The University of the State of New York

The State Education Department
State Review Officer
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No. 24-012

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 Sarah M. Pourhosseini, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request for compensatory education related to the student's 2022-23 school year. The appeal must be dismissed.

II. Overview—Administrative Procedures

When a student who resides in New York is eligible for special education services and attends a nonpublic school, Article 73 of the New York State Education Law allows for the creation of an individualized education services program (IESP) under the State's so-called "dual enrollment" statute (see Educ. Law §3602-c). The task of creating an IESP is assigned to the same committee that designs educational programing for students with disabilities under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482), namely a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law §§ 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. 23-144). 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.

Briefly, the CSE convened on February 9, 2022, and January 4, 2023 to formulate IESPs for the student (see generally Parent Ex. B; Dist. Ex. 2). In a due process complaint notice, dated February 17, 2023, the parent, through a lay advocate, alleged that the district failed to offer the student equitable services, and thus, failed to offer the student a free appropriate public education (FAPE) for the 2022-23 school year (Parent Ex. A). As relief, the parent requested an order directing the district to provide the student with six periods per week of SETSS for the entirety of the 2022-23 school year, an order directing the district to implement the student's SETSS and related services at enhanced rates, and an order directing the district to provide a bank of compensatory educational services for services not provided during the 2022-23 school year (Parent Ex. A at p. 3).

A. May 31, 2023 Impartial Hearing Officer Decision and Appeal

An impartial hearing convened on March 23, 2023, and concluded on May 17, 2023 after three days of proceedings (March 23, 2023 Tr. pp. 1-18; April 27, 2023 Tr. pp. 1-118; May 17, 2023 Tr. pp. 1-85).[1] In a decision dated May 31, 2023, the IHO concluded that although the district sustained its burden to establish that the February 2022 IESP and the January 2023 IESP both offered the student a FAPE, the evidence demonstrated that the district failed to implement both IESPs, which denied the student a FAPE for the 2022-23 school year (see Application of a Student with a Disability, Appeal No. 23-144). The IHO also found that the student was entitled to receive the services recommended in the February 2022 and January 2023 IESPs, and the parent had located providers to implement the services in the IESPs "at an enhanced rate" (id.). However, the IHO denied with prejudice the parent's request for compensatory educational services consisting of six periods per week of special education teacher support services (SETSS) for the 2022-23 school year (id.).

The parent appealed, arguing that the IHO erred in finding the February 2022 and January 2023 IESPs were appropriate and requested a finding that the student was entitled to receive six periods per week of SETSS for the 2022-23 school year and an order directing the district to fund SETSS and occupational therapy (OT) services obtained for the student at the contracted rates, and to order the district to provide a bank of SETSS to compensate the student for the six hours of SETSS the student should have received during the 2022-23 school year (Application of a Student with a Disability, Appeal No. 23-144).

In a decision dated October 2, 2023, another SRO held that the evidence in the hearing record supported the parent's contention that the January 2023 CSE did not rely on sufficient evaluative information to develop the student's IESP and that the IHO's determination that the January 2023 IESP was appropriate must be reversed (Application of a Student with a Disability, Appeal No. 23-144). However, the SRO also determined that, as the IHO did not address the

[1] The transcripts from the impartial hearing in this matter were not consecutively paginated throughout the impartial hearing; for clarity, transcript citations in this decision will refer to the date of the impartial hearing and the page number, such as "Mar. 23, 2023 Tr. p. 1."

appropriateness of the parent's unilaterally obtained services or equitable considerations and the hearing record was insufficiently developed on these issues, the matter must be remanded to the IHO to make determinations on those issues after further development of the hearing record (id.). For example, the SRO noted that the hearing record did not identify when the student began receiving privately obtained OT services or the frequency of the contracted OT services, the hearing record failed to identify a start date for the delivery of the privately obtained SETSS, and the hearing record was unclear as to whether the student received SETSS, OT, and speech-language therapy under pendency after the filing of the February 2023 due process complaint notice or through implementation of the February 2022 IESP (id.). The SRO found that "the application of the Burlington-Carter test to determine whether the parent's unilaterally obtained services were appropriate to meet the student's needs is inherent to—and a necessary predicate for—a determination of whether the parent may be awarded reimbursement, or direct funding, of unilaterally obtained services" and noted that "it does not appear that the hearing record was developed with an eye towards applying the correct legal standard" (id.). The SRO held that "rather than denying the parent's request for funding of the unilaterally obtained services due to a failure to present sufficient evidence, the matter is remanded for a determination as to whether the privately obtained SETSS and OT services constituted an appropriate unilateral placement of the student" such that the cost of the services would be reimbursable to the parent or, alternatively, could be directly paid by the district to the provider (id.). Lastly, the SRO noted that the "Second Circuit's approach to compensatory education may leave room for unique circumstances where an award of compensatory education may be warranted where, for example, a student is unilaterally placed but the parent's request for tuition reimbursement is denied" (id. at n. 16).

B. Impartial Hearing Officer Decision on Remand

Upon remand, the IHO conducted two conferences with the parties on October 25, 2023 and December 5, 2023 to clarify the issues to be determined on remand (Oct. 25, 2023 Tr. pp. 1-12; Dec. 5, 2023 Tr. pp. 13-29). At the October 25, 2023 hearing date, the IHO noted that the matter had been remanded "for hearing to complete the record" (Oct. 25, 2023 Tr. p. 2). The parties discussed future hearing dates and both parties indicated that they intended to present witnesses testimony at the next hearing date (Oct. 25, 2023 Tr. p. 4). At the December 5, 2023 hearing date, both the parent and the district declined to add any evidence to the hearing record, having made no further submissions of documents and taking no additional testimony (Dec. 5, 2023 Tr. pp. 13-29). The parent made an opening statement; the parent and the district rested on the evidence previously submitted; both parties then made closing statements (Dec. 5, 2023 Tr. pp. 15-16, 19-28). The parent's advocate stated that the student's "SETSS services and OT services, pursuant to . . . the February 9th, 2022 IESP were provided under pendency and paid for . . . [so] the appropriateness of that placement here is essentially moot" (Dec. 5, 2023 Tr. pp. 17).[2] The parent advocate then reiterated the parent's request for compensatory education (Dec. 5, 2023 Tr. p. 18). The district, in its closing statement, asserted that the remand order directed the IHO to assess if or when and by whom the SETSS and OT services were delivered to the student as well as whether the services were sufficient to address the student's needs and noted that because the parent had submitted no additional evidence on remand, "the issues that were present when the SRO reviewed

[2] The advocate for the parent was unaware if the student received speech-language therapy services during the 2022-23 school year (Dec. 5, 2023 Tr. p. 17).

all the evidence still remain" (Dec. 5, 2023 Tr. pp. 19-21). In response, the parent advocate noted that if the prior SRO knew the student received "all services" under pendency, he would have noted that in his decision, "[b]ut such information, of course, was not available to [him]" (Dec. 5, 2023 Tr. p. 23).

In a decision dated December 6, 2023, the IHO summarized the procedural posture of the matter at hand, noting that the prior SRO had found a denial of FAPE based on the January 2023 IESP and that finding had become the law of the case (IHO Decision at pp. 1-2; see Parent Ex. K). The IHO further noted that the SRO had remanded the matter for a determination of the appropriateness of the parent's unilaterally obtained services during the 2022-23 school year, had set forth the legal standards to employ to make that determination, and had found that the hearing record was insufficient to make findings under that standard (IHO Decision at pp. 1-3). The IHO related that "on November 28, 2023, the date disclosures were due, the parent's representative advised by email that 'the parent will not be making additional disclosures in the matter, but will rely on evidence disclosures and witness testimony already presented'" (id. at p 3). The IHO noted that during the continued hearing "instead of presenting evidence to further develop the record regarding specific issues set forth by the SRO, the parent decided to rest on the record that the SRO found to be insufficient" (id.).[3] The IHO concluded that as the parent had elected to not present any additional evidence in accordance with the prior SRO's findings, she was "compelled to find that the parent failed to establish that the unilateral placement was appropriate and the parent's request for 120 hours of compensatory SETSS must be denied" (id. at p. 4).

IV. Appeal for State-Level Review

The parent, through the lay advocate, appeals and asserts that because the unilateral placement was "moot" at the time the impartial hearing reconvened upon remand in fall 2023, therefore, the IHO should have ordered compensatory education.[4] The parties' familiarity with the particular issues for review on appeal in the parent's request for review and the district's answer thereto is also presumed and the allegations and arguments will not be recited here in detail. The salient issue on appeal is whether the IHO erred in denying the parent's request for compensatory education relating to the student's 2022-23 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

[3] The IHO also noted that after the conclusion of the hearing the parent sought to introduce, as evidence, the pendency agreement for the matter, and the district objected because the evidence was not disclosed prior to the hearing (IHO Decision at p. 3; see Dec. 5, 2023 Tr. pp. 26-28). At the hearing the document was not admitted into the hearing record and the IHO held that the services that the student received through pendency were "not relevant to the appropriateness of the placement and is insufficient to sustain the parent's burden in this case" (IHO Decision at p. 3).

[4] On appeal the parent seeks compensatory education either from the district, or from her own provider, presumably Benchmark, at a rate of $175 per hour.

(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]).[5] "Boards of education of all school districts of the state shall furnish services to students who are residents of this state and who attend nonpublic schools located in such school districts, upon the written request of the parent" (Educ. Law § 3602-c[2][a]). In such circumstances, the district of location's CSE must review the request for services and "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an [IEP]" (Educ. Law § 3602-c[2][b][1]). The CSE must "assure that special education programs and services are made available to students with disabilities attending nonpublic schools located within the school district on an equitable basis, as compared to special education programs and services provided to other students with disabilities attending public or nonpublic schools located within the school district (id.).[6]

As was noted in the prior SRO decision, some consideration must be given to the appropriate legal standard to be applied to the parent's request for services obtained for the student during the 2022-23 school year. 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 February 2022 IESP for the 2022-23 school year and that the January 2023 IESP was inappropriate and was not implemented and, as a self-help remedy, she unilaterally obtained private services from Benchmark for the student without the consent of the school district officials, and then commenced due process to obtain remuneration for the costs thereof (see Parent Ex. A). Accordingly, the issue in this matter is whether the parent is entitled to public funding of the costs of the private SETSS and OT services 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

[5] 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]).

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

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).

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]). 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. 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).

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).

VI. Discussion

A. IHO Dismissal

The parent asserts that the IHO erred in dismissing her request for compensatory education, contending that the SRO had remanded the matter to the IHO for the purposes of determining if the parent should be reimbursed for the cost of unilaterally obtained services but, in the parent's view, the services the student was provided with unilaterally during the 2022-23 school year have been funded by the district under pendency and are therefore moot. The parent contends that the only remaining question is whether the district erred in only providing the student with three hours of SETSS per week under pendency during the 2022-23 school year, rather than the six hours per week the parent asserts the student required and, if so, whether compensatory education is warranted to make up for the difference.

However, I find that the IHO did not err in denying relief under the remanded directives mandated to the IHO in the prior SRO decision to conduct a Burlington/Carter style analysis of the appropriateness of the services that the parent unilaterally obtained from Benchmark without the consent of district officials (see Application of a Student with a Disability, Appeal No. 23-144). The IHO correctly noted that the findings in Application of a Student with a Disability, Appeal No. 23-144—namely that the district had insufficient evaluative information to

recommend appropriate equitable services in the January 2023 IESP, and that the hearing record was insufficient to show that the unilateral services were appropriate—had become the law of the case. Accordingly, the parent's failure to submit additional evidence or testimony on that question was dispositive and the IHO correctly dismissed the parent's claim.[7] The parent's claim that the IHO shifted the burden of proof inappropriately to the parent in this matter is unavailing because, as set forth above, State law provides that 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, and the unilaterally obtained services at issue in this matter are to be assessed in the same manner as a unilateral placement as directed in the prior State level appeal decision (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85; see Application of a Student with a Disability, Appeal No. 23-144).

Finally, to the extent that the parent asserts that an assessment of the appropriateness of the services the student received during the 2022-23 school year is "moot" and the focus on this proceeding should only be on whether compensatory services, in addition to those services the student may have received during the 2022-23 school year, the parent's argument is flawed in that it would be impossible to determine an appropriate compensatory remedy without knowing what educational programming the student received and where it may have fallen short in addressing the student's needs.[8] The parent has been provided with two opportunities before an impartial hearing officer to provide adequate evidence regarding the services she privately obtained from Benchmark during the 2022-23 school year and I do not find it appropriate in light of the available hearing record to attempt to blend the two forms of relief in this case. Instead, it is appropriate to craft alternative relief.

[7] The parent has submitted three documents with her request for review as proposed SRO exhibits (Req. for Rev. Exs. A-C). Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]). Proposed SRO Exhibits A and B are pendency forms showing what the student was authorized to receive under pendency during the 2022-23 school year (Req. for Rev. Exs. A; B). Proposed SRO Exhibit C is a complete copy of an April 2023 SETSS provider progress report showing the student's need for SETSS and recommending an increase to six hours per week (Req. for Rev. Ex. C). An incomplete version of the progress report lacking the recommendation page was admitted into evidence during the initial hearing (see Parent Ex. M). I decline to consider the proposed additional evidence, as Proposed SRO Ex. B is already in the hearing record and Proposed SRO Exhibits A and C were available at the time of the impartial hearing and could have been admitted then or during the remanded hearing. It may be that the proposed additional evidence is the sort of evidence that the IHO was expecting to be submitted by the parent at the time the IHO gave the parent the invitation to submit evidence to complete the record; however, the parent made the conscious decision not to submit these documents during the remand hearing.

[8] It should be noted that although the parent reported to the February 2022 CSE that the student evidenced "significant delays within the expressive language . . . doman[s]," the hearing record indicates little attention has been paid to ensuring that the student receive speech-language therapy services, either by the parent or the district (Dist. Ex. 1 at p. 1; see Dec. 5, 2023 Tr. p. 17).

B. Relief

As noted in the prior State level appeal decision in this matter, the January 2023 CSE lacked sufficient evaluative information to recommend appropriate equitable services at the time of the CSE meeting (Application of a Student with a Disability, Appeal No. 23-144). It is likely that with the passage of time the CSE may have an opportunity to obtain updated information on the student's needs and abilities in the form of progress reports, provider reports, and grades.[9]

Accordingly, I will direct the district, if it has not already done so, to request progress reports from the student's current providers and conduct a classroom observation of the student in the current placement and make independent findings with respect to the student's needs including potentially reinstating a recommendation for SETSS in an IESP for the student.

VII. Conclusion

Having determined that the evidence in the hearing record supports the IHO's determination that the parent's request for compensatory education should be dismissed, the necessary inquiry is at an end.

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

THE APPEAL IS DISMISSED.

IT IS ORDERED that the district request evaluative information as set forth above, conduct a classroom observation of the student as set forth above within 60 days of the date of this decision, and reconvene the CSE to consider the results of the aforesaid evaluations within 30 days of the receipt of each evaluation.

Dated: **Albany, New York**
February 14, 2024

JUSTYN P. BATES
STATE REVIEW OFFICER

[9] I note briefly that report card grades may not be the most useful measure of the student's needs and abilities as the exhibit and associated testimony suggested that some of the student's assessment results were not based on the State curriculum (see Parent Ex. O).