



The University of the State of New York

The State Education Department

State Review Officer

www.sro.nysed.gov

No. 23-143

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:

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 educational services to remedy respondent (the district's) failure to provide educational services to her son for the 2022-23 school year. Respondent (the district) cross-appeals from that portion of the IHO's decision that ordered it to fund the costs of private SETSS delivered by Benchmark Student Services (Benchmark) during a portion of the 2022-23 school year. The appeal must be sustained in part. The cross-appeal must be sustained in part.

II. Overview—Administrative Procedures

When a student who resides in New York is eligible for special education services and attends a nonpublic school, Article 73 of the New York State Education Law allows for the creation of an individualized education services program (IESP) under the State's so-called "dual enrollment" statute (see Educ. Law §3602-c). The task of creating an IESP is assigned to the same committee that designs educational programming for students with disabilities under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482), namely a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and

school districts 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

As the hearing record is not fully developed in this matter, there is little evidence to describe the student's educational history. Briefly, according to the hearing record, a CSE convened on June 7, 2022 after a "turning five re-evaluation" and developed an IESP for the student for the 2022-23 school year (kindergarten) (Parent Ex. B at p. 1). At the time of the June 2022 CSE meeting, the student was attending a nonpublic school and receiving special education itinerant teacher (SEIT) services and occupational therapy (OT) (id.). The June 2022 CSE found the student eligible for special education and related services as a student with an other health impairment and recommended that he receive five periods per week of direct, group special education teacher support services (SETSS) and four 30-minute sessions per week of individual occupational therapy (OT) (id. at pp. 1, 10).^{1, 2}

On November 16, 2022, the student's father signed a contract with Benchmark Student Services (Benchmark), pursuant to which the parent authorized Benchmark to provide "[s]pecial [e]ducation [t]eacher services" to the student for the duration of the 2022-23 school year at a specified "SETSS service rate" (Parent Ex. C at p. 1). The contract further indicated that Benchmark would provide "[s]pecial [e]ducation [t]eacher" services consistent with the student's "most-current agreed-upon IEP or IESP" (id.).

A. Due Process Complaint Notice

By due process complaint notice dated November 16, 2022, the parent alleged that the district denied the student equitable services pursuant to Education Law § 3602-c by failing to implement the special education and related services it recommended for the student for the 2022-23 school year (Parent Ex. A at p. 1). The parent further asserted that the district shifted the burden of implementing the recommended SETSS and related services onto the parent (id.). The parent asserted she was unable to find providers willing to accept the district's published rates and was forced to obtain private providers at enhanced rates (id. at pp. 1-2). The parent also requested pendency based on the June 2022 IESP, which recommended that the student receive five periods per week of SETSS and four 30-minute sessions per week of OT (id. at p. 2). For relief, the parent requested a finding that the district failed to provide the student a free appropriate public education (FAPE) and equitable services for the 2022-23 school year, an order compelling the district to implement the student's program of SETSS and related services "at enhanced market rates," and a bank of hours of compensatory educational services to remedy the period of time the student was without services during the 2022-23 school year (id.).

B. Impartial Hearing Officer Decision

A hearing on pendency was held on January 24, 2023, at which the district did not appear (Tr. pp. 1-6). The parent indicated that the June 2022 IESP was the student's last agreed upon

¹ The student's eligibility for special education as a student with an other health impairment is not in dispute (see 34 CFR 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

² SETSS is not defined in the State continuum of special education services (see 8 NYCRR 200.6). As has been laid out in prior administrative proceedings, the term is not used anywhere other than within this school district and a static and reliable definition of "SETSS" does not exist within the district.

program (Tr. p. 4). In an interim decision on pendency dated January 25, 2023, the IHO ordered the district to "provide" the student with five periods per week of direct/indirect SETSS and four 30-minute sessions per week of individual OT as pendency beginning with the date of the parent's November 16, 2022 due process complaint notice (Interim IHO Decision at p. 5).

At the next scheduled impartial hearing dates on February 22, 2023, March 27, 2023, and April 28, 2023, the district did not appear, and the parent agreed to continue the matter to an additional hearing date (Tr. pp. 8, 12-13, 16-17). On May 5, 2023, the parent's advocate and the IHO reconvened for the impartial hearing on the merits, at which the district did not appear (Tr. pp. 22-29).

The parent's documentary evidence was admitted, and the parent gave an "opening/closing statement" (Tr. pp. 25-27). During her statement, the advocate withdrew the parent's request for related services and indicated the parent requested funding for the SETSS services she unilaterally obtained for the student at a specified enhanced rate as provided by Benchmark (Tr. p. 26). The parent also requested an order from the IHO directing the district to implement the services recommended in the June 2022 IESP for the remainder of the 2022-23 school year (*id.*). The parent further requested a bank of 50 hours of SETSS, which represented the ten weeks between the projected implementation date of the June 2022 IESP on September 1, 2022 and November 16, 2022, when the parent contracted with Benchmark to provide SETSS to the student (Tr. p. 27; *see* Parent Exs. B at p. 1; C). Lastly, the parent requested that the bank of 50 hours be available to the parent to utilize through December 31, 2023 (*id.*).

By decision dated May 30, 2023, the IHO found that the district failed to provide the student with the services recommended in the June 2022 IESP and that the parent was "entitled to funding for the special education supports services privately secured during the school year" (IHO Decision at p. 7). The IHO found that the additional relief requested by the parent was unsupported by the hearing record (*id.*).

IV. Appeal for State-Level Review

The parent appeals and asserts that the IHO failed to consider the parent's request for compensatory educational services and erred in failing to order ten weeks of SETSS for the period of time between the implementation date of the June 2022 IESP and the date on which the student began receiving SETSS from the parent's unilaterally obtained provider. The parent argues that the district did not appear at the impartial hearing and therefore did not refute the parent's claims and requested relief. As relief, the parent requests an order directing the district to fund 50 hours of compensatory SETSS services at market rates available for the parent to utilize through December 31, 2024.³

In an answer and cross-appeal, the district initially alleges that the request for review should be dismissed as untimely because the parent failed to file the request for review with the Office of

³ In her request for review, the parent acknowledges that, during the impartial hearing, she requested an expiration date of December 31, 2023 for the compensatory educational services. Nevertheless, the parent notes that, due to the length of the proceedings, the parent would need more time "to allow the student time to access and benefit from those services."

State Review (OSR) within the required time frame.⁴ Next, the district argues that the IHO correctly determined that the parent was not entitled to compensatory educational services; however, the district alleges that the IHO erred in awarding district funding of the costs of private services delivered by Benchmark during the 2022-23 school year. As its cross-appeal, the district asserts that the IHO erred in failing to deny all of the parent's requested relief based on the parent's failure to demonstrate the appropriateness of her unilaterally obtained SETSS. The district also alleges that equitable considerations do not favor the parent. The district argues that the parent failed to provide ten-day written notice of her intent to unilaterally obtain services and that she has not demonstrated a legal obligation to pay the costs of the unilaterally obtained SETSS.

In a reply and answer to the cross-appeal, the parent responds to the district's cross-appeal and argues that the IHO's award of district funding for the unilaterally obtained services should be upheld. The parent asserts that she provided the student with the same SETSS as were recommended in the June 2022 IESP and she submitted evidence demonstrating SETSS were provided by an appropriately credentialed and experienced teacher. With regard to equitable considerations, the parent contends that the district could have raised these arguments had it appeared at the impartial hearing and that the district's arguments are without merit.

V. Applicable Standards

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

However, under State law, parents of a student with a disability who have privately enrolled their child in a nonpublic school may seek to obtain educational "services" for their child by filing a request for such services in the district of location where the nonpublic school is located on or before the first day of June preceding the school year for which the request for services is made (Educ. Law § 3602-c[2]).⁵ "Boards of education of all school districts of the state shall furnish

⁴ State regulation provides that the "petitioner 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" (8 NYCRR 279.4[e]). The parent timely served the request for review on the district on July 9, 2023 but did not file her appeal with the OSR until July 20, 2023. The district was granted an extension of time to respond. In this case, the timeline for rendering a decision did not commence until the parent's advocate filed the request for review. Based on the foregoing, I decline to exercise my discretion to dismiss the parent's appeal as the district suffered no prejudice and the parent's advocate was attentive and acted quickly to self-correct the error once she became aware of the filing issue. There was minimal disruption of the State Review procedures in this case and the staff of the OSR were not required to expend scarce resources locating the problems with the parent's filing.

⁵ State law provides that "services" includes "education for students with disabilities," which means "special

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 individualized education program" (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

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see *R.E. v. New York City Dep't of Educ.*, 694 F.3d 167, 184-85 [2d Cir. 2012]).

VI. Discussion

A. Unilaterally Obtained Services

In its cross-appeal, the district does not appeal from the IHO's determination that it failed to provide the student with the services recommended in the June 2022 IESP (IHO Decision at p. 7). Accordingly, the IHO's determination has become final and binding upon the parties (see 34 CFR 300.514[a]; 8 NYCRR200.5[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]). On appeal, the crux of the dispute between the parties relates to the appropriateness of the SETSS unilaterally obtained by the parent and delivered to the student by Benchmark during the 2022-23 school year.

Prior to reaching the substance of the parties' arguments, some consideration must be given to the appropriate legal standard to be applied. 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 IESP for the 2022-23 school year 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

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.*).

commenced due process to obtain remuneration for the costs thereof (Parent Ex. E ¶¶ 2, 5, 9).⁷ Accordingly, the issue in this matter is whether the parent is entitled to public funding of the costs of the private SETSS. "Parents who are dissatisfied with their child's education can unilaterally change their child's placement . . . and can, for example, pay for private services, including private schooling. They do so, however, at their own financial risk. They can obtain retroactive reimbursement from the school district after the [IESP] dispute is resolved, if they satisfy a three-part test that has come to be known as the Burlington-Carter test" (Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 526 [2d Cir. 2020] [internal quotations and citations omitted]; see Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 14 [1993] [finding that the "Parents' failure to select a program known to be approved by the State in favor of an unapproved option is not itself a bar to reimbursement"]).

The parent's request for privately-obtained services must be assessed under this framework. That is, a board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Carter, 510 U.S. 7; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 252 [2d Cir. 2009]). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

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

⁷ During the hearing, the parent withdrew her request for related services (Tr. p. 26).

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).

1. Student's Needs

Here, the only evidence of the student's needs is the description of the student in the June 2022 IESP and the student's needs as set forth in the IESP are not in dispute (Parent Ex. B).

Review of the June 2022 IESP shows that the CSE considered information provided in a January 31, 2022 special education itinerant teacher services (SEIT) progress report, a June 3, 2022 social history update, and an undated OT report, as well as information provided by the parent (Parent Ex. B at pp. 1-5).⁸ At the time of the January 2022 SEIT report, as set forth on the June 2022 IESP, the student was receiving four 60-minute sessions per week of SEIT services and two 30-minute sessions per week of OT (id. at p. 1). According to information obtained during the June 2022 social history update and included on the June 2022 IESP, the student began receiving SEIT services in September 2021 and OT "in the middle of the school year" (id.). The parent

⁸ The January 2022 SEIT progress report, the June 2022 social history update, and the OT report referenced in the June 2022 IESP were not included in the hearing record.

reportedly explained that the student was having a difficult time holding a crayon or pencil and stated that "the evaluators expressed that [the student] needed speech therapy, but said that the SEIT would address his speech needs" (*id.*). The parent also reportedly stated that "nothing ha[d] changed since [the student] began receiving services, that he ha[d] only become more delayed," that the student "definitely need[ed] speech therapy" and that the student "d[id] not want to attempt to hold the pencil with the correct grip" (*id.*).⁹

The IESP described the student as "engaged in activities to his liking," as possessing a strong sense of self and as being very self-directed (Parent Ex. B at p. 2). The student was able to rote count to ten and needed minimal verbal prompting to count with one-to-one correspondence (*id.*). The student was also reportedly able to label shapes and identify colors (*id.*). The student knew the first letter of his name, and he could make and continue simple patterns such as "ABAB" and "ABBA" (*id.*). According to the June 2022 IESP, during circle time and morning meeting, the student had difficulty sitting due to fidgeting behavior and he was described as sitting on both of his feet while rocking back and forth (*id.*). The student reportedly often bothered peers sitting next to him and caused disruption during circle time (*id.*). The teacher "frequently prompt[ed] [the student] to sit on his spot and not to hurt the peers sitting next to him" (*id.*). The student was noted to have difficulty "raising his hand and waiting for his turn to respond to questions"; he "often call[ed] out the answers unless guided to respond appropriately" (*id.*). The student was further described as "not eager to share with peers and/or adults" and as having "the knowledge to share but w[ould] often grab from his peers and destroy what they built" (*id.*). The student was noted to be "very strong-willed which affect[ed] his behavior and overall functioning in the classroom" (*id.*). When given a lot of positive reinforcement, the student's behavior had reportedly started to show improvement (*id.*). The student was beginning to understand that there were consequences to his actions, and he was slowly starting to demonstrate more age-appropriate behaviors (*id.*). The student was reportedly "learning that poor behavior c[ould] result in missing out on exciting classroom activities" (*id.*).

In the area of speech-language skills, as reported on the June 2022 IESP, the student's speech was "intelligible and [was] mostly understood by both peers and adults" (Parent Ex. B at p. 2). The student knew "his first and last name, his age, the names of his parents and the names of his siblings," he was able to "name the days of the week and c[ould] answer questions about the season and the weather" (*id.*). The student reportedly "d[id] not sing along with the class when singing any songs," which were songs that he knew as the class sang them on a daily basis (*id.*). The student needed "prompting to talk slowly and in an audible tone while conversing with teacher[s] or peers" (*id.*). The student was able to answer "simple 'Wh' questions with repetition and prompts" (*id.*).

The June 2022 IESP reflected that the student's parents were very supportive and involved, and, according to the student's mother, the student was generally cheerful but sought a lot of attention at home, was very impulsive, and was self-directed (Parent Ex. B at p. 3). The June 2022 IESP indicated that the academic, developmental and functional needs of the student, including concerns of the parent were that the student showed inconsistencies in focusing and attention skills,

⁹ The June 2022 IESP indicated that during the CSE meeting, the parent was advised that she could request a speech-language therapy evaluation to be conducted during the summer or wait until September 2022 to request a speech-language therapy evaluation (Parent Ex. B at p. 2).

he needed multiple prompts to listen to instructions and to follow along, he called out answers when the class met for morning meeting or circle time, and he had difficulty sitting during circle time, which was "very disruptive to the teacher and his peers" (id.).

With respect to the student's social development, the June 2022 IESP indicated that, according to the parent, the student was very social, easy going, and had a lot of friends (Parent Ex. B at p. 3). Additionally, according to the SEIT services progress report as reflected on the IESP, the student loved to play with his peers, although he had difficulty sharing and would grab things (id.). Among the student's social strengths were that the student had learned to take turns with verbal cues when playing games or tabletop activities with his peers and that he could engage in small group activities with a teacher's assistance (id.). The IESP further reflected information from the SEIT progress report that the student would intentionally break things his peers built and would refuse to apologize, which impeded his social interactions (id.).

Additionally, according to the IESP, the SEIT progress report reflected that the student had difficulty following classroom rules and routines and difficulty with multistep directions due to a lack of focus and not an inability to follow instructions (id.). However, "[w]ith prompts, refocusing and repetition, [the student] w[ould] follow simple instructions with minimal assistance" (id.).

The physical development portion of the June 2022 IESP included information regarding the student's motor skills from the SEIT progress report, as well as a description of the student's self-help skills (Parent Ex. B at p. 4). Additionally, according to an undated OT report incorporated into the June 2022 IESP, the student "present[ed] with limitations in sensory processing skills, as well as decreased fine motor difficulty during classroom table top activities" (id.). The student also "present[ed] with significantly decreased grasping and decreased visual motor/visual perceptual skills" and demonstrated a poor sitting tolerance and exhibited many sensory-seeking behaviors (id.). The student was further described as demonstrating "a decreased attention span and poor auditory filtering skills" (id.). The occupational therapist indicated that these delays had a negative impact on the student's "ability to function in the classroom and to achieve academic success" (id.). The June 2022 IESP noted that the student was able to participate in all physical activities in school (id.). The occupational therapist reported that the student "show[ed] slow and steady progress in all targeted areas of development" (id. at p. 5). The IESP noted that the student's "overall challenges in sensory regulation and modulation, and graphomotor skills [we]re all interfering with [his] ability to fully engage and participate in academic related tasks and activities" (id.). The IESP further noted the student's challenges needed to be addressed "for him to be able to function independently within his school and home environment" (id.).

With respect to management needs, the June 2022 IESP indicated that the student "require[d] the continued related service support of [OT] to address fine-motor delays" (Parent Ex. B at p. 5). The IESP indicated "the student "require[d] refocusing and redirection from his teachers and provider to maintain his attention and stay on task" (id.). With respect to the effect of the student's needs on involvement and progress in the general education curriculum, the IESP indicated the student's "noted fine-motor and sensory processing delays impede[d] his overall ability to participate meaningfully during instruction, as well as to engage appropriately with his

peers" (*id.*). The June 2022 IESP noted that the student was expected to make progress toward meeting his annual goals with the recommended program and supports (*id.*).¹⁰

2. Appropriateness of SETSS

Although the parent asserts that she obtained for the student the same SETSS for the 2022-23 school year as were recommended in the June 2022 IESP and that the services were provided by an appropriately credentialed and experienced teacher, the hearing record does not include sufficient information to support the parent's assertions and fails to show how any educational services were designed to address the student's special education needs.

As described above, the June 2022 IESP identified several of the student's needs with respect to his academic abilities, motor skills, and social development and recommended that the student receive five periods per week of SETSS and four 30-minute sessions per week of OT (Parent Ex. B at pp. 1-5, 10). However, there is no evidence in the hearing record that demonstrates what services the student received from Benchmark or how the services addressed the student's needs.

The parent's contract with Benchmark indicated that Benchmark would provide the student with "[s]pecial [e]ducation [t]eacher services" during the 2022-23 school year consistent with the student's "most-current agreed-upon IEP or IESP" in a location "consistent with the IEP/IESP mandate" (Parent Ex. C at p. 1). The student's mother testified by affidavit in lieu of direct testimony that, due to the district's inaction, she had "no choice but to contract with a private educational agency to provide [the student] with the mandated services" and that she "signed a contract with the agency and in doing so [she] assumed responsibility for the cost of services should [her] complaint and request for direct payment to the agency not prevail" (Parent Ex. E at ¶¶ 5-6 2).¹¹ The parent's affidavit identified the SETSS and OT services recommended in the June 2022 IESP; however, the parent appears to have withdrawn her request for OT services, which were not identified in the Benchmark contract, and she did not otherwise specifically indicate the services she obtained for the student, either in terms of frequency, manner of delivery, or even a description of the services (*id.* at ¶¶ 2, 5). The parent's affidavit does not even identify Benchmark as the "private educational agency" the parent procured to deliver the student's services (*see* Parent Ex. E). Further there is no evidence that Benchmark actually provided the services reflected in the contract or any other proof that the student received services. The hearing record includes a printout from the State website for teacher certification lookup, which identifies a teacher who has a certificate for teaching students with disabilities (Grades 1-6) issued in 2016 (Parent Ex. D). However, the hearing record does not refer to this teacher in any other place and, accordingly, there is no indication as to whether the identified teacher provided services to the student or what such services might have been.

¹⁰ This section of the June 2022 IESP included several typographical errors, including the name of a different student (Parent Ex. B at p. 5).

¹¹ The signature page of the contract indicates that it was signed by the student's father, not by the student's mother (Parent Ex. C at p. 2).

Although the parent argues that she attempted to implement the program recommended for the student in the June 2022 IESP, the parent must still come forward with evidence that describes the services and the delivery thereof. Review of the transcript shows that the parent's advocate was aware of this burden as she indicated in her opening statement that the service provider was appropriate for the student and appropriately licensed and credentialed (Tr. p. 26). However, as discussed above, the hearing record lacks any information about who provided the student with services, the level of services the student received, and does not explain how any services that may have been provided by Benchmark addressed the student's needs (see L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 491 [S.D.N.Y. 2013] [in reviewing the appropriateness of a unilateral placement, courts prefer objective evidence over anecdotal evidence]; L.Q. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 490 [S.D.N.Y. 2013] [rejecting parents' argument that counseling services met student's social/emotional needs where "[t]here was no evidence . . . presented to establish [the counselor's] qualifications, the focus of her therapy, or the type of services provided" and, further, where "[the counselor] did not testify at the hearing and no records were introduced as to the nature of her services or how those services related to [the student's] unique needs"]; R.S. v. Lakeland Cent. Sch. Dist., 2011 WL 1198458, at *5 [S.D.N.Y. Mar. 30, 2011] [rejecting the parents' argument that speech-language therapy services met student's needs where parents "did not offer any evidence as to the qualifications of the provider of the therapy, the focus of the therapy, or when and how much therapy was provided"], aff'd sub nom., 471 Fed. App'x 77 [2d Cir. June 18, 2012]).

In review of the IHO's findings, the IHO erred in failing to apply a Burlington/Carter analysis to the parent's claims. Applying the correct standard, the hearing record does not include sufficient information to find that any services procured for the student were appropriate, or even that special education services were in fact obtained for the student during the 2022-23 school year. Accordingly, the IHO erred in awarding the parent reimbursement or direct funding for five periods per week of SETSS for the 2022-23 school year.

B. Compensatory Education

Turning to the parent's request for 50 hours of compensatory SETSS beginning with the June 2022 IESP implementation date of September 1, 2022 through November 16, 2022, when the parent began receiving services from Benchmark, I find the IHO erred in denying the parent's request.

Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). Compensatory education relief may be awarded to a student with a disability who remains eligible for instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). The purpose of an award of compensatory education is to provide an appropriate remedy for a denial of a FAPE (see E.M. v. New York City Dep't of Educ., 758 F.3d 442, 451 & n.12 [2d Cir. 2014]; P. v. Newington Bd. of Educ., 546 F.3d 111, 123 [2d Cir. 2008] [holding that compensatory education is a remedy designed to "make up for" a denial of a FAPE]; see also Doe v. E. Lyme, 790 F.3d 440, 456 [2d Cir. 2015]; Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005] [holding that, in fashioning an appropriate compensatory education remedy, "the inquiry must be fact-specific, and to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"]; Parents

of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1497 [9th Cir. 1994]). Accordingly, an award of compensatory education should aim to place the student in the position he or she would have been in had the district complied with its obligations under the IDEA (see Newington, 546 F.3d at 123 [holding that compensatory education awards should be designed so as to "appropriately address[] the problems with the IEP"]; see also Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1289 [11th Cir. 2008] [holding that "[c]ompensatory awards should place children in the position they would have been in but for the violation of the Act"]; Bd. of Educ. of Fayette County v. L.M., 478 F.3d 307, 316 [6th Cir. 2007] [holding that "a flexible approach, rather than a rote hour-by-hour compensation award, is more likely to address [the student's] educational problems successfully"]; Reid, 401 F.3d at 518 [holding that compensatory education is a "replacement of educational services the child should have received in the first place" and that compensatory education awards "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA"]).

There is no dispute that the district failed to implement the student's June 2022 IESP. Accordingly, the hearing record shows the student did not receive the mandated SETSS or OT services from the district during the 2022-23 school year. The parent requests ten weeks of SETSS for the period up to November 16, 2022 when she asserts that she obtained services for the student unilaterally. As asserted by the parent, this constituted approximately 10 weeks of the school year. Accordingly, I will order the district to provide the student with compensatory education for the services missed during that period.¹² However, as the parent is not requesting OT services, the award will be limited to SETSS and the district will be directed to provide the student with 50 periods of instruction provided by a special education teacher. I will leave open the possibility that the district and the parent may agree to satisfy some of the compensatory education services with any private services obtained by the parent.

VII. Conclusion

In summary, the parent failed to demonstrate the appropriateness of her unilaterally obtained SETSS and the IHO erred in awarding reimbursement or direct funding for those services, but also erred in denying the parent's request for compensatory educational services. In light of these determinations, I need not address the parties' remaining contentions.

THE APPEAL IS SUSTAINED IN PART.

THE CROSS-APPEAL IS SUSTAINED IN PART.

IT IS ORDERED that the IHO's decision, dated May 30, 2023, is modified by reversing those portions which found the parent was entitled to funding for unilaterally obtained SETSS and which found the parent was not entitled to compensatory educational services; and

¹² While the parent requests that the district fund the compensatory education at market rate, absent additional information in the hearing record identifying a plan for the delivery of the compensatory education through private providers, I will order the district to deliver the services subject to any agreement between the parties for other arrangements.

IT IS FURTHER ORDERED that, unless the parties otherwise agree, the district shall provide the student with 50 hours of compensatory instruction to be provided by a special education teacher; and

IT IS FURTHER ORDERED that the awarded compensatory education services shall expire one year from the date of this decision if the student has not used them by such date.

Dated: **Albany, New York**
 September 11, 2023

SARAH L. HARRINGTON
STATE REVIEW OFFICER