



The University of the State of New York

The State Education Department

State Review Officer

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No. 23-190

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

Appearances:

Law Offices of Lauren A. Baum, PC, attorneys for petitioners, by Lauren A. Baum, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Jared B. Arader, 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. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied, in part, their request to be reimbursed for the costs of the student's special education itinerant teacher (SEIT) services and related services for the 2022-23 school year. The appeal must be sustained in part.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; *see* 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]).¹ If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in

¹ Similarly, when a preschool student in New York is eligible for special education services, the IDEA calls for the creation of an IEP, which is delegated to a local Committee on Preschool Special Education (CPSE) that includes, but is not limited to, parents, teachers, an individual who can interpret the instructional implications of evaluation results, and a chairperson that falls within statutory criteria (Educ. Law § 4410; *see* 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.1[mm], 200.3, 200.4[d][2], 200.16; *see also* 34 CFR 300.804).

mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

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

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

III. Facts and Procedural History

The student in this matter was first evaluated for services through the Early Intervention Program (EIP) in 2018 and 2019, but did not qualify for services (see Parent Ex. I at p. 2). In September 2019, the parents enrolled the student in a day school program, where he attended a classroom with eight students and three "staff members" (id. at p. 3). The student attended the day school program in-person until March 2020, when the school closed due to the COVID-19 pandemic (id.). The student's father, who worked from home during that time, supported the student with remote learning, which took place for the remainder of the school year (id.). In

September 2020, the student resumed attending the day school program in-person until August 2021, when he "aged out" of the program (id.).

The evidence reflects that, in spring 2021, the parents "self-referred" the student to a hospital, where he "reportedly received physical therapy [PT] weekly due to gross motor delays and occupational therapy [OT] weekly due to sensory issues" (Parent Ex. I at pp. 2-3). The student attended therapy sessions "for a few months" and the parents discontinued services in September 2021 (id. at p. 3).

In September 2021, the student began attending a "general education" classroom in a private preschool program (Parent Ex. I at p. 3).² The student's classroom consisted of 13 students and 2 teachers (id.). At a parent meeting held during fall 2021, the parents were told that the student was "eager to learn but showed difficulties with fine motor skills (e.g., manipulating a paintbrush) and difficulties with transitions (e.g., he continue[d] playing after being prompted to switch to a structured activity with the class)" (id.).

The evidence reflects that over the course of four days in January and February 2022, the parents privately obtained a psychological evaluation of the student (dated March 9, 2022; March 2022 psychological evaluation) (see Parent Ex. I at pp. 1, 18).³ According to the evaluation report, the parents referred the student to assess his "current cognitive, academic and social-emotional functioning and determine his educational and therapeutic needs due to concerns raised by his school about difficulties transitioning and some rigid behaviors" (id. at p. 1). The parents also sought an understanding of the student's needs, as he would be turning five years old later in the year and was expected to transition to kindergarten in September 2022 (id.).

As reflected in the March 2022 psychological evaluation report, the parents reported the feedback they had received at a parent meeting held in fall 2021, during which the student's teacher shared that the student showed difficulties with fine motor skills and transitions (Parent Ex. I at p. 3). According to the parents, the student had always managed frustrations well, but they reported that school staff informed them that the student often cried when transitioning from preferred activities and sometimes "tantrum[ed]," but it was noted the tantrums did not last long (id. at p. 4). Reportedly, it was difficult, at times, to get the student's attention, and while he could engage in reciprocal conversation, he did so inconsistently (id.). It was also reported that the student could follow up to three-step related directions (id.). The parents further reported that the student seemed to crave movement, including running and swinging, and he demonstrated gross motor concerns as he appeared to be unsure of himself while on his feet and displayed a lack of balance (id.). Regarding fine motor skills, the parents found the student had difficulty using scissors, coloring,

² The student's preschool classroom teacher during the 2022-23 school year described the preschool program as serving "both students with special needs and neurotypical students," noting further that the program "allow[ed] SEITS to come and work with children who need[ed] further 1:1 support from a special education teacher" (Parent Ex. L ¶ 7).

³ Throughout the impartial hearing, the March 2022 psychological evaluation was frequently referred to as a neuropsychological evaluation (see, e.g., May 4, 2023 Tr. p. 19). However, the evaluation report itself identifies it as a psychological evaluation, and thus, as noted, it will be referred to as the March 2022 psychological evaluation throughout this decision.

and using utensils, which was consistent with school reports that he had a hard time when asked to do drawing and coloring (id.).

The evaluator observed the student to display a somewhat repetitive manner in his play, a consistently high activity level during pretend play, and flexibility by shifting his focus, all while remaining cheerful and regulated (see Parent Ex. I at pp. 5-6). The evaluator found the student spoke in full sentences with a range of affect, displayed appropriate volume and pacing when speaking, used language to indicate wants and needs, and appeared to have good receptive language as he followed directives and appeared to understand a majority of the instructions; moreover, while the student's attention and physical regulation were somewhat limited and he was self-directed more often than not, he did not display outward signs of frustration, including when tasks increased in difficulty (id. at pp. 7-8).

Assessment of the student's cognitive functioning yielded scores in the borderline range to the extremely low range (see Parent Ex. I at pp. 8-9, 19). The evaluator noted that the scores were likely an underrepresentation of the student's intellectual functioning, both due to his late arrival and his competing interest in playing in the first session, and thus he displayed difficulties with attention and regulation on most subtests (id. at pp. 8-9, 14). Overall, the evaluator found that the student "demonstrated a number of academic skills well within his age range," which further supported the conclusion that the student's scores with regard to his cognitive functioning underrepresented his intellectual functioning, "as cognitive abilities [we]re necessary to learn and demonstrate academic skills" (id. at pp. 10, 14).

With respect to the student's academic performance assessed through the Woodcock-Johnson IV (WJ-IV), the evaluator found that the student recognized several letters, demonstrated "very age-appropriate" identification, demonstrated understanding of picture images, showed appropriate counting skills and understanding of math concepts for his age but did not yet write any numbers, used a weak left-handed pencil grip when asked to copy lines and letters, did not write his name when asked, and displayed lower understanding of letter-sound associations though it was noted that this was frequently an emerging skill for children of his age (Parent Ex. I at pp. 1, 9-10). Overall, the evaluator found the student demonstrated academic skills commensurate with what was expected for his age and received cluster scores of 86 and 95 respectively in basic reading skills and reading (id. at pp. 9-10). The evaluator noted that, consistent with many same-age peers, the student was unable to complete subtests that required him to read and write sentences, and therefore, cluster scores were not obtained for math and writing (id.).

Regarding social/emotional functioning, the evaluator noted that COVID-19 safety guidelines required the evaluator to modify the standardized administration of assessments in this area and that several behaviors (e.g., range of facial expressions) could not be fully observed due to the use of a mask, but she further indicated that while formal scores were not obtained, anecdotal information provided a "wealth of clinical information" regarding the student's functioning in each area of assessment (Parent Ex. I at p. 10). In the area of communication, the student reportedly occasionally used complex sentences in a correct fashion, displayed grammar and range of vocabulary within age-appropriate limits, generally demonstrated appropriate volume and intonation, and did not make significant errors in his overall use of language (id. at p. 11). Regarding nonverbal communication, it was noted that the student did not coordinate many gestures with his verbal language and did not gesture across the majority of the assessment activities, as was typically expected of a child of his age (id.). The evaluation report indicated that

the student remained engaged in social interaction for the duration of activities but that attentional challenges occasionally interfered with his ability to sustain reciprocal social interaction and that mild challenges within the area of reciprocal social interactions—such as inconsistent eye contact and limited turn taking—suggested to the evaluator that, overall, the student's skills in this area were slightly below expectations (id.). According to the evaluator, the student did not display repetitive behaviors or compulsions or rituals; self-injurious behaviors; any unusual interests of abnormal intensity; complex mannerisms; any obvious or significant signs of anxiety, aggression, or anger; and showed mild challenges transitioning from preferred activities, some overactivity, distractibility, and some probable sensory-seeking behaviors, namely by seeking input in the form of movement and by sitting on the floor instead of in the designated chair (id. at pp. 11-12).

In the area of adaptive functioning, the evaluator found that teacher and parent reporting were consistent in ranking the student's communication skills in the lower end of the average range and socialization skills in the moderately low range (see Parent Ex. I at p. 12). Regarding daily living skills, the parents reported that the student was toilet trained during the day, was inconsistently careful around hot objects, and did not put on pullover garments independently (id.). Teacher reporting noted that the student inconsistently used the toilet independently, did not put on front-opening clothing, and did not yet independently count 10 objects with one-to-one correspondence (id.). Significant concerns were indicated in the area of motor skills with the parents noting that the student inconsistently ran smoothly with changes in speed and direction, inconsistently walked downstairs with alternating feet, and did not yet hold a crayon or pencil appropriately for drawing; the teacher reported that the student partially climbed up and down high objects in a safe manner, did not jump off the ground with both feet without falling, and partially used scissors to cut paper along a straight line (id. at pp. 12-13).

Based on the student's testing results, the evaluator's recommendations included consistent support, both small group and individual learning experiences, SEIT services, individualized sensory experiences, OT at a frequency of no less than three times per week, outside psychotherapy, an updated PT evaluation, and a speech-language evaluation (see Parent Ex. I at pp. 15-17). The evaluator also noted that the student was not yet developmentally ready for a structured academic curriculum and if he were to transition to a kindergarten program in September 2022, he would continue to require the indicated supports, including a play-based program that focused on developmental foundations in social, communication, sensory-motor, and language skills (id.).

Thereafter, in an email to an individual the parents identified as part of the district CPSE dated March 24, 2022, the parents referred the student to the CPSE for an initial eligibility determination (see May 4, 2023 Tr. pp. 15-16; Parent Ex. BB). In the referral email, the parents indicated that the student had "always had physical motor skill delays and received private speech and [PT] services in 2018" (id.). In addition, the parents noted having recently observed "serious fine motor skills delays as well as issues with transitions and sensory issues" with the student (id.). The parents indicated that the student's private preschool program "reported issues with attention, regulation, transitions and fine motor skills" (id.). Additionally, the parents indicated that they had "recently carried out a full neuropsychological evaluation" of the student, and the "report recommend[ed] [that] he need[ed] specific support in the classroom as well as [OT]" (id.).

In an email, dated March 30, 2022, the parents followed-up on their initial referral email dated March 24, 2022 (see Parent Ex. CC). In an email dated April 7, 2022, the parents re-sent

their initial March 24, 2022 email referring the student to the CPSE for an eligibility determination (compare Parent Ex. DD, with Parent Exs. BB).⁴ On April 28, 2022, the director of a special education services agency (agency director) forwarded the parents March 30, 2022 follow-up email to the same district staff member to whom the parents had sent their initial referral email and the March 30, 2022 follow-up email (see Apr. 27, 2023 Tr. p. 241; Parent Ex. EE at pp. 1-2; see also Parent Exs. BB-CC).⁵ The district staff member immediately responded to the agency director's email on April 28, 2022, noting that it was the "first time this email ha[d] been received by [him]"; the district staff member also noted that the "referral was processed" and the "next step [wa]s for the parent[s] to provide consent via email to receive their evaluation packet via email" (Parent Ex. EE at p. 1). On the same day, the agency director responded to the district staff member, noting that she would reach out to the parents as soon as possible (id.). Later that same day, April 28, 2022, the parents sent an email to the agency director and to the district staff member providing consent to evaluate the student (id.). As a result, the following evaluations of the student were completed: a May 2022 social history, a May 2022 classroom observation, a June 2022 OT evaluation, a June 2022 PT evaluation, and a June 2022 speech-language evaluation (see generally Parent Ex. GG; Dist. Exs. 1-3; 5). The parents provided the district with a copy of the March 2022 psychological evaluation of the student (see Parent Ex. I at p. 1; May 4, 2023 Tr. p. 19).

On June 27, 2022, a CPSE convened and found the student eligible to receive special education as a preschool student with a disability (see Dist. Ex. 6 at pp. 1-2).⁶ At that time, the June 2022 CPSE developed an IEP, which included recommendations for the student to receive 10 hours per week of SEIT services, three 30-minute sessions per week of individual OT, and three 30-minute sessions per week of individual PT (id. at pp. 1, 12).⁷ The CPSE created annual goals

⁴ Although the parents sent the same email in April 2022 as the initial March 24, 2022 email, the parents addressed it to a different individual at the CPSE (compare Parent Ex. DD, with Parent Exs. BB; see May 4, 2023 Tr. pp. 16-18).

⁵ At the impartial hearing, the agency director testified that the director of the student's private preschool referred the parents to her in March 2022 (see Apr. 27, 2023 Tr. pp. 241, 245). During an initial telephone call with the parents, she obtained "some information about concerns [with the student's] development" (Apr. 27, 2023 Tr. pp. 245-46). According to the agency director, she learned that the student had recently been evaluated and the "school was requesting some support for him in the classroom as he was having some difficulty in the classroom with his behavior, socializing and meeting some academic expectations" (Apr. 27, 2023 Tr. p. 246).

⁶ In relevant part, State law dictates that a "child shall be deemed a preschool child through the month of August of the school year in which the child first becomes eligible to attend school pursuant to section [3202] of this chapter" (Educ. Law § 4410[1][i]). Pursuant to section 3202 of the Education Law, in New York a "person over five and under [21] years of age who has not received a high school diploma is entitled to attend the public schools maintained in the district in which such person resides without payment of tuition" (Educ. Law § 3202[1]). The student in this case turned five years old in October 2022; as a result, the student remained eligible to receive preschool services as a preschool student through August 2022 (see Parent Ex. A at p. 1).

⁷ State law defines SEIT services (or, as referenced in State regulation, "Special Education Itinerant Services" [SEIS]) as "an approved program provided by a certified special education teacher . . . , at a site . . . , including but not limited to an approved or licensed prekindergarten or head start program; the child's home; . . . or a child care location" (Educ. Law § 4410[1][k]; 8 NYCRR 200.16[i][3][ii]; see "[SEIS] for Preschool Children with Disabilities," Office of Special Educ. Field Advisory [Oct. 2015], available at <http://www.p12.nysed.gov/specialed/publications/2015-memos/documents/SpecialEducationItinerantServicesforPreschoolChildrenwithDisabilities.pdf>; "Approved Preschool Special Education Programs Providing [SEIT] Services," Office of Special Educ. [June 2011], available at <http://www.p12.nysed.gov/specialed/publications>

with corresponding short-term objectives targeting the student's needs in the areas of cooperative play, transitioning, communication, attention, fine motor skills, visual motor skills, and gross motor skills (ascending and descending stairs, and jumping) (*id.* at pp. 8-11). As strategies to address the student's management needs, the June 2022 CPSE noted that the student would "benefit from [s]pecially [d]esigned [i]nstruction in the form of: [a] structured learning environment, verbal/gestural/visual prompts and cues, guided repetitions, [a] system of least prompts, modeling, questioning techniques, direct instruction, social stories and positive reinforcement" (*id.* at p. 6). The June 2022 CPSE IEP noted that the student would be attending a district public school in September (*id.* at p. 1). Additionally, the CPSE reflected in the IEP that the parents shared concerns about the student's pragmatic language skills and that they disagreed with the speech-language evaluation results, which showed that the student functioned at an age-appropriate level (*id.* at p. 4).

In an email to the parents dated July 5, 2022, a district CPSE administrator informed the parents that, "[a]s per discussed in the initial review and based on evaluations, [the student wa]s found eligible for 10 months special services within an educational setting" (Parent Ex. II at pp. 1-2). The administrator explained that because the student's "initial review" occurred on the last day of the 2021-22 academic school year (i.e., June 27, 2022) and the student had a 2017 date of birth, the student was "no longer eligible for services through [the] CPSE" as of June 27, 2022 (*id.* at p. 1). In addition, the administrator advised the parents that if they wished to "continue special education services" through the district, she had copied the district supervisor of "CSE School-Aged (K-12) services to have his team transition [the student] in preparation for Kindergarten continued special services" on her email; she also advised the parents to email the district with their "intentions for a CSE initial review" and the district would contact them to create an "IEP or I[n]dividualized E[ducation] S[ervices] P[lan] suitable for September 2022" (*id.*).

In response, the parents sent an email to the district, dated July 11, 2022—which included the email address of the district supervisor of CSE school-age services—confirming that they wanted to "proceed with the CSE process and have an initial review" (Parent Ex. JJ).

On August 7, 2022, the parents executed an enrollment contract with the student's private preschool program for the student's attendance during the 2022-23 school year (*see* Parent Ex. M at pp. 1-2).

A. Due Process Complaint Notice

By due process complaint notice, dated August 17, 2022, but submitted to the district via email on September 6, 2022 (September 2022 due process complaint notice)—the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2022-23 school year (*see* Parent Ex. A at pp. 1, 5).⁸ The parents alleged that the CPSE failed to

[/SEITjointmemo.pdf](#)). In addition, SEIT services are "for the purpose of providing specialized individual or group instruction and/or indirect services to preschool students with disabilities" (8 NYCRR 200.16[i][3][ii] [emphasis added]; *see* Educ. Law § 4410[1][k]).

⁸ At the time the parents submitted the September 2022 due process complaint notice, the student was already receiving privately obtained speech-language therapy, and within the next week, he began receiving privately obtained SEIT services and privately obtained hospital-based OT and PT services (*compare* Parent Ex. A at pp. 1, 5, *with* Parent Ex. S at pp. 1-2, *and* Parent Ex. X at p. 3, *and* Parent Ex. Y at p. 8).

recommend 12-month programming for the student, and notified the district of their intentions to have the student remain at his private preschool program, "as he [wa]s not yet ready for a typical kindergarten program" (id. at pp. 2-3). The parents also alleged that the district failed to comply with its child-find obligations and, as a result, the parents had to "privately fund his prior [OT] and [PT] services" (id. at p. 2). Additionally, the parents asserted that the CPSE relied solely on their privately obtained March 2022 psychological evaluation of the student, and "refused to provide services during [s]ummer 2022" despite a "demonstrated need for extended school year services" (id.). The parents noted that the student required SEIT and related services to "avoid regression and to facilitate readiness for school in September," and due to the parents being "forced to fund these services themselves," they sought reimbursement for the costs of these services that were provided to the student during summer 2022 (id.). The parents also noted that, consistent with the instructions previously provided to them, they had reached out to the CSE directly but had not received a response (id.).

Next, the parents indicated that, in addition to placing the student at his private preschool, they sought the provision of SEIT services, OT, and PT as recommended in the student's June 2022 CPSE IEP (see Parent Ex. A at p. 3). According to the parents, the private preschool offered the student a "small, well-staffed classroom and an appropriate peer group, that in conjunction with the SEIT services, [PT] and [OT] c[ould] appropriately address" the student's needs (id.). As a result, the parents requested reimbursement for the expenses incurred for the student's summer 2022 program, which consisted of 10 hours per week of SEIT services, three 30-minute sessions per week of individual OT, and three 30-minute sessions per week of individual PT; additionally, the parents requested funding or direct payment of the same frequencies and durations of the same services for the 2022-23 school year at the providers' current rates, as well as reimbursement for the costs of the student's private preschool and the provision or funding for transportation (id. at pp. 3-4).

As a final point, the parents indicated that they agreed with the special education program recommended in the June 2022 CPSE IEP, and thus, sought to exercise the student's pendency right to have the district "fund the [student's] SEIT and related services" as applicable to this case (Parent Ex. A at pp. 3-4).

B. Impartial Hearing and Events Post-Dating the September 2022 Due Process Complaint Notice

As reflected by the evidence in the hearing record, the student began attending a private preschool program on or about September 12, 2022 (see Parent Ex. N at p. 1; see generally Parent Exs. J-K). The evidence reflects that the parents reenrolled the student in the same private, general education preschool he had attended during the 2021-22 school year and, for the 2022-23 school year, the student's classroom consisted of seven total students and two teachers (see Parent Exs. L at p. 1; N at p. 1). The hearing record also reflects that the student began receiving afterschool SEIT services on or about September 8, 2022 and school-based SEIT services on or about September 14, 2022 (see Parent Ex. S at pp. 1-2 [indicating that the student received approximately 30 total hours of SEIT services during September 2022]).⁹ Similarly, the hearing record reflects

⁹ District forms completed by the student's SEIT provider indicate that the agency providing SEIT services directly billed the district for services provided to the student during the 2022-23 school year through January 2023 (see generally Parent Ex. S).

that the student began receiving privately obtained OT and PT during the 2022-23 school year on or about September 6 and September 7, 2022, as well as privately obtained speech-language therapy on or about September 1, 2022 (see Parent Exs. X at p. 3; Y at p. 8).

On September 14, 2022, an IHO with the Office of Administrative Trials and Hearings (OATH) was appointed to preside over this matter (see IHO Ex. II at p. 1). In an email to the parties dated September 28, 2022, the IHO, among other things, invited them to a prehearing conference scheduled for October 12, 2022 (see Parent Ex. G at pp. 19-20). On October 12, 2022, the parties proceeded to the impartial hearing and as noted, the IHO conducted a prehearing conference (see Oct. 12, 2022 Tr. p. 1; IHO Ex. II at p. 1).¹⁰ On the same day—October 12, 2022—the parents submitted an amended due process complaint notice, dated October 10, 2022 (see Oct. 12, 2022 Tr. p. 4; Parent Ex. E at p. 5; see generally Parent Ex. D). However, at the impartial hearing, the parents' attorney advised that she was withdrawing the amended due process complaint notice and would instead file a "new complaint and move for consolidation" (Oct. 12, 2022 Tr. p. 4; see IHO Ex. II at p. 1).

The parents filed a second due process complaint notice, dated October 19, 2022 (October 2022 due process complaint notice), wherein the parents alleged violations similar to those in the September 2022 due process complaint notice regarding the CPSE process, but also included additional alleged violations upon which to conclude that the district failed to offer the student a FAPE for the 2021-22 and 2022-23 school years (compare Parent Ex. B, with Parent Ex. A). In the October 2022 due process complaint notice, the parents indicated that, on October 13, 2022, the district had agreed that the student's June 2022 CPSE IEP formed the basis for the student's pendency services, but to date, the district had not produced a "signed agreement" for pendency (Parent Ex. B at p. 5). As a result, the parents indicated that they had arranged for the student to receive the following services: 10 hours per week of individual SEIT services, one 45-minute session per week of OT, one 45-minute session per week of PT, and four 60-minute sessions per week of speech-language therapy while the student attended his private preschool (id.). The parents requested that the district provide compensatory educational services for any pendency services not provided to the student (id.).

In the October 2022 due process complaint notice, the parents requested the following as relief for the district's failure to offer the student a FAPE for the 2021-22 and 2022-23 school years: compensatory educational services for the district's failure to comply with its child-find and pendency obligations consisting of funding or reimbursement for the provision of 10 hours per week of individual SEIT services, three 30-minute sessions per week of individual OT, three 30-minute sessions per week of individual PT, and four 60-minute sessions per week of individual speech-language therapy at the providers' then-current rates (see Parent Ex. B at p. 6). Alternatively, the parents requested reimbursement for expenses they incurred to provide the student with the following services during summer 2022: 10 hours per week of SEIT services, four 60-minute sessions per week of speech-language therapy, three 30-minute sessions per week of individual OT, and three 30-minute sessions per week of individual PT (id.). In addition, the parents requested funding or direct payment of the student's services, consisting of 10 hours per week of individual SEIT services, four 60-minute sessions per week of speech-language therapy,

¹⁰ The vast majority of the transcripts from the impartial hearing in this matter were not consecutively paginated throughout the impartial hearing; for clarity, all transcript citations in this decision will refer to the date of the impartial hearing and the page number, such as "Oct. 12, 2022 Tr. p. 1."

three 30-minute sessions per week of individual OT, and three 30-minute sessions per week of individual PT during the 10-month portion of the 2022-23 school year, and reimbursement for the costs of the student's tuition at his private preschool (id.).

Following the submission of the parents' October 2022 due process complaint notice, the IHO conducted another prehearing conference on October 21, 2022 (see IHO Ex. II at pp. 2-5). Thereafter, on approximately four subsequent impartial hearing dates scheduled from November 14, 2022 through March 7, 2023, the IHO conducted additional prehearing or status conferences with the parties (see generally IHO Exs. III-VI; Jan. 23, 2023 Tr. pp. 1-8; Mar. 7, 2023 Tr. pp. 1-22).

In the midst of these early administrative proceedings, the parties fully executed a "Pendency Implementation Form," on or about November 13, 2022, which reflected the parties' agreement that the student's June 2022 CPSE IEP formed the basis for the student's pendency services and consisted of the following: 10 hours per week of SEIT services with district payments made to a specific provider—the "Monica Catani Dream Team, Inc."—by either direct funding or reimbursement; three 30-minute sessions per week of individual OT services (no provider or payment information supplied); and three 30-minute sessions per week of individual PT services (no provider or payment information supplied) (Parent Ex. C at pp. 1-2).¹¹

On November 15, 2022, a CSE convened and developed an IEP for the 2022-23 school year (see Dist. Ex. 7 at pp. 1, 23). At that time, the November 2022 CSE found the student eligible for special education as a student with an other health-impairment, the CSE recommended a general education placement with integrated co-teaching services (ICT) for instruction in English language arts (ELA), mathematics, social studies, and sciences; two periods per week of special education teacher support services (SETSS) in a group for mathematics; three periods per week of SETSS in a group for ELA; one 30-minute session per week of counseling services; two 30-minute sessions per week of individual OT; one 30-minute session per week of OT in a group; and two 30-minute sessions per week of individual PT (id. at pp. 1, 18-19).¹² The November 2022 IEP included annual goals targeting the student's needs, as well as strategies to address the student's management needs (id. at pp. 4-18).

At the final status conference held on March 7, 2023, the IHO indicated that the parents had submitted a third due process complaint notice, dated March 1, 2023 (March 2023 due process complaint notice), which was consolidated with the ongoing administrative proceedings by order dated March 6, 2023 (see Mar. 7, 2023 Tr. p. 4; IHO Ex. VI at p. 1; see generally Parent Ex. AA).¹³

¹¹ As requested by the parents, the October 2022 due process complaint notice was consolidated with the impartial hearing already proceeding with respect to their September 2022 due process complaint notice (see Parent Exs. B at pp. 1, 7; F at pp. 13-18; IHO Ex. III at p. 1). The evidence reflects that the IHO issued an order of consolidation, however, the hearing record fails to include the same (see Parent Ex. F at p. 15; see generally Oct. 12, 2022 Tr. pp. 1-21; Jan. 23, 2023 Tr. pp. 1-8; Mar. 7, 2023 Tr. pp. 1-22; Apr. 25, 2023 Tr. pp. 1-155; Apr. 27, 2023 Tr. pp. 156-298; May 4, 2023 Tr. pp. 1-68; Parent Exs. A-O; Q-T; V; X-Z; AA-EE; GG-LL; UU-XX; Dist. Exs. 1-7; IHO Exs. I-IX).

¹² The student's eligibility for special education programs and related services as a student with an other health-impairment is not in dispute (see 34 CFR 300.8[a][9]; 8 NYCRR 200.1[zz][10]).

¹³ The hearing record does not include a copy of the IHO's order consolidating the March 2023 due process

The parents' attorney summarized the allegations and the relief being sought in the March 2023 due process complaint notice (see Mar. 7, 2023 Tr. pp. 5-13).

Following the final status conference held on March 7, 2023, the impartial hearing resumed on April 25, 2023 (see Apr. 25, 2023 Tr. p. 1; IHO Ex. VI at p. 1).¹⁴ At that time, the district confirmed information previously emailed to the IHO, which indicated that the district would not defend the student's November 2022 IEP or present a case with regard to whether the district offered the student a FAPE; however, the district's attorney confirmed his intention to cross-examine all of the parents' witnesses (see Apr. 25, 2023 Tr. at pp. 7-8).¹⁵ The parents' attorney also confirmed that the parents sought the relief set forth in their email dated March 12, 2023, consisting of the following: 20 hours per week of SEIT services, two 60-minute sessions per week of speech-language therapy, reimbursement for co-pays made to obtain OT until securing an OT provider "willing to bill the [district] under pendency," reimbursement for co-pays made to obtain PT until securing a PT provider "willing to bill the [district] under pendency," a continuation of both OT and PT services, one 60-minute session per week of counseling, and reimbursement for the costs of the student's private preschool program (id. at pp. 8-22).¹⁶ In addition, the parents' attorney confirmed that the parents were not seeking an order for compensatory educational services (id. at p. 22). Thereafter, the impartial hearing continued with the presentation of the parents' case-in-chief, and concluded on May 4, 2023 (id. at pp. 22-155; see Apr. 27, 2023 Tr. pp. 156-298; May 4, 2023 Tr. pp. 1-68). In addition, both parties submitted closing briefs to the IHO (see generally IHO Exs. VIII-IX).

C. Impartial Hearing Officer Decision

In a decision dated July 28, 2023, the IHO initially summarized the lengthy procedural history of the case (see IHO Decision at pp. 1-12). Next, the IHO summarized the testimonial evidence elicited at the impartial hearing (id. at pp. 12-31). Turning to the findings of fact and conclusions of law, the IHO found that the district conceded at the impartial hearing that it failed to offer the student a FAPE for the 2022-23 school year and the student's private preschool program was not appropriate because it did not provide him with specially designed instruction sufficient

complaint notice with the ongoing proceedings (see generally Oct. 12, 2022 Tr. pp. 1-21; Jan. 23, 2023 Tr. pp. 1-8; Mar. 7, 2023 Tr. pp. 1-22; Apr. 25, 2023 Tr. pp. 1-155; Apr. 27, 2023 Tr. pp. 156-298; May 4, 2023 Tr. pp. 1-68; Parent Exs. A-O; Q-T; V; X-Z; AA-EE; GG-LL; UU-XX; Dist. Exs. 1-7; IHO Exs. I-IX).

¹⁴ At the status conference held by the IHO on January 23, 2023, the parents withdrew their request to be reimbursed for the costs of the student's private preschool program (see Jan. 23, 2023 Tr. pp. 4-5; IHO Ex. V at pp. 1-2).

¹⁵ The hearing record does not include copies of the emails referenced at the impartial hearing concerning the district's decision to not defend the student's November 2022 IEP (see generally Oct. 12, 2022 Tr. pp. 1-21; Jan. 23, 2023 Tr. pp. 1-8; Mar. 7, 2023 Tr. pp. 1-22; Apr. 25, 2023 Tr. pp. 1-155; Apr. 27, 2023 Tr. pp. 156-298; May 4, 2023 Tr. pp. 1-68; Parent Exs. A-O; Q-T; V; X-Z; AA-EE; GG-LL; UU-XX; Dist. Exs. 1-7; IHO Exs. I-IX).

¹⁶ With regard to the requested OT services, the parents' attorney noted that the parents had privately provided the student with one 45-minute session per week of OT, and the "new" OT provider intended to deliver three 30-minute sessions per week of OT in various locations (i.e., one session in an OT gym, one session at school, and one session in a location to be determined) (Apr. 25, 2023 Tr. pp. 19-20). Similarly, the parents had privately provided the student with one 45-minute session per week of PT (id. at p. 20).

to meet the student's needs, but also noted that portions of the "SEIT and certain related services" were "appropriate components of the [s]tudent's educational program" (id. at p. 31).¹⁷

As relevant to the issues to be resolved on appeal, the IHO found that the student required SEIT, OT, and PT services, as well as the provision of counseling services (delivered as "counseling/DIR/Floortime therapeutic services") in order to make "meaningful progress" (IHO Decision at pp. 42-47). The IHO also found, however, that the student did not need speech-language therapy services (id. at pp. 43-46). With respect to the SEIT services, the IHO initially concluded that the 11 hours per week of school-based SEIT services (i.e., delivered to the student in school by two different individuals) were appropriate and that the hearing record contained sufficient evidence of the student's need for "1:1 support" to address his "academic and behavioral challenges" within the classroom (id. at p. 46). However, the IHO determined that, although it "appear[ed] that additional SEIT services may have been required" within the school setting, staff was not available to provide additional school-based hours, and therefore, the student received three hours per week of afterschool SEIT services on Monday and Friday afternoons (id.). According to the IHO, the afterschool SEIT services "unnecessarily extended the school day" for the student and "deprived him of the one-to-one support needed in the classroom to participate in academics and activities," which, based on the testimonial evidence, was "support [that] was critical in the classroom" (id.). For example, the IHO pointed to the agency director's testimony explaining that the "additional SEIT was provided to the [s]tudent 'based on the classroom teacher's concerns and the fact that he wasn't maintaining certain information in order to level the playing field within the classroom environment'" (id.). In addition, the IHO noted that the agency director testified that the student "'needed some one-to-one support in order to even participate in some of the activities that weren't able to be provided within the classroom setting at that time without removing him from the group too much'" (id. at pp. 46-47). Because the three additional hours of SEIT services were delivered to the student after school, outside the "venue where needed," the IHO found that these services were not an appropriate component of the student's educational program (id. at p. 47). As a final point, the IHO noted that the psychologist who conducted the student's March 2022 psychological evaluation—who had recommended SEIT services in the evaluation report—testified that, without "updated information" about the student's progress from February to September 2022, she could not "make recommendations for the 2022-2023 school year as to SEIT services" the student required (id., citing Apr. 25, 2023 Tr. pp. 129-31).

In light of the foregoing, the IHO denied the parents' request to be reimbursed for the costs of the student's SEIT services beyond the 11 hours delivered as school-based services (see IHO Decision at pp. 47, 51-52).

Next, the IHO turned to the parents' request to be reimbursed for the costs of the OT services delivered to the student at his preschool program and at the OT provider's sensory gym (see IHO Decision at p. 47, citing Apr. 25, 2023 Tr. pp. 81-85, 87-88, 92 and Parent Ex. XX).¹⁸

¹⁷ In addition to finding that the student's private preschool program was not appropriate, the IHO also found that although the parents produced "some evidence of regression," the evidence did not demonstrate that the student's "regression was atypical" or that the academic skills "could not be recouped in [20]-to-[40] school days" (IHO Decision at pp. 36-37). Consequently, the IHO denied the parents' request for 12-month programming (id. at p. 37).

¹⁸ Although the IHO's decision refers to her analysis as addressing the parents' request for PT services, the evidence used in support of the analysis relates solely to the student's OT services delivered pursuant to the related

Here, the IHO found that the occupational therapist delivered services "based on the [student's] IEP and her clinical observations" of the student (IHO Decision at p. 47). The IHO noted that the occupational therapist testified about the student's progress, including his ability to "recognize all the upper-case letters," the student's progress "attempting to write all the straight-lined letters and O and Q with minimal cues," and his progress in writing a "few upper-case letters E, F, L, T, H, I and O and Q with significant cues and encouragement and sensory input to participate in the activity" (*id.*, citing Parent Ex. XX ¶ 10). The IHO concluded that the parents were entitled to be reimbursed for the costs of the OT services, at a rate of \$110.00 per hour for three 30-minute sessions per week for the 2022-23 school year (10-month program) "(minus any payments made through pendency)" (IHO Decision at pp. 47, 51).

Finally, the IHO addressed the parents' request to be reimbursed for the costs of the student's privately obtained OT and PT services (*see* IHO Decision at pp. 48-49). The IHO initially noted that both providers "unequivocal[ly]" testified at the impartial hearing that each delivered services to the student that were "medically based out-patient services" (*id.* at p. 48). The IHO also noted that the testimonial evidence "did not provide any connection to the educational process or the issues being addressed" in the student's private preschool program (*id.*). With respect to the privately obtained OT services, the IHO found that the therapist "was not familiar with, nor had she spoken with any other OT provider" of the student (*id.*). Additionally, the occupational therapist testified that "she could not 'speak to [the student's] school-based service'" and could "only provide medically based outpatient services" (*id.*). With regard to the privately obtained PT services, the IHO found that the therapist had described the "medical model" of services as "working towards specific goals to improve [the] function in [the student's] daily routine, as well as the community setting," whereas the "educational model" of PT services "work[ed] towards function[ing] within the school setting, the classroom setting and, things of that nature" (*id.*). The IHO further noted that, at times, the medical model and the educational model of services "may or may not overlap," and the "medical model may exceed or may enhance that which [wa]s within the educational model" (*id.*). According to the IHO, the physical therapist could not "speak to her patient's [the student's] needs under the educational model" because, at the hospital, providers solely deliver "services under the medical model" (*id.*).

As part of her analysis, the IHO noted that, generally, in order to offer a FAPE, a school district was not required to "design an educational program intended to address a student's difficulties in generalizing skills to other environments outside of the school environment, particularly in cases in which it [wa]s determined that the student [wa]s otherwise likely to make progress in the classroom" (IHO Decision at p. 48). As a result, the IHO found that the parents' request to be reimbursed for the costs of copayments made "for medical services"—i.e., the privately obtained OT and PT services—were "beyond the obligation" of the district, as it was "more than that required under FAPE" (*id.* at p. 49). In support of this finding, the IHO relied, in part, on legal authority for the proposition that, "when considering the appropriateness of reimbursement for at-home services," a school district was "not obligated to provide for such services as a result of any failure to provide [a] FAPE" (*id.*). The IHO also relied, in part, on legal authority stating that the "IDEA d[id] not itself articulate any specific level of educational benefits

services authorization (RSA) under pendency and that began in February 2023 (*see* IHO Decision at pp. 47, 54-58; Parent Ex. XX ¶¶ 3-5; May 4, 2023 Tr. pp. 27-30). The student's mother testified at the impartial hearing that all of the OT services delivered pursuant to the RSA for pendency were directly billed to the district (*see* May Tr. pp. 30-31; Parent Ex. UU at pp. 1-2).

that must be provided through an IEP," and the statute "ensure[d] an 'appropriate' education, 'not one that provide[d] everything that might be thought desirable by loving parents'" (id.). The IHO further noted that the "IDEA provide[d] for a 'program that provide[d] a basic floor of opportunity, rather than one that provide[d] an 'optimal programmatic alternative'" and school districts were "not required to 'maximize' the potential of students with disabilities" (id.). Consequently, the IHO denied the parents' request to be reimbursed for the copayments "paid under its insurance plan" for the privately obtained OT and PT services (id. at pp. 49, 51).¹⁹

Thus, overall, the IHO denied the parents' requests for the following relief: reimbursement of the costs of the student's private preschool program for the 10-month, 2022-23 school year; funding of speech-language therapy (two 60-minute sessions per week); copayments made for privately obtained OT services (one 45-minute session per week) and PT services (one 45-minute session per week) (total of \$1380.00); and funding or reimbursement of the afterschool SEIT services (see IHO Decision at pp. 51-52). The IHO granted the parents' requests for the following relief: funding or reimbursement of the costs of the student's OT services (three 30-minute sessions per week) at the rate of \$110.00 per hour for the 10-month, 2022-23 school year (less any payments made pursuant to pendency); funding or reimbursement for the costs of the student's counseling services (one 60-minute session per week) (delivered via play therapy using the DIR/Floortime methodology) at the rate of \$200.00 per hour for the 10-month, 2022-23 school year (total of \$765.00 upon proof of payment); and funding or reimbursement of the costs of the student's school-based SEIT services for the 10-month, 2022-23 school year (total of 11 hours per week) at a rate of \$185.00 per hour (id. at p. 51).

IV. Appeal for State-Level Review

The parents appeal. Initially, the parents affirmatively assert that the IHO properly ordered funding for the SEIT and related services the IHO found appropriate. However, the parents contend that the IHO erred by finding that the student was not entitled to receive more than 11 hours per week of individual SEIT services, and relatedly, failed to consider the parents' request for 20 hours per week of SEIT services. The parents also contend that the IHO erred by finding that the student did not require the privately obtained speech-language therapy services (two 60-minute sessions per week) provided during the 2022-23 school year. Finally, the parents contend that the IHO erred by failing to consider the student's need for PT services (three 30-minute sessions per week) and improperly denied their request to be reimbursed for the costs of the student's privately obtained OT and PT services (i.e., copayments). As relief, the parents seek a determination that the recommendation for 20 hours per week of individual SEIT services was appropriate to meet the student's needs; that two 60-minute sessions per week of speech-language therapy was appropriate to meet the student's needs; and the student continues to need OT and PT (both to be delivered in three 30-minute sessions per week). In addition, the parents seek an order directing the district to fund or reimburse them for the following costs: the student's SEIT services provided during the 2022-23 school year at a rate of \$185.00 per hour; speech-language therapy

¹⁹ The IHO also discussed equitable considerations and found that the hearing record failed to contain evidence sufficient to warrant either a reduction to, or a denial of, tuition reimbursement as relief (see IHO Decision at pp. 49-50). Additionally, the IHO noted that she had "reviewed the parent's remaining contentions and f[ou]nd them to be either unnecessary to this decision, without merit, beyond [her] jurisdiction, too vague to be of use, or without sufficient basis in the [hearing] record for a finding and award of relief" (id. at p. 50). Therefore, the IHO indicated that "any relief not specifically discussed in this decision [wa]s denied, and all the [p]arent's remaining claims not discussed herein [we]re dismissed" (id.).

services delivered during the 2022-23 school year at a rate of \$200.00 per hour; and OT services (one 45-minute session per week) and PT services (one 45-minute session per week) delivered during the 2022-23 school year at a rate of \$20.00 per session (copayments).²⁰

In an answer, the district responds to the parents' allegations and generally argues to uphold the IHO's decision in its entirety.

V. Applicable Standards

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P. 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, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

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

²⁰ To the extent that the parents do not appeal the IHO's findings adverse to them—namely, that the private preschool program was not appropriate to meet the student's needs and that the student was not entitled to 12-month programming—or allege that the IHO failed to address issues raised in the consolidated due process complaint notices, such as the district's alleged failure to comply with its child-find obligations or that the district failed to offer the student a FAPE for the 2021-22 school year, those determinations have become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

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 (Carter, 510 U.S. at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether a unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether the placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] ["evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

The Second Circuit has set forth the standard for determining whether parents have carried their burden of demonstrating the appropriateness of their unilateral placement.

No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

(Gagliardo, 489 F.3d at 112, quoting Frank G., 459 F.3d at 364-65).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85).

VI. Discussion—Unilateral Placement

A. Student Needs

With respect to the student's needs, the parties do not dispute that the student has demonstrated needs to be addressed through the provision of special education (SEIT services) and related services of OT and PT. However, the parties dispute whether the student required both school-based and afterschool SEIT services provided to the student, as well as whether the student was entitled to receive 20 hours per week of SEIT services and two 60-minute sessions per week of speech-language therapy services. The parties also dispute whether the parents should be reimbursed for the costs of privately obtained OT and PT services.

While parents are entitled to reimbursement for the cost of an appropriate private placement when a district has failed to offer their child a FAPE, it does not follow that they may take advantage of deficiencies in the district's offered placement to obtain all those services they might wish to provide for their child at the expense of the public fisc, as such results do not achieve the purpose of the IDEA. To the contrary, "[r]eimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71 [emphasis added]); see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148). Accordingly, while a parent should not be denied reimbursement for an appropriate program due to the fact that the program provides benefits in addition to those required for the student to receive educational benefits, a reduction from full reimbursement may be considered where a unilateral placement provides services beyond those required to address a student's educational needs (L.K. v. New York City Dep't of Educ., 674 Fed. App'x at 101 [2d Cir. Jan. 19, 2017]; see C.B. v. Garden Grove Unified Sch. Dist., 635 F. 3d 1155, 1160 [9th Cir. 2011] [indicating that "[e]quity surely would permit a reduction from full reimbursement if [a unilateral private placement] provides too much (services beyond required educational needs), or if it provides some things that do not meet educational needs at all (such as purely recreational options), or if it is overpriced"]; Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ., 790 F.2d 1153, 1161 [5th Cir. 1986] ["The Burlington rule is not so narrow as to permit reimbursement only when the [unilateral] placement chosen by the parent is found to be the exact proper placement required under the Act. Conversely, when [the student] was at the [unilateral placement], he may have received more 'benefit' than the EAHCA [the predecessor statute to the IDEA] requires"]).

1. SEIT Services

The parents argue that the IHO erred by finding that the afterschool SEIT services were not appropriate. Relatedly, the parents argue that the IHO failed to assess whether the student required 20 hours per week of SEIT services. The parents contend that the IHO acknowledged that the student may have needed more than the 11 hours of SEIT services, and that by denying reimbursement for additional SEIT services, the IHO improperly faulted the parents for their inability to arrange for the "optimal provision of SEIT" services.

The district counters that the IHO properly limited the parents' relief to the 11 hours of school-based SEIT services provided to the student, as the hearing record did not contain any evidence explaining why the student also required afterschool SEIT services and the district was not otherwise obligated to generalize the student's skills outside of the classroom.

With regard to the student's need for special education support in the classroom, the evaluator who conducted the March 2022 psychological evaluation recommended school-based SEIT services in order to shadow the student for portions of the school day by supporting his attention and participation in the classroom routine, providing him with sensory and movement breaks and scaffolded activities based on his attention and stamina, and ensuring his processing of language and understanding of expectations (see Parent Ex. I at pp. 15-16). The evaluator did not, however, recommend a specific amount of school-based SEIT services, and moreover, she did not recommend any form of afterschool services to address the student's needs other than "[o]utside psychotherapy using the DIR/Floortime-based philosophy" to address the student's "foundation social communication skills (i.e., rigidity in play; difficulties with reciprocation)" (*id.* at pp. 15-17). At the impartial hearing, the evaluator testified that inconsistent attention and regulation were the challenges that most interfered with the student's ability to learn (see Apr. 25, 2023 Tr. p. 118). She further testified that the student "really" required a SEIT to support him and help him understand the material presented during structured activities, but that at other times of the day—such as lunchtime and free play—SEIT support would not be required (see Apr. 25, 2023 Tr. p. 121).

The school-based SEIT who worked with the student in his preschool classroom beginning in September 2022 testified that, in the classroom, the student often lost focus on a given task and was unable to complete work independently without receiving 1:1 support (see Parent Ex. VV ¶ 7).^{21, 22} She added that the student struggled to take initiative and follow through when trying to complete an age-appropriate task, struggled when transitioning between activities (most notably from a preferred activity to a non-preferred activity, as it was noted that at the beginning of the school year he would frequently scream or cry when he was asked to transition), and required consistent support such as prompting in order to follow his classroom routine (*id.*). According to the school-based SEIT, the student was a "social child and benefit[ted] from social interaction with children with age-appropriate language and ability as he [wa]s able to model his behaviors based on theirs" (*id.* ¶ 12).

At the impartial hearing, the agency director testified that, initially during the 2022-23 school year, the student received 10 hours per week of school-based SEIT services, which was thereafter reduced to 9 hours per week (see Apr. 27, 2023 Tr. p. 248). The agency director explained that the school-based SEIT's hours were reduced because the student's "schedule changed" and the classroom teacher shared concerns about his ability to maintain "certain

²¹ The school-based SEIT provided her direct testimony via affidavit (see generally Parent Ex. VV). Throughout her affidavit, the school-based SEIT referred to a second SEIT by name, and described this second SEIT as having also provided school-based services to the student during the morning from "Monday to Thursday" (*id.* ¶¶ 6, 11, 14). However, billing records for all of the SEIT services from September 2022 through January 2023—and, in particular, for the second SEIT referenced in the affidavit—reflect that this second SEIT only provided services to the student exclusively afterschool, from 3:00 p. m. to 4:00 or 4:30 p. m. (compare Parent Ex. VV ¶ 6, with Parent Ex. S at pp. 2, 4-5, 7, 10). In or around January 2023, a third SEIT began providing school-based SEIT services to the student; however, the school-based SEIT did not refer to this third SEIT within the affidavit (compare Parent Ex. S at p. 11, with Parent Ex. VV).

²² Although the evidence in the hearing record reflects that the student eventually received SEIT services from three different providers, the initial school-based SEIT provider was the only SEIT to provide testimonial evidence at the impartial hearing (see generally Oct. 12, 2022 Tr. pp. 1-21; Jan. 23, 2023 Tr. pp. 1-8; Mar. 7, 2023 Tr. pp. 1-22; Apr. 25, 2023 Tr. pp. 1-155; Apr. 27, 2023 Tr. pp. 156-298; May 4, 2023 Tr. pp. 1-68; Parent Exs. A-O; Q-T; V; X-Z; AA-EE; GG-LL; UU-XX; Dist. Exs. 1-7; IHO Exs. 1-IX).

information in order to level the playing field within the classroom environment" (Apr. 27, 2023, Tr. p. 248). According to her testimony, the student needed "some one-to-one support in order to even participate in some of the activities that weren't able to be provided within the classroom setting at that time without removing him from the group too much" (*id.*). She further testified that a second SEIT was added (i.e., the second SEIT referred to in the school-based SEIT's affidavit) to "provide some direct support as well, some one-to-one intervention" that took place in her office (Apr. 27, 2023 Tr. pp. 248-49; *see* Parent Ex. WW ¶ 6). The second SEIT initially provided the student with one hour per week, but increased to three hours per week (*see* Apr. 27, 2023 Tr. p. 249).²³ The agency director testified that the student's SEIT services increased as a result of an observation she conducted of the student in or around November 2022, which arose due to "concerns with his inability to maintain or he would be taught something and then he'd either lose the skill or not be able to maintain it" (*id.*). In addition, the agency director testified that the student demonstrated "some behavioral eloping, like walking out of the classroom"; he had "difficulty maintaining attention to tasks"; his "fine motor skills were extremely delayed"; and he could not "participate in journals" (*id.*). The agency director further testified that, in addition to recommending an increase in SEIT services, she also recommended changing the delivery of the current school-based SEIT services from the morning to the afternoons, as the student became "more behavioral and less available towards the early afternoons" (*id.*).

The agency director also testified that around December 2022 or January 2023, the student's preschool classroom teacher informed her that the student had started exhibiting "different behaviors, like [he was] really polite but oppositional" and would not "comply" with "things in the classroom when [the school-based SEIT] wasn't there" (Apr. 27, 2023 Tr. p. 252). As a result, the agency director "increased [the school-based] SEIT [services]" by three hours per week and added a third SEIT to the student's overall program to provide "support, specifically during the times that the teacher was saying he was having difficulty" in the mornings (Apr. 27, 2023 Tr. pp. 252-53; *see* Parent Ex. S at p. 11). At the impartial hearing, the student's preschool teacher confirmed that the student was consistently receiving 11 hours per week of school-based SEIT services by two different school-based SEIT providers during the second half of the school year (*see* Apr. 27, 2023 Tr. pp. 169-70). She explained that, during the first half of the school year, the student received approximately eight hours of school-based SEIT services delivered by one provider; then, for the second half of the school year, a second school-based SEIT began delivering three additional hours of services (*see* Apr. 27, 2023 Tr. pp. 173-74).²⁴

In early January 2023, the student's school-based SEIT and his afterschool SEIT prepared a fall/winter progress report (*see* Parent Ex. Q at pp. 1, 6). After providing a general review of the student's educational program; his present levels of need and SEIT support for those needs; and his progress in ELA (reading and writing), mathematics, communication, social/emotional skills, fine and gross motor skills, and his adaptive skills, the SEITs recommended that the student receive 20 hours per week of 1:1 SEIT services (*id.* at pp. 1-6). The SEITs indicated in the report that the

²³ Billing records in the hearing record reflect that this second SEIT provider of afterschool services began directly billing the district for her services—approximately three hours per week or more—on September 8, 2022 (*see* Parent Ex. S at p. 2).

²⁴ The student's private preschool program operated five days per week; on Monday through Thursday, with arrival between 8:50 a.m. and 9:00 a.m. and dismissal at 2:30 p.m. (*see* Parent Ex. K). On Friday, the program began with arrival at 8:50 a.m. to 9:00 a.m., but students were dismissed at 12:00 p.m. (noon) (*id.*).

student required a "lot of repetition and 1:1 assistance to learn age-appropriate concepts throughout each domain" (id. at p. 6).

In April 2023, the student's afterschool SEIT conducted a classroom observation at his preschool (see Parent Ex. LL at p. 1). On the day of the observation, the student did not have any SEIT support (id.; see Apr. 27, 2023 Tr. pp. 259-60). According to the classroom observation, the student engaged in "preferred activities independently"—such as coloring a picture, performing a yoga pose, and playing on the playground—and "sustained close attention to the read aloud, although he required 1:1 physical support to remain on his rug spot" (Parent Ex. LL at pp. 1-2). During read aloud, the classroom teacher sat next to the student to assist in maintaining his seat on the rug and to "decrease fidgeting" (id. at p. 1). During "morning meeting," the student required "multiple prompts" to sit on the rug, he was "distracted," and he attempted to distract another peer (id.). According to the observation report, the student needed prompts to listen "multiple times" (id.). In addition, the student "avoided" his turn at morning meeting to "complete the weather job" by crawling to the board and refusing to describe the day, despite "multiple attempts to redirect" him to "follow instruction" (id.). The student engaged in a tabletop activity (tracing letters) and drawing a self-portrait, but "left his seat numerous times and was only able to attend to task with [his] 1:1 teacher's support" (id.). Overall, the afterschool SEIT described the student as "familiar with the classroom routines, but, at times, he [showed] difficulty following directions and required reminders and repetition" (id. at p. 2). The afterschool SEIT also noted that the student was "apologetic for requiring reminders and was respectful to teachers and peers" (id.). As noted in the observation report, the student, at times, appeared to not "listen when spoken to directly and [] le[ft] his seat multiple times," and needed "1:1 support during structured activities at the table and the rug" (id.).

2. Speech-Language Therapy Services

The parents argue that the IHO improperly denied funding or reimbursement for the privately obtained speech-language therapy services delivered to the student. The parents also argue that the IHO exceeded her jurisdiction by finding that the speech-language provider delivered services outside of speech-language therapy, and any finding thereto, was not supported by the evidence in the hearing record. In addition, the parents contend that the IHO improperly denied payment of the speech-language therapy services based on the finding that the speech-language provider did not formally evaluate the student, she improperly failed to give any weight to the evidence elicited from the speech-language provider, and the hearing record as a whole supports a determination that the district failed to sufficiently assess the student's speech-language needs to recommend services.

The district contends that the IHO properly denied the parents' request to fund the privately obtained speech-language therapy services. The district asserts that the IHO did not improperly shift the burden of proof to the parents and correctly determined that, absent a speech-language evaluation conducted by the private speech-language therapist, the hearing record lacked evidence to support the student's need for speech-language therapy services.

As previously noted, the evaluator who conducted the student's March 2022 psychological evaluation noted that the student was quite social and initiated language for a variety of reasons, and moreover, the results of an administration of the Vineland-3 yielded scores in the average range for communication based on both parent and teacher reporting (see Parent Ex. I at pp. 12-13, 20). The evaluator testified that anecdotal information from the assessment revealed some

difficulties with nonverbal communication, and noted that the student had inconsistent eye contact and did not coordinate a lot of gestures with his overall verbal language but that his level of language for his age was fairly typical (see Apr. 25, 2023 Tr. p. 116). The evaluator testified that, regarding language skills and communication skills, "it seemed like there was enough of a red flag to pursue a more comprehensive evaluation with a speech[-]language pathologist just to determine what support would be most useful" (Apr. 25, 2023 Tr. p. 120). The March 2022 psychological evaluation report included a recommendation for a speech-language evaluation due to concerns regarding the student's inconsistent receptive language skills (e.g., difficulties understanding novel instructions, difficulties attending to and responding to others) and difficulties with some aspects of pragmatic language (e.g., inconsistent eye contact, difficulties maintaining reciprocal conversation) (Parent Ex. I at p. 17).

As previously indicated, a June 2022 speech-language evaluation was completed as part of the student's initial evaluation in this case (see generally Parent Ex. GG). The speech-language evaluation report noted that the student had been referred for an evaluation due to concerns regarding focusing, transitioning, and listening, as well as classroom teacher concerns regarding the student's ability to attend to structured tasks and transitioning, and parent reports that the student had difficulty producing certain sounds in words (id. p. 1). The evaluator observed the student to maintain appropriate eye contact, transition from one task to another given minimal verbal prompts, speak using "3[plus] word" utterances, demonstrate an adequate repertoire of words, produce some articulation errors which were typical of children his age but could be understood by unfamiliar listeners, and follow two-step directions during play (id. at p. 3).

The evaluator administered the Preschool Language Scale Fifth Edition (PLS-5) to assess the student's auditory comprehension and expressive language skills, which resulted in scores demonstrating that the student presented with average skills in both areas (standard scores of 96 and 99, respectively) (see Parent Ex. GG at pp. 3-5). Administration of the Goldman-Fristoe Test of Articulation-3rd Edition (GFTA-3) found the student presented with the phonological process of "gliding," which reportedly occurred when liquid consonants (e.g., /l/, /r/) were replaced with /y/ or /w/, but it was noted that this error was typical at the student's age and was not eliminated until the age of six or seven years old (id. at p. 5). The evaluator indicated that the student's phonological development was average for production of English speech sounds in words and in connected speech relative to his same age peers (id.). According to the June 2022 speech-language evaluation report, the student presented with appropriate pragmatic language skills based on the Speech and Language Development Chart (2nd Edition), parent report, evaluator observation, and informed clinical opinion (id. at p. 6). The evaluator found no concerns in the areas of voice and fluency, oral peripheral speech mechanism, hearing, and feeding (id. at pp. 6-7).

A review of the additional evaluative information obtained as part of the student's initial evaluation included reports with respect to the student's struggles with cooperative play and reciprocal interactions, transitions and attending to activities, providing verbal responses to open-ended questions, multiple step directions for familiar activities, and joint attention (see, e.g., Dist. Exs. 1 at p. 2; 3 at p. 2; 5 at pp. 2-3). However, it was also reported that the student was very verbal, could express his needs, was able to express himself using full sentences and his words were typically understood, was able to follow through with single-step directives, and had an adequate vocabulary (see Dist. Exs. 1 at p. 2; 2 at p. 2; 5 at p. 3).

Progress reporting from the student's teacher and providers did not indicate that he exhibited needs in the area of speech-language development. The November 2022 teacher progress report indicated that the student was attending a pre-K class and included teacher reporting that the student's reading and listening comprehension estimated grade equivalents were at the pre-K level and noted that the student followed along, enjoyed, and comprehended stories, asked questions during "read alouds" and traced letters, but was not sounding out or spelling words yet and did not display letter-sound correspondence (Parent Ex. L at p. 1). According to the report, expressively the student "love[d] telling stories" and "like[d] to talk with" his friends (*id.* at p. 2).

The January 2023 SEIT progress report did not identify speech or communication needs (*see* Parent Ex. Q at pp. 4, 6). The report reflected that the student interacted with both of his teachers equally, had no problem verbally engaging with new adults or classroom visitors, and was a social child who enjoyed interacting with peers (*id.* at p. 1). The report identified "significant" delays in attention, academic readiness, and fine and gross motor skills and noted the student's need for support to engage in cooperative play (*id.*). The progress report included "targets" in the areas of reading, writing, math, social/emotional, and physical and adaptive skills, but did not include the same for the student's communication domain (*id.* at pp. 3-6).

3. OT and PT Services

The parents assert that the IHO erred by failing to address the student's need for three 30-minute sessions per week of PT services and erroneously denied funding for the student's privately obtained OT and PT services.

Regarding the student's OT and PT needs, the March 2022 psychological evaluation report reflected that the student did not put on pullover garments independently and did not put on front-opening clothing, displayed some probable sensory-seeking behaviors, and presented with significant concerns with respect to fine and gross motor skills as it was noted the student inconsistently ran smoothly with changes in speed and direction, inconsistently walked downstairs with alternating feet, did not jump off the ground with both feet without falling, did not yet hold a crayon or pencil appropriately for drawing, and partially used scissors to cut paper along a straight line (*see* Parent Ex. I at pp. 11-13). To address the student's needs, the evaluator recommended individualized sensory and motor experiences, OT at a frequency of no less than three times per week, and an updated PT evaluation (*id.* at p. 17).

Both the May 2022 social history update and the May 2022 classroom observation identified fine motor skills as an area of need for the student, and the social history reflected reports that the student was unsteady on his feet, hesitant with climbing, exhibited decreased strength and low muscle tone, and had difficulty navigating stairs independently (*see* Dist. Exs. 3 at pp. 1, 2; 5 at pp. 1, 3).

As reflected in the June 2022 PT evaluation, the student demonstrated below average skills for his age level according to the Peabody Developmental Motor Scales-2 (PDMS-2) (*see* Dist. Ex. 2 at pp. 1, 3). Specifically, the evaluator found that the student did not demonstrate the ability to hop, walk on a straight line, jump forward or sideways, descend stairs without hand support, or perform a single leg stance without upper extremity support of his right leg (*id.* at p. 3). It was also noted that the student ascended and descended stairs using a step-to-step pattern, he had decreased muscle tone and decreased coordination skills, and his decreased body stability was affecting his acquisition of normal gross motor skills (*id.* at pp. 3-4).

According to the June 2022 OT evaluation results, the student presented with deficits in multiple domains, including fine motor skills, grasping patterns, impulse control, attention span, and motor planning (see Dist. Ex. 1 at pp. 1, 6). Specifically, the student's grasping subtest score indicated "significant deficits" in grasping, hand strength, manual dexterity, and accuracy (id. at p. 6). With respect to sensory processing, the evaluator found the student presented with delayed attention and impulse control, especially during fine motor or tabletop tasks, was unable to determine the amount of force required when manipulating fine motor tasks and tended to grasp items very loosely, had difficulty registering and modulating information from proprioceptive and auditory systems, and it appeared that issues with sensory processing and modulation were interfering with the student's attention span, skill acquisition, and development of age-appropriate behaviors (id. at pp. 5-6).

Based upon the student's needs, the evidence demonstrates that the June 2022 CPSE recommended that the student receive three 30-minute sessions per week of individual OT and PT (see Dist. Ex. 6 at pp. 1, 12). The June 2022 IEP included annual goals addressing the student's needs in the areas of attention to tasks and activities; fine motor skills incorporating coordination, control, and bilateral integration for effective performance in the classroom; visual motor skills for proper scissor grasping and cutting; ascending and descending stairs using step-over-step pattern; and jumping different surfaces and heights (id. at pp. 9-11). The hearing record also includes evidence that, in the area of physical development, the November 2022 teacher progress report identified student needs in fine motor skills, writing and drawing, forming letters, and endurance for fine motor tasks (see Parent Ex. L at pp. 1, 3). The November 2022 CSE also identified needs in the areas of OT and PT, and recommended two 30-minute sessions per week of individual OT, one 30-minute session per week of OT in a group of three, and two 30-minute sessions per week of individual PT (see Dist. Ex. 7 at pp. 2-4, 18-19, 24). The November 2022 IEP included annual goals to address the student's needs in the areas of OT (attending to table top activities, using age-appropriate grasp and force, improving self-regulation, tracing letters and familiar shapes) and PT (ascending and descending stairs using step-over-step pattern, walking in a straight line, jumping, throwing, kicking) annual goals (id. at pp. 9, 13-17). And finally, the January 2023 SEIT progress report identified the student's gross and fine motor targets as improving motor coordination, visual motor, and in-hand manipulation skills in preparation for writing activities, and improving bilateral hand coordination skills (see Parent Ex. Q at p. 5).

B. Specially Designed Instruction

Regulations define specially designed instruction, in part, as "adapting, as appropriate to the needs of an eligible student under this Part, the content, methodology, or delivery of instruction to address the unique needs that result from the student's disability" (8 NYCRR 200.1[vv]; see 34 CFR 300.39[b][3]).

1. OT and PT Services

Turning first to the parties' arguments regarding whether the parents should be reimbursed for the costs of the privately obtained OT and PT services, the crux of this dispute focuses on the fact that the OT and PT services were delivered via a "medical" model versus an "educational" model.

The pediatric occupational therapist who worked with the student during the 2022-23 school year testified that she conducted her initial evaluation "of this episode of care" for the

student at the end of June 2022 (Apr. 25, 2023 Tr. p. 62).²⁵ She testified that she worked with the student from June 2022 until the present time, and had been providing OT services to the student for one 45-minute session per week outside of his preschool at a rehabilitation center (see Apr. 25, 2023 Tr. pp. 62-63, 66; Parent Ex. Y at pp. 5, 7-12). She identified the student's OT needs as significant fine motor and visual motor integration deficits, and his "primary goals" as imitating and copying shapes and letters, trying to elicit a three fingered grasp, and attending (Apr. 25, 2023 Tr. p. 63). To address these needs, the occupational therapist stated that she worked on a tripod grasp the student would need for writing and that she may use a pair of tongs or small manipulatives, something other than just a pencil, so as to find creative, playful, age-appropriate things "to work on those skills in all different ways" (Apr. 25, 2023 Tr. pp. 63-64). The occupational therapist testified that since the student benefitted from vestibular proprioceptive input, she used obstacle courses, swing hookups with different types of swings, and bear climbing up and sliding down a wedge to give the student different types of movement (see Apr. 25, 2023 Tr. p. 64). The occupational therapist also testified that the student had made progress from a writing perspective and noted that while he would mostly scribble when she started with him, at the time of her testimony, he was able to do vertical and horizontal lines, was improving with intersecting lines, was much better with tracing and imitating, was starting to do letters of his name, and was working towards diagonal lines so that he could better form his "R" and his "N" (Apr. 25, 2023 Tr. p. 68).

Under cross-examination, the occupational therapist acknowledged that she kept session notes for each session but was not asked to provide those notes for the purpose of the impartial hearing, and she did not have any contact with any other occupational therapists in connection with the student (see Apr. 25, 2023 Tr. p. 70). The occupational therapist testified that she prepared the June 2022 report and submitted it as a medical record, which the hospital then submitted to the insurance company, but also noted that the parents had access to all medical records for their children (see Apr. 25, 2023 Tr. p. 71). Regarding her recommendation for two 45-minute sessions of OT per week, the occupational therapist testified that she could not speak to whether that would be in addition to or replacing school-based OT services, as she only provided "medically-based outpatient services" (see Apr. 25, 2023 Tr. p. 72). Additionally, the occupational therapist acknowledged that she worked with the student in the late afternoon, but she found the student came to sessions with an appropriate amount of energy and that she had not seen him come in particularly fatigued (see Apr. 25, 2023 Tr. p. 73).

Turning to PT, the physical therapist who provided services to the student during the 2022-23 school year testified that, in June 2022, she conducted her initial evaluation of the student and had been providing him with one 45-minute session per week at a rehabilitation center (see Apr. 25, 2023 Tr. pp. 94-96; Parent Ex. Y at pp. 5-12). The physical therapist described student's needs in the areas of coordination, jumping, "reciprocal negotiation of stairs, up and down," single leg balance, and transitioning on and off the floor (Apr. 25, 2023 Tr. p. 96). In addressing the student's needs, the physical therapist testified that sessions would usually start with a warmup activity that would engage his core, some proprioceptive work, and then transition to another task (id.). She explained that if they were working on stair negotiation, they would transition to a reciprocal task such as bicycle, tricycle, or a reciprocal negotiation of a scooter board and then incorporate his goal functionally into a play activity, such as an obstacle course that included stairs (id.). The

²⁵ The pediatric occupational therapist noted that she had worked with the student previously for a short episode of care (see Apr. 25, 2023 Tr. p. 62).

physical therapist noted student progress in transitioning from the floor through half-kneel position without using his arms for support, walking down the stairs switching feet with minimal to moderate cueing, and jumping mechanics (see Apr. 25, 2023 Tr. pp. 97-98).

The physical therapist also testified that she did not personally provide reports to the parents and that she did not see any IEPs in connection with the student (see Apr. 25, 2023 Tr. pp. 99-100). She further explained that it would be at the parents' discretion as to whether the student's IEP would be shared with her (see Apr. 25, 2023 Tr. p. 101). She acknowledged that she took notes after every session but that she had not been asked to provide those notes in connection with this proceeding (see Apr. 25, 2023 Tr. p. 100).

According to the physical therapist, she could only speak to the "medical model" of services delivered to the student and that she determined that the student "needed one time weekly outpatient services" and indicated that she was able to provide appropriate PT services based on her assessment of his needs through the medical model (see Apr. 25, 2023 Tr. pp. 99, 101). In explaining the distinction of PT under a medical model versus an educational model, the physical therapist testified that, often under an educational model, the student worked toward functioning within the school setting or classroom setting, whereas in the medical model they worked toward specific goals to improve function in his daily routine and in the community setting (see Apr. 25, 2023 Tr. pp. 101-02). She further acknowledged that the two models may or may not overlap or coincide and that a medical model may exceed or may enhance what was within the educational model (see Apr. 25, 2023 Tr. p. 102). While the physical therapist acknowledged there could be some overlap—such as with skills like climbing stairs or jumping—she also stated that she did not practice in the educational model and could not speak to the student's "care" under the educational model (Apr. 25, 2023 Tr. p. 103).

Based on the evidence in the hearing record, although the private OT and PT providers acknowledged that they worked within the medical model and not an educational model, and the physical therapist acknowledged that she had not seen the student's IEP, the hearing record demonstrates that the privately obtained OT and PT services appropriately identified and addressed the student's needs. As a result, the IHO erred by denying the parents' request to be reimbursed for the copayments made to obtain these services during the 2022-23 school year.

2. Speech-Language Therapy Services

The student received speech-language therapy from a private speech pathologist twice weekly for 60-minute sessions beginning in September 2022 (Apr. 27, 2023 Tr. pp. 178-79; see Parent Ex. X at pp. 1-7). On appeal, the parents assert that the IHO erred in finding that the student did not require speech-language therapy and in not awarding relief. The parents assert that the district failed to sufficiently assess the student's speech-language needs and that by denying relief, in part, due to the student's provider not conducting a speech-language assessment, the IHO shifted the burden to the parents.

Turning to the information in the hearing record regarding the student's language skills, the speech pathologist stated that at the June 2022 CSE meeting she made objections to the speech-language testing and noted her concerns regarding the student's "very significant" pragmatic language deficits (Apr. 27, 2023 Tr. p. 199). The June 2022 IEP reflects the CSE's decision to not recommend speech-language services and it was reported that at the CSE meeting the parents

shared concerns about the student's pragmatic language skills and disagreed with the results that showed the student to be functioning at an age-appropriate level (Dist. Ex. 6).

The speech pathologist stated that she had the opportunity to review the June 2022 speech-language evaluation before the CSE meeting (Apr. 27, 2023 Tr. p. 180). Regarding the choice of assessment tool used to assess the language of a child, the speech pathologist stated it was not the one she would have used, but also acknowledged that it was a valid option (Apr. 27, 2023 Tr. pp. 180-81). However, she noted that she was more concerned about the way in which the evaluator assessed the student's pragmatic language skills and noted her disagreement with the evaluator's use of the Speech and Language Development Chart, which she stated was "really just like a chart" that one might see hanging on the wall in a graduate student program or a clinician's office and that it was not a standardized assessment and that she would not have referred to that particular chart (Apr. 27, 2023 Tr. pp. 181, 184; see Parent Ex. KK at p. 3).

However, according to the June 2022 speech-language evaluation report, the findings with respect to the student's pragmatic language skills were based not only on the Speech and Language Development Chart (2nd Edition), but also parent report, evaluator observation, and informed clinical opinion (Parent Ex. GG at p. 6). Further, as discussed above, the district also had multiple sources of information about the student's communication skills and needs, other than the June 2022 speech-language evaluation the private speech pathologist took issue with, in determining that the student did not require speech-language therapy (see Parent Exs. I at pp. 12-13, 20; L; Q; GG; Dist. Exs. 1 at p. 2; 2 at p. 2; 5 at p. 3). Therefore, the evidence supports the IHO's determination that the parents are not entitled to reimbursement for privately obtained speech-language therapy services as the services provided were in excess of the provision of a FAPE to the student.²⁶

3. SEIT Services

As explained herein, overall, the hearing record contains sufficient evidence to conclude that the student required 1:1 school-based SEIT services to make progress in the classroom, and moreover, the evidence reflects that the SEIT services were provided to the student with specially designed instruction (see Apr. 25, 2023 Tr. p. 121; Apr. 27, 2023 Tr. pp. 252-53; Parent Exs. I at pp. 15-16; VV ¶¶ 7-10, 14). However, contrary to the parents' contentions, the hearing record also contains sufficient evidence to conclude that the student did not require 20 hours per week of school and home based SEIT services.

At the impartial hearing, the school-based SEIT testified that she worked with the student for eight hours per week (two hours each day Monday through Thursday) during the 2022-23 school year and primarily delivered services in the student's preschool classroom (see Apr. 25, 2023 Tr. p. 52; Parent Ex. VV ¶ 6; see also Parent Ex. S at pp. 1, 3, 6, 8-9). The school-based SEIT also testified that, on most days, she would take the student into the hallway to work 1:1 for about 30 minutes on the skills he required the most support with, such as counting, identifying and

²⁶ The parents also argue that the IHO determined an issue not before her when she opined that the speech pathologist's services went "beyond" those related to speech and language, and further assert that the IHO failed to properly weigh the speech pathologist's testimony because she found her to be "frustrating" and "arrogant" (see IHO Decision at pp. 44- 45). However, as discussed above, the IHO's ultimate determination that the student was not entitled to speech-language therapy services was supported by the totality of the evidence in the hearing record and, as a result, there is no basis to disturb that finding.

writing uppercase and lowercase letters, identifying sounds, and "corresponding sounds to letters" (Parent Ex. VV ¶ 9; see also Apr. 27, 2023 Tr. pp. 165-66). The school-based SEIT explained that in the classroom, whether working independently or receiving whole group instruction, she sat next to the student to provide support by breaking down tasks for him into simpler step-by-step instructions, repeating the teacher's instructions if necessary, providing modifications such as chunking of material, and providing verbal timed warnings and visual schedules to help keep him on task and give him a clear expectations, which helped with transitions (see Parent Ex. VV ¶ 8). Also, to address the student's challenges with writing, she wrote letters and numbers in yellow highlighter and had the student use crayon or pencil to trace the writing and provided hand-over-hand assistance and modeling (id.). In addition, the school-based SEIT testified that she worked with the student on academics, completing tasks and assignments, transitions, socialization, and the "behavioral aspect" (Apr. 25, 2023 Tr. pp. 147-48).

The school-based SEIT also testified that she spoke daily with the student's teachers and discussed the student's progress and behavior and informed the teachers of the independent work done with the student (see Parent Ex. VV ¶ 11). The school-based SEIT explained that she advised the teachers on the supports that the student needed to make appropriate progress, how to address his learning needs, and ensured that the student's supports—such as timed warnings and the breaking down of tasks—were kept consistent throughout his day (see id.).

At the impartial hearing, the agency director testified that, based on the March 2022 psychological evaluation and her observations of the student, she believed he required more than 10 hours per week of SEIT services and had initially recommended "more than [10] hours" (Apr. 27, 2023 Tr. pp. 275-76). The agency director explained that in addition to the school-based SEIT services, an afterschool SEIT worked with the student on his pre-academic skills, counting, one-to-one correspondence, writing and identifying letters, and sound correspondence (see Apr. 27, 2023 Tr. pp. 287-88). The agency director characterized the afterschool SEIT services as "filling in the gaps" or as "remediation" (Apr. 27, 2023 Tr. p. 288). She further explained that she tried to add more school-based SEIT sessions, but could not do so due to a shortage of special education teachers (see Apr. 27, 2023 Tr. p. 289). The agency director noted that she had very frequent contact with the SEIT providers (see Apr. 27, 2023 Tr. p. 253).

Based on a review of the hearing record, it is unclear whether any of the student's teachers or the other SEIT providers were aware that the student was actually receiving afterschool SEIT services (see generally Oct. 12, 2022 Tr. pp. 1-21; Jan. 23, 2023 Tr. pp. 1-8; Mar. 7, 2023 Tr. pp. 1-22; Apr. 25, 2023 Tr. pp. 1-155; Apr. 27, 2023 Tr. pp. 156-298; May 4, 2023 Tr. pp. 1-68; Parent Exs. A-O; Q-T; V; X-Z; AA-EE; GG-LL; UU-XX; Dist. Exs. 1-7; IHO Exs. I-IX). For example, the student's preschool classroom teacher during the 2022-23 school year testified that, at the beginning of the year, the student only had one school-based SEIT who provided services for eight hours per week, and then a second school-based SEIT began providing services for an additional three hours per week (i.e., a total of 11 hours per week of school-based SEIT) during the second half of the school year (see Apr. 27, 2023 Tr. pp. 169, 174). The school-based SEIT testified that the student received all 11 hours per week as school-based SEIT services, and she did not state that the student received SEIT support from anyone else (see Apr. 25, 2023 Tr. p. 52; see generally Parent Ex. VV).

The evidence reflects that, during the first half of the 2022-23 school year, the student made progress, as reflected in the January 2023 SEIT progress report (see generally Parent Ex. Q).

Nevertheless, the progress report included a recommendation for continued SEIT services, but at an increased level of 20 hours per week (id. at p. 6). The January 2023 SEIT progress report indicated that the student would benefit from 20 hours of SEIT services throughout the week, as he required "a lot of repetition and 1:1 assistance to learn age-appropriate concepts throughout each domain" (id.). The January 2023 SEIT progress report also showed that the SEITs worked with the student on developing persistence and the ability to maintain focus on tasks, problem-solving skills, emotional skills, self-control and self-help skills, stamina during writing tasks, and developing hand strength and dexterity for writing, drawing and fine motor activities (id. at pp. 2-4). According to the school-based SEIT, during the 2022-2023 school year the student "made substantial progress," and she stated that the student's ability to transition had improved significantly and most notably, when transitioning from a preferred activity to a non-preferred activity (see Parent Ex. VV ¶ 17). The school-based SEIT further identified the student's progress in the areas of letter identification, number identification, counting objects using 1:1 correspondence, behaviors towards his classmates, and in his ability to engage in cooperative play with his peers (id.).

The student's preschool classroom teacher testified that, with the support of his SEIT, the student had made significant progress since the beginning of the school year (see Parent Ex. WW ¶ 13). She explained that his progress included attempting to write more letters, continuing to work on writing his name consistently, improving letter identification from 4 letters to 18 letters, identifying the numbers 1 through 10 consistently with accuracy, counting objects using 1:1 correspondence with "much better" accuracy, recognizing both upper and lower case letters of his name, and improving his ability to transition from preferred activities (id.).

At the impartial hearing, the agency director stated that the student had made "pretty significant" progress most recently, but that overall, "absolutely he[d] made progress," and noted that progress was seen in letter recognition, attention, social skills, emotional regulation, fine motor skills, and reduced resistance to writing-drawing skills (Apr. 27, 2023 Tr. pp. 261-63).

When asked why the January 2023 SEIT progress report included a recommendation for more SEIT services, greater than what the student was "receiving now" in light of the progress the student had made, the agency director explained that the January 2023 SEIT progress report reflected the student's progress from September 2022 to January 2023, and the student's progress she had just described at the impartial hearing occurred "more towards the spring" (Apr. 27, 2023 Tr. pp. 264-65). More specifically, the agency director testified that the student—who, according to the agency director, was then-currently receiving 15 hours per week of SEIT services—required additional SEIT services because the student still had some delays and areas that needed intervention and that it was not possible to provide all that support and intervention and remediation within the 10 hours of SEIT services already allotted per week (see Apr. 27, 2023 Tr. p. 265). She continued by noting that the 10 hours per week was not sufficient time during the remainder of the current school year to prepare the student for kindergarten in the fall and that was why the agency was providing more SEIT services (see Apr. 27, 2023 Tr. pp. 265, 274).

While the hearing record shows that a recommendation had been made for an increase in SEIT services to 20 hours per week, the evidence in the hearing record also shows that the student made progress with the 11 hours per week of school-based SEIT services he consistently received during the second half of the school year and therefore, did not require 20 hours per week of SEIT services. For example, while the school-based SEIT reiterated in her testimony that she believed

that the student required 1:1 support from a special educator within a small general education classroom for at least 20 hours per week to meet his individual needs and make appropriate progress, she also testified, somewhat to the contrary, that the student's needs were being appropriately addressed by the SEIT services he received during the 2022-23 school year—which, according to the January 2023 SEIT progress report, consisted of 10 hours per week of SEIT services (see Parent Exs. Q at p. 1; VV ¶ 18).

Additionally, the evidence in the hearing record shows that while the student benefitted from school-based SEIT support in the classroom, the student was able to function in the classroom during the times the SEIT was not present. For example, the school-based SEIT testified that, based on information relayed to her by the student's classroom teachers, when a SEIT was not in the classroom, the student got very distracted and did not know what to do next and that it was very difficult for him to work independently, as he needed someone to sit with him and provide significant 1:1 support and modifications when necessary (see Parent Ex. VV ¶ 14; see also Apr. 25, 2023 Tr. pp. 146-47). The classroom teacher confirmed that the student had the support of a school-based SEIT for less than half the time he was in the preschool program school and that while he was able to function throughout the day, he needed a SEIT to help him complete educational or academic tasks throughout the day (see Apr. 27, 2023 Tr. p. 171). She continued to explain that without a SEIT in the classroom, the teaching assistant would work with the student 1:1, although not exclusively, as the teaching assistant was there to help every child in the classroom (see Apr. 27, 2023 Tr. pp. 171-73). In addition, the agency director testified that the preschool program could address the student's needs when a SEIT was not present in the classroom because "it's two teachers with seven children" and therefore, there were plenty of opportunities to physically be available to support his needs and that the classroom teachers were "very familiar" with the strategies that were in place to support the student (Apr. 27, 2023 Tr. p. 260).

In this instance, the fee-for-service model selected by the parents leaves itself vulnerable to the argument that segregable services exceed the level that the student required to receive a FAPE (see *L.K.*, 2016 WL 899321, at *7). Accordingly, in light of the foregoing, showing that the afterschool SEIT services, provided in addition to the school-based SEIT services were segregable from the student's school-based programming, and as the hearing record fails to contain sufficient evidence demonstrating that the student required additional SEIT services beyond those awarded by the IHO, there is no reason to disturb the IHO's finding.

C. PT Pendency Services

As part of the argument that the IHO improperly denied the parents' request to be reimbursed for the costs of their copayments made for privately obtain OT and PT services, the parents also argue that the IHO failed to address the district's failure to implement PT services pursuant to pendency. The parents contend that, pursuant to pendency, the student was entitled to receive three 30-minute sessions per week of individual PT services.

Although the parents assert a failure to implement pendency on appeal, the parents also concede that the parties entered into an agreement as to the student's educational programming to be provided by the district during this proceeding (see Parent Ex. C), and that the district eventually took steps to implement the student's pendency program (Req. for Rev. ¶¶ 19-21).

Pursuant to the parties' agreement, the student's program during the pendency of this proceeding consisted of 10 hours per week of SEIT services provided by Monica Catani Dream

Team, Inc., three 30-minute sessions per week of OT, and three 30-minute sessions per week of PT, with all services to be delivered on a 10-month basis (Parent Ex. C at p. 1). According to the parent, she received an email from the district in April 2023 offering related services authorizations for OT and PT (May 4, 2023 Tr. pp. 27-28). However, earlier in the hearing, at the March 7, 2023 hearing date, counsel for the parent indicated that the parents "haven't found someone willing to accept the [district's] RSA . . . so they're asking for reimbursement of their co-pay for the private physical therapy that they provide" (March 7, 2023 Tr. p. 10). There is little information in the hearing record otherwise regarding implementation of OT or PT services pursuant to pendency during the course of this proceeding.

Nevertheless, the parents do not appear to seek any relief associated with the district's alleged failure to implement PT services under pendency, but instead, appear to assert this as an alternative argument to receive an award of reimbursement for the funds expended to privately obtain the student's PT services, which the IHO denied (Req. for Rev. ¶¶ 39, 46). This argument is consistent with how the parent's asserted the student's right to pendency during the proceeding (see March 7, 2023 Tr. p. 10; IHO Ex. IX at pp. 7-8). Accordingly, having found that the IHO erred in failing to award reimbursement for the cost to the parents of the privately obtained OT and PT services, this issue need not be further addressed.

Nevertheless, it is worth noting that the Second Circuit has held that where a district fails to implement a student's pendency placement, students should receive the pendency services to which they were entitled as a compensatory remedy (Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 456 [2d Cir. 2015] [directing full reimbursement for unimplemented pendency services awarded because less than complete reimbursement for missed pendency services "would undermine the stay-put provision by giving the agency an incentive to ignore the stay-put obligation"]; see Student X, 2008 WL 4890440, at *25, *26 [ordering services that the district failed to implement under pendency awarded as compensatory education services where district "disregarded the 'automatic injunction' and 'absolute rule in favor of the status quo' mandated by the [IDEA] and wrongfully terminated [the student's] at-home services"] [internal citations omitted]).

VII. Conclusion

Having determined that the IHO correctly declined to award the parents' reimbursement for the costs of SEIT services delivered outside of the school setting and speech-language therapy services due to those services not being necessary for the student to receive an educational benefit, and having found that the IHO erred in declining to award reimbursement for the costs of OT and PT services, the necessary inquiry is at an end.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision, dated July 28, 2023, is modified by reversing that portion which denied the parents' request to be reimbursed for the copayments made to privately obtain the student's OT and PT services.

Dated: Albany, New York
October 27, 2023

CAROL H. HAUGE
STATE REVIEW OFFICER