (Parent Ex. P at ¶ 24). The neuropsychologist testified that the student required "much more support than a special education class setting [could] provide," and therefore recommended that the student attend a "full-time, small, private specialized or nonpublic school that [was] designed for students with language-based learning disabilities" (id.). He further recommended that the student required "daily direct remediation reading instruction in a [one-to-one] or small group setting . . . [that] use[d] a multisensory, evidence-based reading intervention for dyslexia and language-based learning disabilities," intervention imbedded throughout the school day, integration of related services, multisensory curriculum, and individualized attention, a 12-month school year, continuation of speech-language therapy, testing accommodations, and classroom accommodations (id. at ¶¶ 25-26; see Parent Ex. C at pp. 17-20).

According to the neuropsychologist's testimony, he had "recently" learned that the student had been attending Ryken and "while his skills [were] improving, he continue[d] to struggle reading" (Parent Ex. P at ¶ 27). The neuropsychologist testified that the student's transition to high school required that he read texts of increasing complexity and level of difficulty and that the gap between the student's skill level and that of his peers was increasing (id.). Given the student's continued challenges in this area and the added complexity of the student's language disorder that limited his ability to comprehend material, the neuropsychologist testified that the student required SETSS to access learning and it was "imperative for [the student] to receive [one-on-one] SETSS after school as part of his educational program" (id.).

During the impartial hearing the neuropsychologist testified that he was familiar with the Ryken program and "it seem[ed] like it [was] an appropriate setting for the student" (Tr. p. 110). On cross-examination, when asked how he reconciled his opinion that the program at Ryken was appropriate for the student with his recommendation for one-to-one SETSS in his testimony by affidavit, the neuropsychologist testified that:

> based on the information that [he] received about how [the student was] doing at [Ryken] . . . . [t]he reports indicate[d] that [the student was] doing well, but that he [was] struggling with homework. And given the fact that he ha[d] a language disorder and . . . his parents [did not] speak English and so they [were] unable to help him with any of his homework, the recommendation [wa]s being made for him to receive SETSS after school to help him with . . . his homework and to help him with his organizational skills as well

(Tr. pp. 110-11).

The neuropsychologist further testified that "given the information [he had] now, [he was] recommending the one-to-one SETSS after school," and noted that, at the time of the neuropsychological evaluation, he "was [not] able to tell" that the student would need these services in the future, but now, given the information that the student was at Ryken and required after-school SETSS he "agreed with that recommendation" (Tr. p. 112). When asked by the IHO

if the Ryken program included the reading support recommended for the student in the neuropsychological evaluation report, the neuropsychologist testified that it was his understanding that the student needed SETSS to keep "up to date with his current . . . instruction . . . and . . . new material" (Tr. pp. 113-14). The neuropsychologist testified that he also understood that the student was receiving extra support to help process material he was learning in classes, and SETSS sessions were a way to process that information on a "deeper level" because he was "struggling to do that during the day given his language disorder" (Tr p. 114). He defined "support" as going through the information and reviewing to make sure that the student understood and helping him make the best use of his time for studying and homework (Tr. pp. 114-15). The IHO asked the neuropsychologist what information he based the SETSS recommendation on, and he responded that it was based on an "update" he received from the parent's attorney, and he could not remember if he saw a report card or if it was a conversation (Tr. p. 116). Ultimately, the neuropsychologist testified that, at the time of the neuropsychological evaluation, his focus was on getting the student into a specialized school, but "now [he thought] that the SETSS [was] required in addition to the specialized school" (Tr. pp. 120-21).

The LMI director testified that in order for the student to make "slow but steady progress" at Ryken, it was "essential" for him to continue to receive 10 hours per week of after-school SETSS to ensure completion of homework assignments and reinforce skills learned in the 12:1+1 special class and to prepare him for Regents examinations (Parent Ex. G at ¶ 18). While the hearing record contains no report cards from the 2023-24 school year, the student's November 2023 SETSS progress report stated that the student's then-current grades "indicate[d] some growth," noting, however, that this was based on an assessment of "work that ha[d] [not] been done independently" and that "every behavior [was] prompted in order to complete tasks" and the student "relie[d] on cues from teachers during the school day and his SETSS provider after school in order to meet the requirements for his classes" (Parent Ex. N at p. 4).

While the hearing record is not particularly robust with evidence of the programming at Ryken, under the totality of the circumstances, I find the unrebutted evidence presented by the parent sufficient to demonstrate that the SETSS were designed to provide more individualized reading instruction than available at Ryken particularly given the student's deficits and the increased difficulty of texts in high school, to promote and increase skills learned at Ryken, to work on skills and habits that would allow the student to achieve success in school, to work on homework, and to prepare for Regents examinations (Tr. pp. 110-15, 142-44, 161-62; Parent Exs. G at ¶¶ 13-14, 18; O at ¶¶ 31-32; P at ¶¶ 25-27). Thus, the evidence demonstrates that the SETSS were delivered to support the student's meaningful access to the curriculum and classroom setting at Ryken. While the IHO rightly questioned the persuasiveness of some of the evidence presented by the parent, the totality of the evidence was sufficient to meet the parent's burden to prove that the unilaterally-obtained SETSS were appropriate and offered specially designed instruction related to the student's ability to receive educational benefit in the school-based special education program at Ryken. On this point, I note that the IHO determined that Ryken was appropriate to meet the student's special education needs and that the additional 10 hours per week of SETSS obtained by the parent exceeded the level that the student required to receive FAPE (IHO Decision at p. 11). However, the question of excessiveness is an equitable consideration, and the Second Circuit Court of Appeals has recently held it is error for an IHO to apply the Burlington/Carter test by weighing equitable considerations in the IHO's analysis of the appropriateness of the unilateral placement (A.P. v. New York City Dep't of Educ., 2024 WL 763386, at *2 [2d Cir. Feb. 26, 2024]

[holding that the IHO should have determined only whether the unilateral placement was appropriate or not rather than holding that the parent was entitled to recover 3/8ths of the tuition costs because three hours of instruction were provided in an eight hours day]).

Based on the foregoing evidence and my independent review of the hearing record, I find that the IHO erred in concluding that SETSS delivered by LMI as an additional component of an overall program including the student's attendance at Ryken were not appropriate when viewed under the totality of the circumstances.

B. Equitable Considerations

The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. 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. Excessive Services

Thus, 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]). An IHO may consider evidence 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). More specifically, while parents are entitled to reimbursement for the cost of an appropriate private placement when a district has failed to offer their child a FAPE, it does not follow that they may take advantage of deficiencies in the district's offered placement to obtain all those services they might wish to provide for their child at the expense of the public fisc, as such results do not achieve the purpose of the IDEA. To the contrary, "[r]eimbursement 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 [emphasis added]; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR

300.148). Accordingly, while a parent should not be denied reimbursement for an appropriate program due to the fact that the program provides benefits in addition to those required for the student to receive educational benefits, a reduction from full reimbursement may be considered where a unilateral placement provides services beyond those required to address a student's educational needs (L.K., 674 Fed. App'x at 101; see C.B. v. Garden Grove Unified Sch. Dist., 635 F. 3d 1155, 1160 [9th Cir. 2011] [indicating that "[e]quity surely would permit a reduction from full reimbursement if [a unilateral private placement] provides too much (services beyond required educational needs), or if it provides some things that do not meet educational needs at all (such as purely recreational options), or if it is overpriced"]; Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ., 790 F.2d 1153, 1161 [5th Cir. 1986] ["The Burlington rule is not so narrow as to permit reimbursement only when the [unilateral] placement chosen by the parent is found to be the exact proper placement required under the Act. Conversely, when [the student] was at the [unilateral placement], he may have received more 'benefit' than the EAHCA [the predecessor statute to the IDEA] requires"]).

For the reasons discussed above, the hearing record shows that the SETSS delivered by LMI addressed the student's educational needs. To determine that the SETSS exceeded what the student required to receive a FAPE, it would be necessary to determine what constituted a FAPE for this student. Here, where the CSE did not convene for the 2023-24 school year and the district declined to present its view at the impartial hearing of what constituted a FAPE for the student, the evidence presented by the parent as to the student's needs, again, is unrebutted. Under these circumstances, I do not find that the evidence supports the IHO's conclusion that the unilaterally obtained SETSS exceeded what the student required to receive a FAPE.

2. Financial Obligation

Turning to the IHO's determination that the parent failed to establish a financial obligation for the SETSS delivered by LMI, 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"]).

Regarding proof of financial risk, 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. v. New York City Dep't of Educ., 758 F.3d 442, 458 [2d Cir. 2014]). 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]).

On June 30, 2023, the parent signed a services agreement with LMI for the delivery of 1:1 SETSS to the student for the 2023-24 school year, which stated that the parent would be responsible to pay for services provided to the student by LMI if they were not funded by the district (Parent Ex. H). In her affidavit testimony, the parent further stated her understanding that LMI would provide the student with 10 hours per week of SETSS at a specified hourly rate (Tr. p. 186; Parent Ex. S ¶ 15). While the parent also testified that she would not be able to afford the costs of more than 10 hours per week of SETSS, this would not act to undermine the written agreement binding the parent to pay for services delivered (see Tr. pp. 186-87). Further, the IHO noted that LMI delivered more than 10 hours per week of SETSS during July 2023 (IHO Decision at p. 11; Parent Ex. K), but the parent does not seek district funding for more than 10 hours per week of services and the fact that additional services were delivered does not change the parent's financial obligation to LMI.

Based on the foregoing, the evidence in the hearing record does not support the IHO's conclusion that the parent did not incur a financial obligation to pay for services delivered by LMI.

3. 10-Day Notice

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

In the appeal prior to remand, one of the issues presented was whether the IHO erred in denying the parent's request for relief based on the parent's failure to submit a 10-day notice. The SRO recommended that, upon remand, the IHO consider what would constitute a fair reduction based on equitable considerations (IHO Ex. II at pp. 13-14). After remand, the IHO found that the lack of a 10-day notice was an equitable consideration that would warrant a 10 percent reduction from the amount of the unilaterally obtained SETSS to be funded by the district (IHO Decision at pp. 11-12). On appeal, the parent argues only that the IHO erred in raising sua sponte the issue of the lack of a 10-day notice. However, the statutory provision states that an award of reimbursement

may be reduced if the parent does not provide notice to the district of the intent to engage in self-help; there is no requirement that the district specifically raise the lack of notice at the impartial hearing for an IHO to exercise discretion to reduce the award. As the parent has not specifically challenged the IHO's determination that a 10 percent reduction would be warranted, this finding has become final and binding on the parties and will not be further 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]).

VII. Conclusion

In summary, the parent met her burden of demonstrating the appropriateness of her unilaterally obtained after-school SETSS delivered by LMI for the 2023-24 school year. As for equitable considerations, the parent has not challenged the IHO's determination that a 10 percent reduction in funding is warranted based on the lack of a 10-day notice.

I have considered the remaining contentions and find it is unnecessary to address them in light of my determinations above.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision dated April 26, 2024 is modified by reversing those portions which found that the parent did not meet her burden to prove the appropriateness of the unilaterally-obtained SETSS for the 2023-24 school year; and

IT IS FURTHER ORDERED that, to the extent it has not already does so pursuant to its obligation to fund the SETSS delivered by LMI pursuant to pendency, the district shall directly fund 90 percent of the costs of up to 10 hours per week of SETSS delivered to the student by LMI for the 2023-24 school year upon proof of delivery.

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

SARAH L. HARRINGTON
STATE REVIEW OFFICER