Case Number: XXXXXX NYC Case Number: «Case»

**FINDINGS OF FACT AND DECISION**

Case Number: «Case»

Student’s Name[[1]](#footnote-2): «Last\_Name», «First\_Name»

Date of Birth: «DOB»

School District: N.Y.C. Dept. of Ed., District #

Hearing Requested by: «Parents\_Name» (“Parent”)

Request Date/Date Complaint Filed: «Request\_Date»

Date of Hearing: «Hearing\_Date»

Actual Record Closed Date: «Record\_Close\_Date»

Date of Decision: XX/XX/202X

Date of Distribution: XX/XX/202X

Time Sensitive Choose an item.

Impartial Hearing Officer: Corey Forster, Esq.

### NAMES AND TITLES OF PERSONS WHO APPEARED ON «Hearing\_Date»

For the Student:

Enter information. Press “enter” to add more as needed.

For the Department of Education:

Enter information. Press “enter” to add more as needed.

**JURISDICTION**

This proceeding arises under the Individuals with Disabilities Education Act (“IDEA”), 20 U.S.C. §§ 1400-1482; the federal regulations implementing IDEA, 34 C.F.R. §§ 300.1, et seq.; Article 89 of the New York State Education Law; and the New York State regulations at 8 NYCRR § Part 200, et seq.

The undersigned Impartial Hearing Officer (“IHO”) is a certified New York State Special Education Hearing Officer, employed by the New York City Office of Administrative Trials and Hearings (“OATH”) as a Special Education Impartial Hearing Officer, and meets all of the qualifications and requirements outlined in both federal and state statute which grant the IHO the authority to adjudicate this hearing. Furthermore, the IHO is not currently, nor has ever been, an employee of the NYC Department of Education, and does not have any personal or professional interest or bias that conflicts with his objectivity to hear this matter.

**BACKGROUND**

On «Request\_Date», Parent filed a Due Process Complaint (DPC) alleging that the Department of Education (DOE) failed to implement an individualized education service plan (IESP) for the «School\_Years» school year. Parent seeks an order directing DOE to implement the IESP with providers at an enhanced rate for services. On «Hearing\_Date», the hearing on the merits was held.

Based upon the record, I find: 1) DOE failed to implement the IESP denying the student a free appropriate public education (FAPE) for the «School\_Years» school year; and 2) the relief Parent seeks is appropriate.

**PROCEDURAL HISTORY**

During the due process hearing, DOE waived its opening statement, submitted NUMBER exhibit(s) into the record, did not present any witness testimony, rested its case on its exhibit(s), did not cross-examine Parent’s witness, and made a closing statement.[[2]](#footnote-3) Parent made an opening statement, submitted NUMBER exhibit(s) into the record, presented NUMBER witness(es) via affidavit, and made a closing statement. A list of the documentary evidence in this proceeding is appended to this Order.

**LEGAL STANDARD**

*Burden of Proof*

Except for circumstances not applicable here, the burden of proof is on the school district during an impartial hearing (Educ. Law § 4404(1)(c); *see* *R.E. v. New York City Dep’t of Educ*., 694 F.3d 167, 184-85 (2d Cir. 2012); *C.F. v. New York City Dep’t of Educ.*, 746 F.3d 68, 76 (2d Cir. 2014).

In cases such as this one, I find that a three-prong approach is used by State Review Officers (“SROs”) in the New York State Office of State Review, *see e.g.*, *Application of a Student with a Disability*, Appeal No. 23-036; *Application of a Student with a Disability*, Appeal No. 23-066; *Application of a Student with a Disability*, Appeal No. 23-218; *Application of a Student with a Disability*, Appeal No. 23-174; *Application of a Student with a Disability*, Appeal No. 24-025; and *Application of the New York City Department of Education*, Appeal No. 24-103. I applied that standard here.

As explained below, I find that the District failed to provide a FAPE on an equitable basis for the «School\_Years» school year, that Parent established the appropriateness of their unilaterally obtained provider and that the equities favor an award.

*FAPE*

The IDEA provides that children with disabilities are entitled to a FAPE (20 U.S.C. § 1400 (d)(1)(A). A FAPE consists of specialized education and related services designed to meet a student’s unique needs, provided in conformity with a comprehensive written Individualized Education Program (IEP) (20 U.S.C. § 1401[9]). Under State law, parents who have privately enrolled their child in a nonpublic school may seek educational “services” for their child with a disability by filing a request in the district 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]). In response, the district must review the request 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] [l]). Further, the location district is responsible for implementing the IESP services (Educ. Law § 3602-c [2] [a]). 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” (Educ. Law § 3602-c [2] [b] [1]).

*Dual Enrollment*

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. *See* 20 U.S.C. § 1412(a)(l)(A); Educ. Law §§ 4402(2)(a), (b)(2). The IDEA confers no individual entitlement to special education or related services upon students who are enrolled by their parents in nonpublic schools. S*ee* 34 CFR 300.137(a). Under State law, however, parents who have privately enrolled their child in a nonpublic school may seek educational “services” for their child with a disability by filing a request in the district 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. *See* Educ. Law § 3602-c(2). Then, the district of location’s Committee on Special Education (“CSE”) must review the request 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)(l).

**FINDINGS OF FACT AND DECISION**

*Credibility*

Upon my evaluation of the evidence, including all admitted documents and the testimonies of the witnesses, I generally find the documents relevant, detailed, and consistent with the allegations in the DPC, as well as representative of the facts for which they were offered. As for the testimony of the witness(es), I find no reason to doubt their veracity with respect to the facts they related, and I credit all the testimony. The weight I afford the exhibits and testimony is reflected in the analysis.

*Prong I – DOE Failed to Provide a FAPE on an Equitable Basis*

At the hearing, the following was undisputed: 1) the IESP submitted into evidence by Parent, dated «IESP\_Date»[[3]](#footnote-4), is Student’s most recent IESP; and 2) Student is entitled to the SETSS and Related Services mandated in said IESP. DOE did not allege and did not submit any evidence to prove that the services were implemented. Therefore, it is undisputed that DOE failed to implement the services set forth in the IESP. It is noted that Parent has located a provider to implement the SETSS and Related Services listed in the IESP at an enhanced rate. Although DOE argued that the rate charged by the Providers was excessive, and submitted a study into evidence regarding what it believes the fair market rate for SETSS and Related Services should be, it failed to present any witness testimony addressing the study or substantiating its contents and conclusions. As a result, I do not find the study credible.

I hereby make the following findings: (1) DOE did not provide Student a FAPE for the «School\_Years» school year; and (2) Student is entitled to receive the SETSS and Related Services mandated in Student’s IESP dated «IESP\_Date».

*Prong II – Parent’s Selected Services Are Appropriate*

Initially, as I have determined that DOE failed to implement the services it recommended in the «IESP\_Date» IESP, I find that Parent was left with no option but to secure equitable services for Student. I find that the services Parent selected are appropriate.

Among the considerations in determining whether a private placement selected by a parent is appropriate is whether the placement is likely to produce progress, not regression. *See Gagliardo v. Arlington Cent. Sch. Dist.*, 489 F.3d 105, 112 (2d Cir 2017), *quoting* *Walczak v. Florida Union Free Sch. Dist.,* 142 F.3d 119, 130 (2d Cir. 1998). Moreover,

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 specifically 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. v. Bd. of Educ.*, 459 F.3d 356, 364-365 (2d. Cir 2006).

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. A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student. *See* 20 U.S.C. § 1401(29); Educ. Law § 4401(1); 34 C.F.R. § 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).

First, the issue of appropriateness of the services is not seriously in dispute. DOE recommended the services in the «IESP\_Date» IESP based on their own determination as to what was appropriate for Student. *See* *Application of a Student with a Disability*, Appeal No. 21-138 (the appropriateness of the services is “not seriously in dispute in this matter as it is the same type of service recommended” in student’s IESP).

Second, there is evidence in the record to support the appropriateness of the parentally selected provider and there is evidence that Student has made progress with these services. [INSERT EXHIBITS].[[4]](#footnote-5)

For these reasons, I find that Parent has met their burden regarding the appropriateness of the services.

*Prong III – Equities*

The remedy for a school district’s failure to provide appropriate equitable services required under Education Law § 3602-c is similar to the remedy for a school district’s failure to provide appropriate services under the IDEA. *See Application of a Student with a Disability,* Appeal No. 20-023, *citing* *Doe v. E. Lyme Bd. of Educ.,* 262 F. Supp. 3d 11, 27 (D. Conn. 2017). Under the IDEA, courts can “grant such relief as the court determines is appropriate,” limited only by the restriction that “the relief is to be appropriate in light of the purpose of the Act.” *Doe v. East Lyme Bd. Of Educ.*, 790 F.3d 440, 454 (2d Cir. 2015) (citation omitted). Equitable considerations are relevant in fashioning relief, and the court enjoys broad discretion in doing so. *Florence Cty. Sch. Dist. Four v. Carter,* 510 U.S. 7, 16 (1993). Although an award of damages is not available under the IDEA (*see Polera v. Bd. of Educ. of Newburgh Enlarged City Sch. Dist.*, 288 F.3d 478, 486 [2d Cir. 2002]), “a court may award various forms of retroactive and prospective equitable relief, including reimbursement of tuition, compensatory education, and other declaratory and injunctive remedies” (*Doe v. East Lyme Bd. of Educ.,* 790 F.3d at 454).

Moreover, the SRO has held that when, like here, the parent has not already paid the providers, and seeks direct funding rather than reimbursement, the “matter is in a subset of more complicated cases in which the financial injury to the parent and the appropriate remedy are less clear.” *Application of a Student with a Disability*, Appeal No. 20-115 *citing* *E.M. v. New York City Dep’t of Educ.*, 758 F.3d 442, 453 (2d Cir. 2014) (holding that equitable considerations allow for direct payment for tuition where the parents were legally obligated to make payments but had not done so due to a lack of financial resources). Because Parent had to find a provider on their own and because “caselaw supports reimbursement and direct remedies in a unilateral placement case,” the SRO has determined that the question of whether a services provider should be directly paid is somewhat similar to the *Burlington*/*Carter* framework, which “forecloses any complete disavowal of the parent’s burden of production and persuasion related to the private, unilateral services obtained by the parent.” *Application of a Student with a Disability*, Appeal No. 20-115 (finding, *inter alia*, the analysis “unworkable to the extent that the SETSS services can be construed as a state-approved option”).

In determining whether a provider agency’s rates are reasonable and appropriate under the circumstances, various factors have been found relevant, including: the provider’s explanation of the rate, including its costs and the qualifications of its instructors (*Application of a Student with a Disability*, Appeal No. 20-140 [while “[g]enerally, teachers at a unilateral placement need not be State-certified . . . there must be objective evidence of special education instruction or supports that are specially designed by . . . providers . . . who have reasonable qualifications that are specifically related to the student’s deficits”]); the value that specialized certification, such as a bilingual extension, adds to instruction (*Application of a Student with a Disability*, Appeal No. 21-183 [approving compensatory SETSS by a bilingual reading specialist at a rate not to exceed $200 per hour]); and the parent’s efforts to locate a DOE-approved SETSS provider from a list provided by the District to the parent (*Application of a Student with a Disability*, Appeal No. 21-096).

Additionally, one must look to whether the parent directly paid the provider or is contractually obligated to pay the provider in the event the District is not ordered to fund SETSS and/or related services at the requested rate. *See e.g., Application of a Student with a Disability*, Appeal No. 21-068 (holding that “it is not appropriate equitable relief . . . to require the district to either reimburse the parent for the costs of SETSS or to directly fund SETSS” where “there is inadequate proof that the parent has expended any funds to pay for SETSS . . . or is legally obligated to do so”). Ultimately, in light of these factors, I must determine whether the requested rate is unreasonable. See *e.g., Application of a Student with a Disability*, Appeal No. 21-138 (determining that “there is no basis for a finding that the rate of $175 was unreasonable”).

Finally, I will consider when Parent notified the District of their disagreement with the District’s program and the enhanced rate claim for SETSS as this establishes the first date upon which the District would have had an opportunity to modify its program and its offered rate for SETSS in light of Parent’s claims. *See id.* (finding further that despite the *per se* reasonableness of the rate, a reduction in rate that had been imposed by the IHO was justified where the parent did not provide a ten-day notice (TDN), per 20 U.S.C. § 1412[a][10][C][iii] and 34 C.F.R. § 300.148[d][1]).

I find that Parent is contractually obligated to pay Provider Agency for the SETSS and Related Services provided during the «School\_Years» school year. Ex. XX. I further find that Parent is aware of the fee(s): $XXX.00 per hour for SETSS and $XXX.00 per hour for each related service, including Speech Therapy, Occupational Therapy, and Counseling. Ex. XX. Moreover, Parent provided the requested TDN (Ex. XX), and DOE has not asserted or suggested that Parent failed to cooperate with DOE or interfered in any manner with the District’s obligation to provide Student with a FAPE on an equitable basis for the «School\_Years» school year.

As I have found that the District failed to provide Student services on an equitable basis for the «School\_Years» school year and that the services are appropriate, I find that Parent is not required to produce anything to satisfy the request for direct funding. *See generally Cohen v. N.Y. City Dep’t of Educ.*, 2023 U.S. Dist. LEXIS 171815 (S.D.N.Y. September 26, 2023) (stating, “[t]o require parents to fund their children’s education in the first instance, unless they demonstrate an inability to pay—as the SRO did here—skews the equities underlying the IDEA and cases applying that law. Direct payment to the school simply requires DOE to belatedly fund expenses that it was obligated to pay all along. Thus, where, as here, a private school is willing to enroll the student and the risk that it will take years to obtain payment, parents who satisfy the *Burlington* factors have a right to retroactive direct tuition payment.”) (internal citations omitted). *See also generally Ferreira v. New York City Dep’t of Educ.*, 2023 U.S. Dist. LEXIS 43032 (S.D.N.Y. March 14, 2023) (noting that the Court found no caselaw holding that “proof of inability to pay is required to establish the propriety of direct retrospective payment,” and that “where it is undisputed that the DOE is responsible for payment, and the DOE does not contest the reasonableness of the cost of tuition, it would be nonsensical to draw a distinction on equitable grounds between requiring the DOE to pay the school directly and forcing the parents to make an initial payment in the same amount that the DOE is then required to reimburse”). I, therefore, find that Parent is entitled to the requested form of payment.

I am ordering the District to fund special education services as detailed in my Order below. As part of my Order, I am requiring Parent to present a valid contract between Parent and Provider Agency and affidavits attesting that the services billed for were provided.

**FUNDING FOR A 10-MONTH SCHOOL YEAR**

I find that Student is entitled to funding of SETSS and Related Services during a 10-month school year as recommended by the «IESP\_Date» IESP. Ex. XX. I further find that a 10-month school year comprises 36 weeks, a reflection of the 180 instructional days divided by five days per week.[[5]](#footnote-6)

Based upon the hearing record, I find that Student is entitled to the services recommended in the «IESP\_Date» IESP and that until DOE begins providing Student with SETSS and Related Services, DOE must fund such services.

**OTHER CONTENTIONS**

I have reviewed the parties’ remaining contentions and find them to be either unnecessary to this decision, without merit, beyond my jurisdiction, or without sufficient basis in the record for a finding.  Accordingly, any relief not specifically discussed in this decision is denied, and all remaining claims not discussed herein are dismissed with prejudice.

**ORDER**

Based on the above findings, it is hereby:

**ORDERED**, DOE failed to provide Student a FAPE for the «School\_Years» school year;

**ORDERED**, DOE fund/reimburse NUMBER periods per week of SETSS, as set forth in Student’s IESP dated «IESP\_Date», for the «School\_Years» school year, by an independent provider of Parent’s choosing, at a rate not to exceed $XXX.00 per hour; and

**ORDERED**, DOE fund/reimburse NUMBER periods per week of Speech-Language Therapy, as set forth in Student’s IESP dated «IESP\_Date», for the «School\_Years» school year, by an independent provider of Parent’s choosing, at a rate not to exceed $XXX.00 per hour; and

**ORDERED**, for any of the services mandated by the «IESP\_Date» IESP that Student has not received, Student shall receive a bank of hours for the «School\_Years» school year that shall expire within 3 years of the date of this decision. The rate of pay for this bank of hours shall be based on the contract Parent enters into with a provider of their choosing OR at a fair market value; and

**ORDERED**, DOE shall pay the above-referenced provider(s) of Parent’s choosing within thirty-five days of DOE’s receipt of: a valid contract between Parent and the chosen provider(s); an affidavit attesting that the services billed for were provided; and invoice(s) for services rendered.

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Corey Forster

Impartial Hearing Officer

**NOTICE OF RIGHT TO APPEAL**

Within 40 days of the date of this decision, the parent and/or the Public School District has a right to appeal the decision to a State Review Officer (SRO) of the New York State Education Department under section 4404 of the Education Law and the Individuals with Disabilities Education Act.

If either party plans to appeal the decision, a notice of intention to seek review shall be personally served upon the opposing party no later than 25 days after the date of the decision sought to be reviewed.

An appealing party's request for review shall be personally served upon the opposing party within 40 days from the date of the decision sought to be reviewed. An appealing party shall file the notice of intention to seek review, notice of request for review, request for review, and proof of service with the Office of State Review of the State Education Department within two days after service of the request for review is complete. The rules of procedure for appeals before an SRO are found in Part 279 of the Regulations of the Commissioner of Education. A copy of the rules in Part 279 and model forms are available at <http://www.sro.nysed.gov>.

**APPENDIX A- REDACTION IDENTIFICATION PAGE**

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| **Redacted Information** | **Term Used In FOFD** |
| «First\_Name» «Last\_Name» | Student |
| «Parents\_Name» | Parent/Guardian |
|  | Parent Attorney/Representative |
|  | DOE Attorney/Representative |
|  | Provider |

**APPENDIX B- DOCUMENTATION ENTERED INTO THE RECORD**

**PARENT EXHIBITS**

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**DOE EXHIBITS**

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**IHO EXHIBITS**

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1. Personally identifiable information is attached as Appendix A, “Redaction Identification Page,” to this decision and must be removed prior to public distribution. [↑](#footnote-ref-2)
2. The instant decision is being issued prior to the completion of the «Hearing\_Date» transcript. OR References to the transcript of the Due Process Hearing conducted on «Hearing\_Date» are denoted “Tr.” [↑](#footnote-ref-3)
3. Parent Exhibit XX and DOE Exhibit XX are duplicate copies of Student’s «IESP\_Date» IESP. This FOFD will cite to Parent Exhibit XX when referencing the «IESP\_Date» IESP. [↑](#footnote-ref-4)
4. Exhibits shall be referred to as follows: Ex. followed by lettered designations for Parent’s Exhibits, numbered designations for DOE’s Exhibits, and roman numeral designations for Impartial Hearing Officer’s Exhibits. Exhibit designations will be followed by the page numbers as needed and appropriate. For example, Parent’s Exhibit A, page 1, will be referred to as Ex. A-1. [↑](#footnote-ref-5)
5. *See NYC DOE 2023-2024 School Year Calendar*, found at <https://www.schools.nyc.gov/about-us/news/2023-2024-school-year-calendar> (last visited XX/XX/2024); *see also Application of a Child with a Disability,* Appeal No. 23-153, pg. 25; *Application of a Child with a Disability,* Appeal No. 23-033, FN 10.

   [↑](#footnote-ref-6)