



The University of the State of New York

The State Education Department

State Review Officer

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No. 23-154

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 Brian Davenport, 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 determined that the educational program and related services respondent's (the district's) Committee on Special Education (CSE) had recommended for the student for portions of the 2022-23 and 2023-24 school years were appropriate. 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 programming for students with disabilities under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482), namely a local CSE that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law §§ 3602-c; 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts related to IESPs, State law provides that "[r]eview of the recommendation of the committee on special education may be obtained by the parent or person in parental relation of the pupil pursuant to the

provisions of [Education Law § 4404]," which effectuates the due process provisions called for by the IDEA (Educ. Law § 3602-c[2][b][1]). Incorporated among the procedural protections of the IDEA and the analogous State law provisions is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

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

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4[a]). 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

Briefly, the student in this matter has attended the same nonpublic, parochial school since kindergarten (see, e.g., Parent Exs. D at p. 3; J at p. 1; Dist. Exs. 6 at p. 1; 7 at p. 1). The evidence in the hearing record reflects that the parent previously engaged in the administrative hearing process with respect to the student's IESP developed for the 2020-21 school year (September 2020

IESP) (see generally Parent Exs. E; K). In a January 2021 decision (January 2021 IHO decision), an IHO found that the student was entitled to five 90-minute sessions per week of special education teacher support services (SETSS), rather than the five periods per week of SETSS recommended in the September 2020 IESP (see Parent Ex. K at p. 2).¹ In the January 2021 IHO decision, the IHO ordered the district, "going forward," to increase the student's SETSS recommendation to five times per week for 90 minutes per session at an enhanced rate (*id.*). The IHO also noted that, in a previous case involving the same student, the "family received an award of compensatory [occupational therapy (OT)] services to be utilized by 2023" but the parent—at that time—had not yet secured an OT provider to fulfill those services and was concerned that the compensatory OT award would expire before the student received all of the services awarded (*id.* at p. 3). The IHO informed the parent at that impartial hearing that it was "too far away from that expiry to take steps to extend the entitlement" and, in approximately 12 to 18 months, "the issue w[ould] become timely, potentially for a new hearing" (*id.*).

The hearing record similarly reflects that the parent filed a due process complaint notice, dated November 23, 2022, with regard to the student's March 2022 IESP developed for portions of the 2021-22 (April through June 2022) and 2022-23 (September 2022 through March 2023) school years (see Parent Exs. C at p. 1; Q at pp. 1-2). In that administrative proceeding, the parties (the same parties in the instant proceeding) entered into a November 2022 resolution agreement in "complete settlement of all claims contained in the impartial hearing request dated 11/23/2022 and filed by the parent" (November 2022 resolution agreement) (Parent Ex. Q at p. 2 [emphasis in original]). Based on the terms of the November 2022 resolution agreement, the parties agreed that the student would receive five 90-minute sessions per week of SETSS (a total of 300 hours), two 60-minute sessions per week of speech-language therapy (80 sessions), and three 30-minute sessions per week of OT (120 sessions) from September 1, 2022 through June 30, 2023 (*id.*).

When the student was in sixth grade (2022-23 school year), a CSE convened to conduct the student's annual review on March 24, 2023, and developed an IESP with a projected implementation date of April 7, 2023 and a projected annual review date of March 24, 2024 (see Parent Ex. B at p. 1; Dist. Exs. 6 at p. 1; 7 at p. 1). Finding that the student remained eligible for special education as a student with a speech or language impairment, the March 2023 CSE recommended that the student receive SETSS (three periods per week in a group), two 60-minute sessions per week of individual speech-language therapy, three 30-minute sessions per week of individual OT, one 30-minute session per week of individual counseling, and one 30-minute session per week of counseling in a group (see Parent Ex. B at pp. 11-12).²

A. Due Process Complaint Notice

By due process complaint notice dated March 27, 2023, the parent alleged that March 2023 CSE improperly reduced the student's SETSS from five periods per week to three periods per week in contravention of the January 2021 IHO decision, which had awarded the student with five 90-

¹ The evidence also reflects that the student has been receiving SETSS from the same provider since 2019 through another "Impartial hearing Interim Order" (Parent Ex. Z ¶ 2).

² The student's eligibility for special education is not in dispute, although, on appeal, the parent raises concerns regarding the category of disability (see 34 CFR 300.8[a][11]; 8 NYCRR 200.1[zz][11]).

minute sessions per week of SETSS at enhanced market rates funded by the district (see Parent Ex. A at pp. 2-3). The parent also alleged that the student had received "SETSS during the summer months under his compensatory hours," but the March 2023 CSE did not recommend summer services (id. at p. 3). In addition, the parent indicated that the student's SETSS provider recommended that the student continue to receive five 60-minute sessions per week of SETSS in his "summary notes" and for the student to receive those services for the "entire 12-month academic year 2023-2024" (id. at pp. 3-4). The parent further indicated that, as noted by the SETSS provider, "[t]hese supports prevent[ed] a tendency for regression" due to the student's diagnoses and that the "current support should keep [the student] at grade level" (id. at p. 4).

The parent asserted in the due process complaint notice that she asked the CSE for a form with the "enhanced rates" and for the CSE "to place in [the student's] IESP that the SETSS, [s]peech and OT providers were to receive the enhanced market rate going forward," and for summer services to continue (Parent Ex. A at p. 4). The parent indicated, however, that the CSE "refused to provide what was given in a court order" (id.).

In addition, the parent noted that she had recently secured an OT provider in early March 2023 at the "enhanced rate," and she requested that OT continue "over the summer months" to allow the student to "make up for lost time not having a provider as the CSE could not provide one and [she] could not secure one with [a Related Service Authorization (RSA)] on the list of providers given to [her] by the CSE" (Parent Ex. A at p. 4). The parent also noted that she did "not agree with the proposal that [the student's] current providers receive the standard rate, as they [we]re contracted at the enhanced rate" (id. at p. 5).

As relief, the parent requested that the district issue her the "enhanced rate P4 form" for the following services on a 12-month school year basis and for the 2022-23, 2023-24, and 2024-25 school years: five 90-minute sessions per week of SETSS, two 60-minute sessions per week of speech-language therapy, and three 30-minute sessions per week of OT (Parent Ex. A at p. 5). The parent also sought an order directing the district to provide "these services in full" and for the "hours and enhanced rates available under the order under the prior court order final decision" (id.).

B. Impartial Hearing Officer Decision

On May 1, 2023, the parties proceeded to an impartial hearing before an IHO with the Office of Administrative Trials and Hearings (OATH), which concluded on June 2, 2023, after six total days of proceedings (see May 1, 2023 Tr. pp. 1-28; May 11, 2023 Tr. pp. 1-17; May 24, 2023 Tr. pp. 1-48; May 26, 2023 Tr. pp. 1-73; June 1, 2023 Tr. pp. 1-25; June 2, 2023 Tr. pp. 1-34).³ At the impartial hearing held on May 11, 2023, the IHO addressed the district's motion to dismiss, as well as the parent's response thereto; the issues to be resolved at the impartial hearing; and the student's pendency services during the administrative proceedings (see May 11, 2023 Tr. pp. 1-17). The IHO denied the district's motion to dismiss the parent's due process complaint notice, and determined that the following constituted the issues to be resolved at the impartial hearing:

³ 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 "May 1, 2023 Tr. p. 1."

"procedural issues with the creation of th[e March 2023] IESP," the reduction of services in the IESP, and the failure to recommend 12-month school year programming (May 11, 2023 Tr. p. 14).⁴ Both parties agreed with the IHO's identification of the issues presented (id.).

In a May 11, 2023 interim decision on pendency, the IHO ordered the district to provide the following as the student's pendency services: five periods per week of SETSS (10 month services), two 30-minute sessions per week of speech-language therapy (10 month services), and three 30-minute sessions per week of OT (10 month services) (see IHO Ex. IV). The IHO noted in the interim decision that the student's pendency services arose by "Agreement of the Parties," dated November 23, 2022, and that the pendency services were retroactive to the date of the parent's due process complaint notice, March 27, 2023 (id.).⁵

By decision dated June 29, 2023, the IHO found that the district offered the student a FAPE for the 2022-23 school year (see IHO Decision at p. 8). The IHO indicated that the district presented the testimony of the district special education teacher to "support their position that the IESP was reasonably calculated to provide [the s]tudent with appropriate recommendations" for the 2023-24 school year (id.). The IHO also indicated that she "accept[ed] the testimony of [the] CSE Special Education Teacher who [she] f[ou]nd credible, sufficiently qualified and experienced to express opinions proffered, regarding the program developed and related services recommended for [the s]tudent" (id.).

Turning to the parent's position that the student would have regressed with reduced services, the IHO found that the "SETSS Provider's live testimony was inconsistent with their 2020 report and their affidavit which seemingly all contradict[ed] each other" (IHO Decision at p. 8). As a result, the IHO noted that the SETSS provider's "inconsistent statements did not allow [her] to rely upon their opinion" (id.).

In summary, the IHO concluded that the evidence in the hearing record did not support the parent's assertion that the March 2023 IESP failed to offer the student a FAPE for the 2023-24 school year, and the IHO dismissed the parent's claims (see IHO Decision at p. 8).

IV. Appeal for State-Level Review

The parent appeals, arguing that the IHO ordered pendency services on a 10-month basis when the January 2021 IHO decision awarded a bank of compensatory educational services that allowed the parent to "create [her] own 12 month summer services." The parent also argues that the IHO erred by applying the wrong legal standard and improperly weighing evidence elicited

⁴ In addressing the district's motion to dismiss, the IHO noted that the parent's relief sought for "future years, 2025" were "not ripe" (May 11, 2023 Tr. pp. 3-4). Therefore, the IHO found that the district correctly objected to this relief, as asserted in its motion to dismiss, and that the primary issue was whether the March 2023 IESP offered the student a FAPE (see May 11, 2023 Tr. p. 4). As a result, the IHO—while denying the district's motion to dismiss—concluded that the district was "correct in their position about the future issues and from the future remedy" (May 11, 2023 Tr. pp. 4-5).

⁵ The parties' agreement referred to within the interim decision on pendency was the November 2022 resolution agreement the parties had reached with respect to the parent's November 2022 due process complaint notice (see IHO Decision at p. 4; Parent Ex. Q at pp. 1-2).

from the district's witness at the impartial hearing. The parent contends that, although the IHO requested closing briefs, the IHO did not refer to the parent's closing brief in the decision. In addition, the parent asserts that the IHO "should have ruled on the appropriateness of the IESP development and that procedures for the development of [the student's] IESP were not followed." The parent further asserts that the IHO improperly shifted the burden of proof to the parent.

Next, the parent argues that the March 2023 CSE improperly reduced the student's SETSS from five times per week to three times per week without the enhanced rate and failed to recommend summer services. The parent contends that the March 2023 CSE's decision to reduce the student's SETSS was not consistent with the SETSS provider's recommendations or the terms of the November 2022 resolution agreement. The parent also argues that the March 2023 CSE improperly identified the student's eligibility category as speech or language impairment rather than other health-impairment. The parent asserts that the March 2023 IESP was not an "accurate interpretation" of the student because the March 2023 CSE did not include the participation of a regular education teacher. In addition, the parent asserts that the March 2023 CSE had obtained the student's report card "hours before the IESP meeting" and failed to request any "standardized test scores." The parent next argues that the IHO erred in not finding any procedural errors notwithstanding that the evidence demonstrated that the district failed to invite a regular education teacher to the CSE meeting.

With respect to the prior written notice issued by the district, the parent contends that it failed to identify that the March 2023 CSE relied on the student's report card in the development of the IESP "but now indicate[d the student] need[ed] new evaluations." The parent also contends that the prior written notice did not reference that the CSE relied on "the standardized MAP scores," which the parent attaches as one of four documents for consideration on appeal as additional evidence. In addition, the parent indicates that the district did not conduct an evaluation to assess whether the student met criteria associated with an "Auditory Processing Disorder" when she requested it at two previous CSE meetings in 2020 and 2021 and even though the evaluation had been recommended in the student's neuropsychological evaluation; the parent further indicates that she obtained the evaluation through her private insurance after the district repeatedly refused to evaluate the student.

Additionally, the parent asserts that the March 2023 CSE did not rely on the student's neuropsychological evaluation from 2020 to develop the student's IESP, and the IHO, similarly, did not rely on the neuropsychological evaluation. The parent argues that the March 2023 CSE relied on the student's report card—rather than the recommendations from the student's SETSS provider—when making the decision to reduce the SETSS recommended in the March 2023 IESP. The parent asserts that the March 2023 CSE ignored her explanation concerning the grade calculations, and failed to "include the present level MAP scores" in creating the IESP, which would have shown that the student required the same level of SETSS as were then currently being provided to him.

With respect to the student's mandated, three-year reevaluations, the parent contends that the district was "push[ing]" the reevaluations "forward" to further reduce the student's recommendations for SETSS and speech-language therapy services.

As relief, the parent seeks a finding that the March 2023 IESP was not appropriate due to the reduction of SETSS, and an award of weekly SETSS (five 90-minute sessions), OT (three 30-minute sessions), speech-language therapy (two 60-minute sessions) at enhanced rates, and counseling, as 12-month services. In addition, the parent seeks an award of independent educational evaluations (IEEs) at district expense in lieu of the district's three-year reevaluations of the student.

In an answer, the district responds to the parent's allegations, and generally argues to uphold the IHO's decision in its entirety. Additionally, the district contends that the parent's request for review fails to comply with practice regulations and should be dismissed, and moreover, that the parent's additional documentary evidence should be disregarded.

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]).⁶ "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 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.).⁷ Thus, under State

⁶ 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]).

⁷ 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

law an eligible New York State resident student may be voluntarily enrolled by a parent in a nonpublic school, but at the same time also enrolled in the public school district, that is dually enrolled, for the purpose of receiving special education programming under Education Law § 3602-c, services for which a public school district may be held accountable through an impartial hearing.

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

VI. Discussion

A. Preliminary Matters—Additional Documentary Evidence

In support of her appeal, the parent submits additional documentary evidence for consideration (see generally SRO Exs. A-E). The district objects to the consideration of the additional documentary evidence, noting that the IHO's decision (submitted as SRO Ex. A) is already part of the hearing record and the remaining four documents (submitted as SRO Exs. B-E) are either immaterial to the parent's allegations or were otherwise available at the time of the impartial hearing (see Answer ¶ 26).

Generally, documentary evidence not presented at an impartial hearing is 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]).

A review of the parent's proposed exhibits reveals that the IHO's decision (SRO Ex. A) is already part of the hearing record, and the March 24, 2023 email (SRO Ex. B) was available at the time of the impartial hearing. However, the nonpublic, parochial school's grading rubric, dated July 12, 2023 (SRO Ex. C), the student's testing results, dated June 1, 2023 (SRO Ex. D), and the student's final sixth grade report card (SRO Ex. E) may not have been available to the parent at the impartial hearing, which concluded on June 2, 2023. Nevertheless, while exhibits C, D, and E may not have been available, none of the exhibits are now necessary to render a decision in this matter, and in an exercise of my discretion, I decline to accept the parent's additional documentary evidence for consideration on appeal.

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.*).

B. Scope of Review

Before addressing the merits of the parent's appeal, a determination must be made regarding which claims are properly before me. The parent contends that the IHO erred by failing to find any procedural violations with respect to the development of the student's March 2023 IESP. More specifically, parent asserts that the March 2023 CSE was not properly composed due to the absence of a regular education teacher, the March 2023 CSE should have found the student eligible for special education as a student with an other health-impairment as opposed to a speech or language impairment, the March 2023 CSE ignored the parent's concerns at the meeting, and the district's prior written notice failed to identify that the March 2023 CSE relied on the student's report card to create the March 2023 IESP.

Generally, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). Under the IDEA and its implementing regulations, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.507[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the original due process complaint notice is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]). Indeed, "[t]he parent must state all of the alleged deficiencies in the IEP in their initial due process complaint in order for the resolution period to function. To permit [the parents] to add a new claim after the resolution period has expired would allow them to sandbag the school district" (R.E., 694 F.3d 167 at 187-88 n.4; see also B.M. v. New York City Dep't of Educ., 569 Fed. App'x 57, 58-59 [2d Cir. June 18, 2014]).

Beyond alleging that the district improperly reduced the student's SETSS and failed to recommend 12-month programming, the parent's due process complaint notice cannot be reasonably read to include any other procedural or substantive allegations concerning the March 2023 CSE meeting process or the IESP itself (see generally Parent Ex. A). Thus, even a broad reading of the due process complaint notice does not reflect that the parent identified the following issues to be addressed at the hearing: the March 2023 CSE's alleged failure to find the student eligible for special education as a student with an other health-impairment, the district's failure to identify the student's report card as evaluative information relied on to develop the March 2023 IESP, and the March 2023 CSE allegedly ignoring the parent's concerns at the meeting; consequently, the parent's claims concerning these issues, raised for the first time on appeal, will not be further addressed as possible bases upon which to conclude that the district failed to offer the student a FAPE for the 2023-24 school year.

However, with regard to the parent's assertion that the March 2023 CSE was improperly composed because it did not include a regular education teacher, the Second Circuit has held that issues not included in a due process complaint notice may be ruled on by an administrative hearing officer when the district "opens the door" to such issues with the purpose of defeating a claim that was raised in the due process complaint notice (M.H. v. New York City Dep't of Educ., 685 F.3d 217, 250-51 [2d Cir. 2012]; see Bd. of Educ. of Mamaroneck Union Free Sch. Dist. v. A.D., 739 Fed. App'x 79 [2d Cir. Oct. 12, 2018]; B.M., 569 Fed. App'x at 59; N.K. v. New York City Dep't

of Educ., 961 F. Supp. 2d 577, 585 [S.D.N.Y. 2013]; A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 282-84 [S.D.N.Y. 2013]; J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *9 [Aug. 5, 2013]).⁸

Here, the district questioned its only witness—the district special education teacher who attended the March 2023 CSE meeting and participated as both the special education teacher and the district representative at the meeting—about the attendees at the meeting on direct examination (see May 24, 2023 Tr. pp. 20, 23). In addition, the district specifically asked the witness whether a regular education teacher attended the March 2023 CSE meeting, thereby possibly opening the door to the issue now raised on appeal by the parent (see May 24, 2023 Tr. p. 24; Req. for Rev. at pp. 2-3). As a result, in an abundance of caution, the composition of the March 2023 CSE will be addressed below.

C. Pendency

The parent contends that the IHO improperly ordered 10-month pendency services when a prior IHO decision had awarded compensatory educational services, which the parent used to create summer services for the student. In response, the district argues that neither the award of compensatory educational services nor the evidence in the hearing record established that the student was entitled to receive 12-month pendency services.

During the pendency of any proceedings relating to the identification, evaluation or placement of the student, the IDEA and the New York State Education Law require that a student remain in his or her then-current educational placement, unless the student's parents and the board of education otherwise agree (20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; see Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 531 [2d Cir. 2020]; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 170-71 [2d Cir. 2014]; Mackey v. Bd. of Educ. of the Arlington Cent. Sch. Dist., 386 F.3d 158, 163 [2d Cir. 2004], citing Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]; M.G. v. New York City Dep't of Educ., 982 F. Supp. 2d 240, 246-47 [S.D.N.Y. 2013]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *20 [E.D.N.Y. Oct. 30, 2008]; Bd. of Educ. of Poughkeepsie City Sch. Dist. v. O'Shea, 353 F. Supp. 2d 449, 455-56 [S.D.N.Y. 2005]).⁹ Pendency has the effect of an automatic injunction, and the party requesting it need not meet the requirements for injunctive relief such as irreparable harm, likelihood of success on the merits, and a balancing of the hardships (Zvi D., 694 F.2d at 906; see Wagner v. Bd. of Educ. of Montgomery County, 335 F.3d 297, 301 [4th Cir. 2003]; Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 [3d Cir. 1996]). The purpose of the pendency provision is to provide stability and consistency in the education of a student with a disability and to "strip schools of the unilateral authority they had traditionally employed to exclude disabled students . . . from school" (Honig v. Doe, 484 U.S. 305, 323 [1987] [emphasis in original]; Evans v. Bd. of Educ. of Rhinebeck Cent. Sch. Dist., 921 F. Supp. 1184, 1187 [S.D.N.Y. 1996], citing Bd. of Educ.

⁸ To be clear, the district did not otherwise open the door to the remaining procedural issues the parent raised for the first time on appeal.

⁹ In Ventura de Paulino, the Court concluded that parents may not transfer a student from one nonpublic school to another nonpublic school and simultaneously transfer a district's obligation to fund that pendency placement based upon a substantial similarity analysis (see 959 F.3d at 532-36).

of City of New York v. Ambach, 612 F. Supp. 230, 233 [E.D.N.Y. 1985]). A student's placement pursuant to the pendency provision of the IDEA is evaluated independently from the appropriateness of the program offered the student by the CSE (Mackey, 386 F.3d at 160-61; Zvi D., 694 F.2d at 906; O'Shea, 353 F. Supp. 2d at 459 [noting that "pendency placement and appropriate placement are separate and distinct concepts"]). The pendency provision does not require that a student remain in a particular site or location (Ventura de Paulino, 959 F.3d at 532; T.M., 752 F.3d at 170-71; Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 753, 756 [2d Cir. 1980]; see Child's Status During Proceedings, 71 Fed. Reg. 46709 [Aug. 14, 2006] [noting that the "current placement is generally not considered to be location-specific"]), or at a particular grade level (Application of a Child with a Disability, Appeal No. 03-032; Application of a Child with a Disability, Appeal No. 95-16).

Under the IDEA, the pendency inquiry focuses on identifying the student's then-current educational placement (Ventura de Paulino, 959 F.3d at 532; Mackey, 386 F.3d at 163, citing Zvi D., 694 F.2d at 906). Although not defined by statute, the phrase "then-current placement" has been found to mean either: (1) the placement described in the student's most recently implemented IEP; (2) the operative placement actually functioning at the time when the due process proceeding was commenced; or (3) the placement at the time of the previously implemented IEP (Dervishi v. Stamford Bd. of Educ., 653 Fed. App'x 55, 57-58 [2d Cir. June 27, 2016], quoting Mackey, 386 F.3d at 163; T.M., 752 F.3d at 170-71 [holding that the pendency provision "requires a school district to continue funding whatever educational placement was last agreed upon for the child"]; see Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 452 [2d Cir. 2015] [holding that a student's entitlement to stay-put arises when a due process complaint notice is filed]; Susquenita Sch. Dist. v. Raelee, 96 F.3d 78, 83 [3d Cir. 1996]; Letter to Baugh, 211 IDELR 481 [OSEP 1987]). Furthermore, the Second Circuit has stated that educational placement means "the general type of educational program in which the child is placed" (Concerned Parents, 629 F.2d at 753, 756), and that "the pendency provision does not guarantee a disabled child the right to remain in the exact same school with the exact same service providers" (T.M., 752 F.3d at 171). However, if there is an agreement between the parties on the student's educational placement during the due process proceedings, it need not be reduced to a new IEP, and the agreement can supersede the prior unchallenged IEP as the student's then-current educational placement (see Bd. of Educ. of Pawling Cent. Sch. Dist. v. Schutz, 290 F.3d 476, 483-84 [2d Cir. 2002]; Evans, 921 F. Supp. at 1189 n.3; Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 86 F. Supp. 2d 354, 366 [S.D.N.Y. 2000], *aff'd*, 297 F.3d 195 [2d Cir. 2002]; see also Letter to Hampden, 49 IDELR 197 [OSEP 2007]). Moreover, a prior unappealed IHO decision may establish a student's current educational placement for purposes of pendency (Student X, 2008 WL 4890440, at *23; Letter to Hampden, 49 IDELR 197).

Once a student's "then-current educational" placement or pendency placement has been established, it can be changed: (1) by agreement between the parties; (2) by an unappealed IHO or court decision in favor of the parents; or (3) by an SRO decision that a unilateral parental placement is appropriate (34 CFR 300.518[a], [d]; 8 NYCRR 200.5[m][1], [2]; see Ventura de Paulino, 959 F.3d at 532; Schutz, 290 F.3d at 483-84; New York City Dep't of Educ. v. S.S., 2010 WL 983719, at *1 [S.D.N.Y. Mar. 17, 2010]; Student X, 2008 WL 4890440, at *23; Arlington Cent. Sch. Dist. v. L.P., 421 F. Supp. 2d 692, 697 [S.D.N.Y. 2006]; Murphy, 86 F. Supp. 2d at 366; Letter to Hampden, 49 IDELR 197). Absent one of the foregoing events, once a pendency placement has been established, it "shall not change during those due process proceedings," S.S., 2010 WL

983719, at *1 [emphasis in the original]). And upon a pendency changing event, such changes apply "only on a going-forward basis" (*id.*). With that said, it has been held that in certain circumstances a court may, on equitable grounds, retroactively adjust a student's pendency placement if a state-level administrative decision in a parent's favor was not issued in a timely manner (see *Mackey*, 386 F.3d at 164-66; *Arlington*, 421 F. Supp. 2d at 701; *O'Shea*, 353 F. Supp. 2d at 457-58; *Murphy*, 86 F. Supp. 2d at 366-67).

Initially, a review of the January 2021 IHO decision reveals that, contrary to the parent's assertions, the IHO did not award any compensatory educational services as relief in that decision (see Parent Ex. K at pp. 2-3).¹⁰ Instead, the IHO referenced the parent's concern about fully using a previous award of compensatory OT services because the parent had not yet secured a provider to deliver the OT services awarded (*id.*). In addition, the IHO only awarded the parent with an increased duration for the student's SETSS, from 60-minute sessions to 90-minute sessions (*id.* at p. 2). Therefore, the parent's assertion that the student was entitled to 12-month services based on an award of compensatory educational services within the January 2021 IHO decision is without merit.

Next, the November 2022 resolution agreement, which formed the basis for the student's pendency services in this proceeding, specifically identified the SETSS, OT, and speech-language therapy as 10-month services that were to be implemented from September 1, 2022 through June 30, 2023 (see Parent Ex. Q at p. 2). Thus, the November 2022 resolution agreement cannot form the basis for the parent's request for 12-month pendency services.

Finally, the parent testified at the impartial hearing that, although the student received SETSS "last summer," those SETSS were "makeup hours from kindergarten to third grade [for] not having a SETSS provider" (June 2, 2023 Tr. pp. 16-17). Thus, even if the parent implemented a compensatory educational services award of SETSS during the summer, a parent's unilateral decision to deliver SETSS to the student during the summer would not entitle the student to 12-month pendency services.¹¹

D. CSE Process

1. March 2023 CSE Composition

As noted above, pursuant to section 3602-c a district of location's CSE—here, the district's CSE—was required to "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]). In requiring a CSE to develop an IESP for a student, section 3602-c does not distinguish between a CSE convened to develop an IESP versus a CSE convened to develop an IEP with regard to the required attendees (see Educ. Law § 3602-c[2][b][1]). Additionally, no other State law or

¹⁰ Additionally, there is no evidence in the January 2021 IHO decision that the IHO consolidated two administrative proceedings, contrary to the parent's assertion (see generally Parent Ex. K).

¹¹ As a final point, the parent does not allege that the student has not received the full complement of SETSS, OT, or speech-language therapy pursuant to the IHO's interim decision on pendency (see generally Req. for Rev.; IHO Ex. IV).

regulation indicates that a CSE convened to develop an IESP may include less participants than those required of a CSE convened to develop an IEP. Therefore, contrary to the district special education teacher's testimony concerning the required CSE members based on her understanding of the district's Standard Operating Procedures Manual (SOPM) entered into the hearing record as evidence (see May 26, 2023 Tr. pp. 19, 23-24, 30-31, 35-36; Parent Ex. EE), the IDEA requires a CSE to include, among others, not less than one regular education teacher of the student if the student is or may be participating in a general education environment (20 U.S.C. § 1414[d][1][B][ii]; see 34 CFR 300.321[a][2]; 8 NYCRR 200.3[a][1][ii]). The regular education teacher "shall, to the extent appropriate, participate in the development of the IEP of the child, including the determination of appropriate positive behavioral interventions and supports, and other strategies, and supplementary aids and services, program modifications, and support for school personnel" (20 U.S.C. § 1414[d][3][C]; 34 CFR 300.324[a][3]; 8 NYCRR 200.3[d]).

Based on the evidence in the hearing record, it is undisputed that a regular education teacher did not attend the March 2023 CSE meeting (see Parent Ex. B at p. 15). It is also undisputed that the student was attending a general education setting at his nonpublic, parochial school; thus, pursuant to the IDEA and State and federal regulations, the March 2023 CSE should have made an attempt to include the student's teacher from the nonpublic school, and, at the very least, should have included the attendance of a regular education teacher, and the failure to include a regular education teacher constitutes a procedural violation (20 U.S.C. § 1414[d][1][B][ii]; see 34 CFR 300.321[a][2]; 8 NYCRR 200.3[a][1][ii]).

However, as indicated above, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]).

On appeal, other than contending that the student's regular education teacher was never invited to attend the March 2023 CSE meeting or that the CSE did not reconvene with a regular education teacher and the student's related services' providers, the parent asserts no other arguments upon which to conclude that this procedural inadequacy impeded the student's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or caused a deprivation of educational benefits (see generally Req. for Rev.).¹² Additionally, a review of the evidence in the hearing

¹² The hearing record does not include any evidence that the parent requested a reconvene of the CSE to include either the student's regular education teacher or his related services' providers (see generally May 1, 2023 Tr. pp. 1-28; May 11, 2023 Tr. pp. 1-17; May 24, 2023 Tr. pp. 1-48; May 26, 2023 Tr. pp. 1-73; June 1, 2023 Tr. pp. 1-25; June 2, 2023 Tr. pp. 1-34; Parent Exs. A-Z; AA-EE; Dist. Exs. 1-8; IHO Exs. I-VII). Similarly, the evidence in the hearing record reflects that the parent did not request the attendance of any other individuals at the March 2023 CSE meeting when the district special education teacher was corresponding with the parent with respect to scheduling the meeting (see generally Parent Ex. L). The parent testified, however, that based on her understanding of the district's standard operation procedures manual, she thought it was the district's responsibility to invite the student's SETSS provider to the IESP meeting (see June 2, 2023 Tr. p. 16). The SETSS provider had previously attended the student's September 2020 CSE meeting convened to develop his IESP for the 2020-21 school year (see Parent Exs. E at pp. 1, 6; Z ¶ 3). However, the evidence in the hearing record does not clarify whether district staff had invited the SETSS provider or how he came to be invited to that CSE meeting (see

record demonstrates that the March 2023 CSE had a February 2023 teacher report available for review and consideration, which was completed by the student's sixth grade classroom teacher, as well as the student's most recent report card and progress reports for speech-language therapy services, counseling services, and SETSS, which were relied on to identify and describe the student's needs (see Dist. Exs. 2 at p. 2; 6 at pp. 1-2; see generally Dist. Exs. 2 at pp. 1-2; 3-5; 7).

Accordingly, the evidence in the hearing record does not provide a basis upon which to conclude that this procedural inadequacy impeded the student's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE, or caused a deprivation of educational benefits (see Davis v. Wappingers Cent. Sch. Dist., 431 Fed. App'x 12, 15 [2d Cir. June 3, 2011]; Dirocco v. Bd. of Educ. of Beacon City Sch. Dist., 2013 WL 25959, at *17-*18 [S.D.N.Y. Jan. 2, 2013] [concluding that when parents were allowed to meaningfully participate in the review process, ask questions of and receive answers from CSE members, and express opinions about the appropriateness of the recommended program for the student, the "preponderance of the evidence" did not show that the "failure to include a ninth grade regular education on the CSE was legally inadequate"]; J.F. v. New York City Dep't of Educ., 2012 WL 5984915, at *7 [S.D.N.Y. Nov. 27, 2012] [concluding that even if a regular education teacher was a required CSE member, the lack of such a teacher did not render an IEP inappropriate when there was no evidence of any concerns during the CSE meeting that the regular education teacher was required to resolve and "no reason to believe" that such teacher was required to advise on lunch and recess modifications or support]; E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at *6-*7 [S.D.N.Y. Sept. 29, 2012] [where the record supported a conclusion that a regular education teacher was required at the CSE meeting and it was possible that an appropriate regular education teacher under the IDEA was not present at the CSE meeting, the evidence did not show that the CSE composition rendered the IEP inadequate]; S.F. v. New York City Dep't of Educ., 2011 WL 5419847, at *9 [S.D.N.Y. Nov. 9, 2011]).

Notwithstanding the foregoing conclusion, the district must make diligent attempts to secure the attendance of the student's regular education teacher from his nonpublic, parochial school at his future CSE meetings as this appears, from the evidence in the hearing record, to be the individual with knowledge of his classroom functioning (see generally Dist. Ex. 6). To be clear, this means inviting the regular education teacher to the CSE meetings with notices of the meeting and not attempting to call the student's school the day before or the day of the CSE meeting to secure the attendance of the teacher (see May 26, 2023 Tr. pp. 24, 37-38).

2. Evaluative Information

On appeal, the parent argues that the IHO erred by finding that the March 2023 IESP was substantively appropriate because the CSE failed to rely on the available evaluative information—and more specifically, the SETSS provider's progress report and accompanying recommendations—in favor of the student's second quarter report card. The parent's concern in this regard lays more with the recommendations of the March 2023 CSE than with the sufficiency

generally May 1, 2023 Tr. pp. 1-28; May 11, 2023 Tr. pp. 1-17; May 24, 2023 Tr. pp. 1-48; May 26, 2023 Tr. pp. 1-73; June 1, 2023 Tr. pp. 1-25; June 2, 2023 Tr. pp. 1-34; Parent Exs. A-Z; AA-EE; Dist. Exs. 1-8; IHO Exs. I-VII).

and consideration of the materials before the committee.¹³ In any event, a review of the information available to the CSE informs the remaining issues to be resolved and, therefore, will be set forth here. Additionally, a review of the information shows that the CSE had sufficient information from a variety of sources, which was considered in developing the student's recommendations.

In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]). Furthermore, although federal and State regulations require that an IEP report the student's present levels of academic achievement and functional performance, those regulations do not mandate or specify a particular source from which that information must come, and teacher estimates may be an acceptable method of evaluating a student's academic functioning. When a student has not been attending public school, it is also appropriate for the CSE to rely on the assessments, classroom observations, or teacher reports provided by the student's nonpublic school (S.F. v. New York City Dep't of Educ., 2011 WL 5419847, at *10 [S.D.N.Y. Nov. 9, 2011] [indicating that based upon 20 U.S.C. § 1414 (c)(1)(A), a CSE is required in part to "review existing evaluation data on the child, including (i) evaluations and information provided by the parents of the child; (ii) current classroom-based, local, or State assessments, and classroom-based observations; and (iii) observations by teachers and related services providers"]).

In addition, neither the IDEA nor State law requires a CSE to "consider all potentially relevant evaluations" of a student in the development of an IEP or to consider "every single item of data available" about the student in the development of an IEP (T.G. v. New York City Dep't of Educ., 2013 WL 5178300, at * 18-*19 [S.D.N.Y. Sept. 16, 2013], citing M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *8 [S.D.N.Y. Mar. 21, 2013]; see F.B. v. New York City Dep't of Educ., 2013 WL 592664, at *8 [S.D.N.Y. Feb. 14, 2013]).

Here, the district special education teacher—who also participated in the March 2023 CSE meeting as the district representative—testified that, in preparation for the CSE meeting, she "always look[ed] at previous testing beforehand, along with the teacher report, the SETSS report, [and] any of the reports that [were] provided to [her]" (May 24, 2023 Tr. pp. 24-25). On cross-examination, the special education teacher confirmed that she had the student's report card, SETSS progress report, and teacher report (May 26, 2023 Tr. p. 40). She also testified that the March 2023 CSE had "more than enough" information to make an appropriate recommendation for the student (May 24, 2023 Tr. p. 31). In addition to the evaluative information identified by the district special education teacher, the district's prior written notice, dated March 27, 2023—and the March 2023 IESP, itself—indicated that the March 2023 CSE also incorporated information obtained

¹³ To the extent the parent raises related issues on appeal pertaining to the completeness of the evaluation documents listed in the prior written notice, as well as the district's failure to conduct an auditory processing evaluation and the CSE's failure to obtain results of standardized test (or MAP scores) conducted by the nonpublic school, as discussed above, these issues were not included in the parent's due process complaint notice and, therefore, are not properly before me on appeal.

from the following sources in the development of the student's IESP: an October 2017 psychoeducational evaluation, a February 2023 counseling progress report, a March 2023 speech-language progress report, a March 2022 OT progress report, and a February 2020 neuropsychological evaluation (see Parent Ex. B at pp. 1-6; Dist. Ex. 2 at pp. 1-2).

With regard to the parent's claims regarding the CSE's use of the evaluative information, review of the March 2023 IESP reflects the student's diagnoses as reported in the February 2020 neuropsychological evaluation, and information obtained from a March 2022 OT progress report, the February 2023 teacher report prepared by the student's sixth grade teacher at the nonpublic school, the February 2023 SETSS progress report, the February 2023 counseling progress report, the March 2023 speech-language progress report, and the student's second quarter report card for the 2022-23 school year (see Parent Ex. B at pp. 1-7; see generally Parent Exs. F-G; J; Dist. Exs. 4; 6; 7).¹⁴

At the time of the February 2020 neuropsychological evaluation, the student was eight years old and in third grade at a general education, nonpublic, parochial school (see Parent Ex. J at p. 1). As reported, the student was receiving five hours per week of SETSS, speech-language therapy, and counseling pursuant to an IESP (id.). Review of the February 2020 neuropsychological evaluation report shows that the evaluator reviewed the student's developmental, educational, and medical history, the parent's concerns, a then-current teacher report, and prior evaluation results (id. at pp. 1-4). The evaluator conducted a classroom observation of the student and reported behavioral observations during testing (id. at pp. 2, 4). Results of cognitive testing indicated that the student's overall intelligence quotient (IQ) was in the superior range, with nonverbal abstract reasoning skills in the superior range, verbal and processing speed skills in the high average range, and visual-spatial and working memory skills in the average range (id. at p. 11). According to the evaluator, the student's relative weakness in visual perceptual skills may have contributed to his "underdeveloped handwriting," and his "[o]n-going weaknesses with drawing and handwriting [were] consistent with a diagnosis of [d]ysgraphia," which was also referred to as a developmental coordination disorder (id.). The evaluator concluded that the student's developmental history and then-current measures of attention supported a diagnosis of an attention deficit hyperactivity disorder (ADHD), combined presentation (id.).

According to the February 2020 neuropsychological evaluation report, "direct examination of [the student's] academic skills revealed average to above average reading comprehension, reading fluency, reading vocabulary, and sight-word reading" skills, with decoding ability "slightly below average" (Parent Ex. J at pp. 11-12).¹⁵ The student's math skills were "average to above average" (id. at p. 12). The evaluator reported that the student struggled with written comprehension, use of grammar and syntax, and the ability to organize and write a story with

¹⁴ The student's March 2022 OT progress report was not included as evidence in the hearing record (see generally Parent Exs. A-Z; AA-EE; Dist. Exs. 1-8; IHO Exs. I-VII).

¹⁵ The evaluator determined that, although the student's assessment results did not indicate the presence of a reading disorder at that time, the student was "at risk" for a reading disorder due to reports of his difficulty with reading comprehension, executive functioning weaknesses, and a below average decoding score (Parent Ex. J at p. 12).

sufficient details, such that he determined test results "indicate[d] a diagnosis of a [s]pecific [l]earning [d]isorder in [w]ritten [e]xpression" (id.). Further measures of the student's social/emotional skills indicated significant levels of anxiety and "milder symptoms of depression," to which the evaluator offered a diagnosis of generalized anxiety disorder (id.). The report included numerous medical, clinical, school-based services and accommodations, and various other recommendations to support the student's needs (id. at pp. 12-18).

The February 2023 school progress report completed by the student's sixth grade teacher indicated that the student was reading on grade level, as demonstrated by his grade-level decoding skills, his ability to locate main ideas and supporting details, and his ability to use context clues to find the meaning of unknown words (see Dist. Ex. 6 at p. 1). The teacher indicated that the student could benefit from "focus in inference and drawing conclusions" (id.). Regarding written expression, the teacher reported that the student could organize thoughts and ideas, and he could "introduce a topic clearly and produce coherent writing appropriate to task" (id.). According to the teacher report, the student's math skills were on grade level, he completed basic and more complex math problems, and answered multistep word problems, but he tended "to rush and not check over his work which l[ed] to silly mistakes" (id.). Additionally, the report indicated that the student asked and answered questions appropriately; he was often engaged in class discussions; he showed disappointment when he felt frustrated or had not done his best; and he was friendly, outgoing, social, respectful, and polite, and he had self-esteem and many friends and appeared to be confident (id. at pp. 1-2).

The student's SETSS providers prepared a February 2023 report indicating that the student received services "at home mainly to support his academics in school" (Parent Ex. F at p. 1). As the student was, at that time, "working at grade-level," the reported focus of the SETSS sessions had "less emphasis on purely academic skills" (id.). The SETSS report indicated that the student "display[ed] strong reading skills and [wa]s reading on level or above grade level with an average of 98 [percent] accuracy" (id. at p. 2). According to the SETSS providers, the student "also show[ed] a knack for math . . . and often solve[d] problems before [they] g[ot] a chance to write them out" (id.). At times, the SETSS providers "expose[d] [the student] to advanced math and he enjoy[ed] both the challenge and the knowledge that he [wa]s good at it" (id.). The SETSS providers identified the student's weaknesses as struggling to use descriptive language, grammar skills, and spelling out words; needing prompting to "write more than the bare minimum," and finding text evidence to support his answers; becoming distracted by his surroundings; and engaging in off-topic conversations (id.). Despite these difficulties, the SETSS providers reported that the student's off-task behavior had "remained at 2 [to] 3 instances per one-hour session" (id.). The report included descriptions of how the SETSS providers worked with the student toward his goals and recommendations such as the continuation of five 60-minute SETSS sessions per week on a 12-month school year basis (id. at pp. 3-4).

The February 2023 counseling progress report indicated that the student received two individual and one group counseling sessions per week (see Dist. Ex. 4 at p. 1). According to the report, the student participated well in sessions, had shown improvement in his willingness to discuss personal issues, had become more cognizant of his anxious thoughts and behaviors although he continued to struggle identifying the triggers, and had shown improvement in his ability to talk about things that frustrated and bothered him although he tended to avoid dealing with them, which hindered his progress (id.). During group sessions, the student had shown

improved social skills with regard to listening and helping peers but exhibited difficulty "being still" and tended to get up frequently (*id.*). The report included recommendations for annual goals and a recommendation that both individual and group counseling continue (*id.* at p. 2).

In a March 2023 speech-language progress report, the provider indicated that the student was receiving two 60-minute sessions per week at home and that the focus of therapy sessions was to "address and support [the student's] academic growth and development" (Parent Ex. G at pp. 1, 2). At that time, the provider reported that the student "continue[d] to demonstrate difficulties in phonological awareness, rules of capitalization, punctuation, [and] self-generating written language tasks" (*id.* at p. 1). According to the report, the student's written expression skills were "poor and an area of great difficulty"; specifically, he exhibited "difficulty with spelling, grammatical rules for sentence structure, explaining vocabulary words, and comprehending and spelling irregular plurals" (*id.*). The provider reported that the student did not self-generate written sentences using questions, construct a three-paragraph creative essay, maintain a given topic, or organize his thoughts in written text, nor did he use descriptive words, figurative language, or creativity in planning a story or executing a written task (*id.*). The progress report reflected then-current and proposed annual goals and indicated that, "[g]oing forward therapy w[ould] continue to focus on his written language skills (*id.* at pp. 1-2).

The student's report card reflected that the student was provided instruction and received the following first quarter, second quarter, and midterm examination grades, respectively, in the "[c]ore [s]ubjects" of: religious studies (81, 89, 92), English language arts (ELA) (86, 87, 94), science (86, 88, 88), social studies (90, 83, 83), and mathematics (94, 92, 87), for a first quarter overall average of 87 and a second quarter overall average of 88 (Dist. Ex. 7 at p. 1). The student achieved grades of "A" in the "[s]pecial [s]ubjects" of music, art, and physical education, as well as for his "[o]verall [g]eneral [e]ffort and "[o]verall [c]onduct" (*id.*).¹⁶ Teacher comments included that the student had done well, worked hard and put in effort, took his work seriously, and had achieved "[s]econd [h]onors" for both quarters (*id.* at p. 2).

A review of the present levels of performance within the March 2023 IESP shows that they included, essentially verbatim, the information contained in the school progress report, the SETSS progress report, the counseling report, and the speech-language progress report, as well as the student's diagnoses from the neuropsychological evaluation and his first and second quarter grades from his report card (compare Parent Ex. B at pp. 1-7, with Parent Exs. F- G; J, and Dist. Exs. 4; 6-7).

¹⁶ According to the report card, the student received the designation of "[c]onsistently/[i]ndependently" for all tasks under the overall effort and conduct headings, with the exception of displaying grade-level penmanship, which the teacher reported the student exhibited "[s]ometimes" (Dist. Ex. 7 at p. 1).

E. March 2023 IESP

1. SETSS Recommendation

The crux of the parent's claims focuses on the March 2023 CSE's decision to reduce the student's SETSS from five 90-minute sessions per week to three periods per week, and as discussed below, the failure to recommend 12-month programming.

Notably, 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, and unless the parties and the IHO take the time to develop a hearing record on the topic in each proceeding, it becomes problematic (see Application of the Dep't of Educ., Appeal No. 20-125). For example, SETSS has been described in a prior proceeding as "a flexible hybrid service combining Consultant Teacher and Resource Room Service" that was instituted under a temporary innovative program waiver to support a student "in the general education classroom" (Application of a Student with a Disability, Appeal No. 16-056), and in another proceeding it was suggested that SETSS was more of an a la carte service that is completely disconnected from supporting the student in a general education classroom setting (Application of a Student with a Disability, Appeal No. 19-047).

In the case at hand, the hearing record does not describe SETSS in any manner, other than noting that one of the student's long-term SETSS providers—while not certified as a special education teacher—is a licensed psychologist, a licensed behavior analyst (LBA), and a Board Certified Behavior Analyst (BCBA) at the "Doctoral Level" and that, based on the February 2023 SETSS progress report, the student received SETSS at home in a one-to-one setting (Parent Exs. F at p. 1; Z ¶1; see June 1, 2023 Tr. p. 13). However, the IHO found this particular SETSS provider was not a credible witness, noting that his testimony at the impartial hearing was inconsistent with the information he provided about the student in his February 2023 SETSS progress report and his affidavit (see IHO Decision at p. 8). As a result, the IHO indicated that she could not "rely on [his] opinion" (id.).

In reaching the decision to recommend a decrease in the frequency of SETSS, the district special education teacher testified that, "[b]ased on all the reports and the data that [she] had . . . [she] actually wanted to terminate SETSS completely"; however, because the student was "due for testing," including conducting psychoeducational and speech-language evaluations, she "just decreased" the amount of SETSS recommended (May 24, 2023 Tr. p. 32; see May 26, 2023 Tr. pp. 18-19, 41).¹⁷ The special education teacher testified that the student did not "qualify for SETSS" as the student's need to improve his writing was something that "a teacher, any teacher" would work on and aside from the student's counseling needs, she questioned what "significant deficits" the student had (May 24, 2023 Tr. pp. 32-33). She explained that the student was "reading on or above grade level and in math, advanced," which, to her, indicated that the student did not need special education services, rather, he was "performing very well" (May 24, 2023 Tr. p. 33).

¹⁷ In contrast to the student's SETSS provider, the IHO found that the district special education teacher was "credible, sufficiently qualified and experienced to express the opinions proffered, regarding the program developed and related services recommended for [the s]tudent" (IHO Decision at p. 8).

The special education teacher opined that "having too much of any service [wa]s detrimental" in that it was a "crutch," which may inhibit students' independence and ability to do things on their own (May 24, 2023 Tr. pp. 33-34). She continued that reducing the SETSS by two periods per week was "not going to break this child," because he was "doing fabulous," and had "good standing in school" (May 24, 2023 Tr. p. 34). The March 2023 IESP indicated that the student could "fully participate in the general education curriculum with SETSS, OT, [s]peech[-language therapy] and [c]ounseling" and that the student's "provider place[d] him on or above grade level in reading" and reported that "[h]e ha[d] met all his goals in math and the provider [wa]s working on advanced math problems with him" (Parent Ex. B at p. 7). Therefore, although the parent disagreed with the reduction in SETSS from five to three periods per week, as the student was "on or above grade level in reading and in math," the CSE's recommendation for three periods of SETSS per week was appropriate (id.).

Additionally, the special education teacher testified that, in conjunction with the SETSS, the March 2023 CSE recommended "a ton of management needs," including printed copies of materials to accommodate the student's dysgraphia and reduced attention; assessment of the content of written expression assignments and no penalties for problems with neatness, spelling or punctuation; graph and grid paper for math problems involving multiple digits; graphic organizers, routines for idea generation, preplanning, organization of ideas, and reviewing and revising templates for produced text; instruction in the use of graphic organizers; time management and organizational tools, including homework log, daily planner, colored folders, highlighters, and timer; prompts to slow down and check his work; movement breaks to refocus attention; preferential seating; editors' checklist; instruction in using rubrics for writing assignments; highlighting and annotating reading passages to improve identification and recall of details; and chunking and breaking down math word problems (May 24, 2023 Tr. pp. 34-35; May 26, 2023 Tr. pp. 52-53; Parent Ex. B at pp. 6-7).

Furthermore, the March 2023 CSE recommended testing accommodations, such as extended time, separate location, on-task focusing prompts, breaks, graphic organizers, directions read and reread, answers recorded in any manner, use of a scribe, and use of large grid or graph paper for math tests (May 24, 2023 Tr. pp. 34-35; Parent Ex. B at p. 13).

Based on a review of the hearing record, the evidence supports finding that the IHO properly concluded that the March 2023 CSE's recommendation for three periods per week of SETSS was reasonably calculated to enable the student to make progress in light of his circumstances.

2. Extended School Year Services (12-month programming)

The parent asserts that the March 2023 CSE failed to recommend 12-month programming for the student to continue to receive both SETSS and OT services during the summer months.

State regulations provide that students "shall be considered for 12-month special services and/or programs in accordance with their need to prevent substantial regression" (8 NYCRR 200.6[k][1]). "Substantial regression" is defined as "student's inability to maintain developmental levels due to a loss of skill or knowledge during the months of July and August of such severity as to require an inordinate period of review at the beginning of the school year to reestablish and

maintain IEP goals and objectives mastered at the end of the previous school year" (8 NYCRR 200.1[aaa], [eee]). State guidance indicates that "an inordinate period of review" is considered to be a period of eight weeks or more (see "Extended School Year Programs and Services Questions and Answers," VESID Mem. [Feb. 2006], available at <http://www.p12.nysed.gov/specialed/applications/ESY/2014-QA.pdf>).

However, State guidance has indicated that section 3602-c does not require school districts to provide dual enrollment services to students with disabilities during the summer, unlike a district's obligation during the course of the regular school year, within an IESP (see "Chapter 378 of the Laws of 2007—Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the [IDEA] 2004 and New York State (NYS) Education Law Section 3206-c," VESID Mem. [Sept. 2007], available at <http://www.p12.nysed.gov/specialed/publications/policy/documents/chapter-378-laws-2007-guidance-on-nonpublic-placements.pdf>). State guidance directs that for such dually enrolled (that is parentally placed) nonpublic school students who qualify for 12-month services (also known as extended school year services) there is a need for an IESP for the regular school year and an IEP for 12-month services programming, resulting in a 10-month IESP and a 6-week IEP ("Questions and Answers on Individualized Education Program (IEP) Development, The State's Model IEP Form and Related Documents," at pp. 39-40, Office of Special Ed. [Apr. 2011], available at <http://www.p12.nysed.gov/specialed/formsnotices/IEP/training/QA-411.pdf>).

Regarding the parent's request that the student receive services on a 12-month basis, the February 2023 SETSS providers' report available to the CSE "strongly recommended" SETSS "for the entire 12-month," 2023-24 school year (Parent Ex. F at p. 4). According to the SETSS providers, those "supports prevent[ed] a tendency for regression from [the student's] diagnoses of ADHD, Generalized Anxiety Disorder, Specific Learning Disorder with Impairment in Written Expression, Developmental Coordination Disorder and Separation Anxiety," and further noted that the "current support should keep him at grade level" (*id.*). In contrast, the district special education teacher testified that the CSE would need to receive information that showed that the student could not "recoup skills" within a 40-day timeline, as "all kids regress[ed] over the summer months," therefore, for students to be eligible for services in the summer they needed to show "significant regression" (May 24, 2023 Tr. p. 38). She testified that during the March 2023 CSE meeting, the parent requested 12-month services "so the SETSS provider c[ould] help [the student] with the summer packet to seventh grade," which she indicated was not why students received 12-month services and was more akin to tutoring (May 24, 2023 Tr. p. 38).¹⁸ According to the special education teacher, the CSE would have needed data to support that the student could not recoup skills within 40 days, there was no such data in the reports available to the March 2023 CSE, and although the provider "said they want[ed]" 12-month services, there was "no regression" demonstrated to support that recommendation (May 24, 2023 Tr. pp. 38-39).

At the impartial hearing, the parent confirmed that the "only way that [the student had] gotten services in the summer [wa]s through [the parent's] appeal to the CSE for RSAs to offer

¹⁸ At the impartial hearing, the parent testified that she did not tell the district special education teacher at the March 2023 CSE meeting that she wanted summer services "to 'help [the student] with the seventh-grade summer packet'" (June 2, 2023 Tr. p. 18). More specifically, the parent testified that the district special education teacher "made that [statement] up and put" that statement into the student's the March 2023 IESP (June 2, 2023 Tr. p. 19).

supplemental services," which was what she was told to do because the CSE did not "write it as a 12 month IESP," but instead, only wrote 10-month IESPs (June 2, 2023 Tr. pp. 23-24). She also testified, however, that the student "received summer services last summer" (June 2, 2023 Tr. p. 17). The parent clarified that the student had a 10-month IESP, and she wanted him to have summer services; however, she had "never been given a regression form, and he received summer services through compensatory hours that he was owed from a previous impartial hearing" (id.). The parent then confirmed that the summer services the student received last summer were from "makeup hours from kindergarten to third grade [from him] not having a SETSS provider" (id.).

In light of the evidence in the hearing record and the evaluative information available to the March 2023 CSE, there is no reason to disturb the IHO's finding that the student was not entitled to 12-month programming because the March 2023 CSE had no evidence that the student experienced substantial regression that would entitle him to such services. Therefore, the parent's appeal must be dismissed.

VII. Conclusion

Having determined that the evidence in the hearing record supports the IHO's findings that the March 2023 IESP offered the student a FAPE for the 2023-24 school year, there is no reason to disturb the IHO's decision and the necessary inquiry is at an end.

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
September 18, 2023**

**STEVEN KROLAK
STATE REVIEW OFFICER**