



The University of the State of New York

The State Education Department

State Review Officer

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No. 24-316

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

Appearances:

Liz Vladeck, General Counsel, attorneys for respondent, by Thomas W. MacLeod, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from a decision of an impartial hearing officer (IHO) which denied her request that respondent (the district) fund the costs of her son's private services delivered by EdZone, LLC (EdZone) for the 2023-24 school year. The appeal must be sustained in part.

II. Overview—Administrative Procedures

When a student who resides in New York is eligible for special education services and attends a nonpublic school, Article 73 of the New York State Education Law allows for the creation of an individualized education services program (IESP) under the State's so-called "dual enrollment" statute (see Educ. Law § 3602-c). The task of creating an IESP is assigned to the same committee that designs educational programming for students with disabilities under the IDEA (20 U.S.C. §§ 1400-1482), namely a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, State law provides that "[r]eview of the recommendation of the committee on special education may be obtained by the parent or person in parental relation of the pupil pursuant to the provisions of [Education Law § 4404]," which effectuates the due process provisions called for by the IDEA (Educ. Law § 3602-

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

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

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

III. Facts and Procedural History

The parties' familiarity with this matter is presumed and, therefore, the facts and procedural history of the case and the IHO's decision will not be recited in detail. The CSE convened on May 18, 2022, determined that the student was eligible for special education as a student with a speech or language impairment, and recommended that the student receive five periods per week of group special education teacher support services (SETSS) and three 30-minute sessions per week of

individual speech-language therapy to be implemented beginning May 31, 2022 (Parent Ex. B at pp. 1, 8).¹ During the 2022-23 school year, the student was parentally placed in a nonpublic school (Dist. Ex. 1 at p. 1). The CSE reconvened on December 19, 2022 and recommended that in addition to the five periods per week of group SETSS and two 30-minute sessions per week of individual speech-language therapy, the student receive two 30-minute sessions per week of individual occupational therapy (OT) (*id.* at pp. 1, 10).

Via a letter dated May 2, 2023, the parent notified the district of her intent to place the student in a nonpublic school for the 2023-24 school year and requested that the district provide the student with special education services under the State's dual enrollment statute (Parent Ex. E).

On August 10, 2023, the parent electronically signed a "Payment Agreement" with EdZone to provide services to the student for the 2023-24 school year "in accordance with the last agreed upon [individualized education program] IEP/IESP" on a 10-month school year basis (Parent Ex. C at pp. 2-3).² The agreement included an attached addendum reflecting the rates charged by EdZone (i.e., \$198.00 per 60-minute individual session; \$148.00 per 60-minute group session) for special education and related services, but neither the agreement nor the addendum listed the specific services to be provided to the student (*id.*).

In a letter dated August 23, 2023, the parent, through her advocate, notified the district that it had failed to assign the student any providers to deliver the students' mandated services for the 2023-24 school year (Parent Ex. D). Additionally, the parent requested that the district "fulfill the mandate" or she would be "compelled to unilaterally obtain the mandated services through a private agency at an enhanced market rate" (*id.*).

The student attended a nonpublic school during the 2023-24 school year (fourth grade) (Dist. Ex. 2 at p. 1). On March 4, 2024, the CSE convened for the student's annual review, continued to find him eligible for special education, and developed an IESP to be implemented beginning March 18, 2024 (*id.*).

A. Due Process Complaint Notice

In a due process complaint notice dated September 8, 2023, the parent alleged that the district denied the student a free appropriate public education (FAPE) for the 2023-24 school year (*see* Parent Ex. A). Specifically, the parent alleged that the "last program the [district] developed for the [s]tudent [wa]s an [IESP] [dated] 05/18/2022" (*id.* at p. 1). The parent requested pendency pursuant to the May 2022 IESP and requested funding for privately-obtained SETSS and speech-language therapy services provided by a private agency at enhanced rates (*id.* at pp. 2-3). The parent also requested an award of compensatory education services to be provide to the student as a bank to make up for missed services (*id.* at p. 3).

¹ The student's eligibility for special education as a student with a speech or language impairment is not in dispute (*see* 34 CFR 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

² EdZone is a limited liability company and has not been approved by the Commissioner of Education as a school or company with which districts may contract to instruct students with disabilities (*see* NYCRR 200.1[d], 200.7).

B. Events Post-Dating the Due Process Complaint

As noted above, the hearing record reflects that on March 4, 2024, the CSE convened to create an IESP for the student (Dist. Ex. 2 at pp. 1, 8). Pursuant to that IESP, the CSE recommended five periods per week of group SETSS; two 30-minute sessions per week of individual speech-language therapy, and two 30-minute sessions per week of individual OT (id.).

C. Impartial Hearing Officer Decision

A pre-hearing conference was held on October 16, 2023 (Tr. pp. 1-8). Further hearings were held on November 6, 2023, December 1, 2023, January 16, 2024, and February 13, 2024 (Tr. pp. 9-78).³ A status conference was held on March 18, 2024 (Tr. pp. 79-86). The impartial hearing was held on May 2, 2024 and concluded on May 28, 2024 after two days of proceedings (Tr. pp. 87-178). In a decision dated June 19, 2024, the IHO found that the parent's claim was ultimately an implementation claim for the 2023-24 school year (IHO Decision at p. 14). The IHO held that the district established that it developed an appropriate IESP for the student for the 2023-24 school year (id. at p. 13). The IHO noted that, at the beginning of the hearing, the parent was effectively put on notice that the May 2022 IESP was not the operative IESP for the 2023-24 school year (id.). The IHO held that the December 19, 2022 and March 4, 2024 IESPs were the operative IESPs for the 2023-24 school year and that, as of May 2, 2024, the parent was made aware that the December 2022 IESP and the March 2024 IESP were the operative IESPs for the 2023-24 school year, but that the parent failed to amend her due process complaint notice to reflect them as being the operative IESPs (id.). The IHO held that the parent could not enforce her implementation claim without having amended her due process complaint notice to reflect that the December 2022 and March 2024 IESPs were the operative IESPs for the 2023-24 school year (id. at p. 14). The IHO dismissed the parent's due process complaint notice with prejudice (id.).

IV. Appeal for State-Level Review

The parent appeals, alleging that the IHO erred in dismissing her due process complaint notice with prejudice. The parent further argues that the IHO erred in holding that the district met its burden of proof under the Burlington-Carter analysis that it had provided the student with a FAPE for the 2023-24 school year. The parent asserts that the IHO erred in holding that the parent could not use the May 2022 IESP, which the parent argues is the last-agreed upon IESP for the student. The parent argues that the IHO erred by denying all relief to the student. The parent contends that the district failed to implement the services and the parent was constrained to find services on her own. The parent asserts that her unilateral actions were appropriate based on the district's failure to "send the necessary service providers for the [s]tudent" and that the parent "was not required to strictly adhere to the letter of the later IESP in order for the [s]tudent to receive

³ At the pendency hearing on November 6, 2023 the IHO admitted into evidence an email sent by the district, reporting that Prime Advocacy had withdrawn hundreds of due process complaint notices "en-masse" over a period of a few days (IHO Decision at p. 4; IHO Ex. I at p. 1). The district lodged an objection to the withdrawal, expressing concern over the absence of parental acknowledgement of the withdrawal (IHO Decision at p. 4). On January 16, 2024, the parent appeared pursuant to a subpoena and advised that she wished to continue with the proceedings and would be represented by Prime Advocacy (id.). The matter convened for a third pendency hearing on February 13, 2024, but the parent's representative reported the parties had executed a pendency agreement before the pendency hearing commenced (id. at p. 5).

services." The parent contends that the record is clear that the student received the SETSS at the frequency recommended in the IESPs during the periods those IESPs were in effect.⁴

The district asserts that the IHO's dismissal with prejudice should be upheld because the IHO advised the parent of the need to amend her due process complaint notice to reflect the operative IESPs for the 2023-24 school year. The district alleges that the parent's failure to seek to amend her due process complaint notice after having been advised by the IHO to do so represented sufficiently egregious conduct warranting an order dismissing the due process complaint with prejudice.

V. Applicable Standards

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

However, under State law, parents of a student with a disability who have privately enrolled their child in a nonpublic school may seek to obtain educational "services" for their child by filing a request for such services in the public school district of location where the nonpublic school is located on or before the first day of June preceding the school year for which the request for services is made (Educ. Law § 3602-c[2]).⁵ "Boards of education of all school districts of the state shall furnish services to students who are residents of this state and who attend nonpublic schools located in such school districts, upon the written request of the parent" (Educ. Law § 3602-c[2][a]). In such circumstances, the district of location's CSE must review the request for services and "develop an [IEP] for the student based on the student's individual needs in the same manner and with the same contents as an [IEP]" (Educ. Law § 3602-c[2][b][1]). The CSE must "assure that special education programs and services are made available to students with disabilities attending nonpublic schools located within the school district on an equitable basis, as compared to special education programs and services provided to other students with disabilities attending public or

⁴ The parent is correct in her assertion that the May 18, 2022 IESP has the same recommended SETSS durations and frequencies as the December 19, 2022 IESP and the March 4, 2024 IESP (compare Parent Ex. B at p. 8, with Dist. Ex. 1 at p. 10, with Dist. Ex. 2 at p. 8). However, as will be addressed in further detail below, in her appeal the parent fails to address the speech-language and OT recommendations contained in the later IESPs (id.).

⁵ State law provides that "services" includes "education for students with disabilities," which means "special educational programs designed to serve persons who meet the definition of children with disabilities set forth in [Education Law § 4401(1)]" (Educ. Law § 3602-c[1][a], [d]).

nonpublic schools located within the school district (*id.*).⁶ Thus, under State law an eligible New York State resident student may be voluntarily enrolled by a parent in a nonpublic school, but at the same time the student is also enrolled in the public school district, that is dually enrolled, for the purpose of receiving special education programming under Education Law § 3602-c, dual enrollment services for which a public school district may be held accountable through an impartial hearing.

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

VI. Discussion

A. 2023-24 School Year

The parent appeals from the IHO's dismissal of the parent's due process complaint notice because it alleged a failure to implement the May 2022 IESP without referencing the later developed December 2022 and March 2024 IESPs.

In her due process complaint notice, the parent alleged that the district "did not supply providers for the services it recommended for the [s]tudent and failed to inform the [p]arent how the services would be implemented" (Parent Ex. A at p. 2). Although the parent's due process complaint notice stated that the "last agreed upon" IESP was dated May 18, 2022," a plain reading of the parent's due process complaint notice establishes that the parent sufficiently pled an implementation claim against the district for the 2023-24 school year regardless of what IESP was in effect. (*id.*). Additionally, the EdZone educational supervisor (educational supervisor) testified that EdZone created the student's program based off of the May 2022 IESP as they did not yet have the subsequent IESPs (Tr. pp. 116-18).⁷ The district argues that the IHO properly dismissed the parent's due process complaint notice "because it failed to raise any allegations with respect to the

⁶ State guidance explains that providing services on an "equitable basis" means that "special education services are provided to parentally placed nonpublic school students with disabilities in the same manner as compared to other students with disabilities attending public or nonpublic schools located within the school district" ("Chapter 378 of the Laws of 2007—Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the Individuals with Disabilities Education Act (IDEA) 2004 and New York State (NYS) Education Law Section 3602-c," Attachment 1 (Questions and Answers), VESID Mem. [Sept. 2007], available at <https://www.nysed.gov/special-education/guidance-parentally-placed-nonpublic-elementary-and-secondary-school-students>). The guidance document further provides that "parentally placed nonpublic students must be provided services based on need and the same range of services provided by the district of location to its public school students must be made available to nonpublic students, taking into account the student's placement in the nonpublic school program" (*id.*). The guidance has recently been reorganized on the State's web site and the paginated pdf versions of the documents previously available do not currently appear there, having been updated with web based versions.

⁷ The educational supervisor testified that "on our end, nothing, you know, really needed to be updated" upon EdZone's receipt of the December 2022 and March 2024 IESPs because EdZone was "only providing SETSS" (Tr. pp. 117-18; Parent Ex. F ¶¶ 7, 14).

December 2022 IESP, which was the operative special education program at the start" of the 2023-24 school year at issue in this matter (Answer ¶ 12).

Although it would have been preferable for the parent to have amended her due process complaint notice to include the December 2022 and March 2024 IESPs, the parent's current due process complaint notice asserts that the district failed to provide the student's recommended SETSS and speech-language services for the 2023-24 school year (see Parent Ex. A). The district failed to rebut the parent's allegation, focusing instead on the parent's mistaken reliance on the May 2022 IESP.⁸ The IHO held that through the December 2022 IESP and the March 2024 IESP the district "develop[ed] an appropriate program for the student" and that the "[d]istrict ha[d] proven its Prong I [burden]" (Tr. p. 104). However, the parent's representative responded to these statements by the IHO asserting that "[t]he parents did not receive any services from the [district]" and that although the district "did develop a new IESP . . . the services were not provided from the [district]" and "[t]hat's why [the parent] fil[ed] a case" (Tr. p. 105). The educational supervisor testified that EdZone "provide[d] [the student] with five hours of SETSS" per week, and that "the mandate is the same" for SETSS throughout all of the IESPs (Tr. p. 161).

In her decision, having held that the district "established it developed an appropriate equitable services program for [the] [s]tudent," the IHO dismissed the parent's due process complaint notice on the basis that the May 2022 IESP was not the student's operative IESP (IHO Decision at p. 13). However, this misses the mark as the primary allegation in the due process complaint notice was that the district did not implement special education services for the student. As set forth above, the district failed to provide evidence that it implemented the recommendations in any of the student's IESPs during the 2023-24 school year (see Dist. Exs. 1-3). The parent clearly alleged that the district failed to implement the student's services during the 2023-24 school year (Parent Ex. A at pp. 1-2). Therefore, the IHO's dismissal of the parent's due process of complaint notice because of the parent's reliance on an outdated IESP was in error. As I am reversing the IHO's finding that the district met its burden of proving that it offered the student a FAPE for the 2023-24 school year, a review of the appropriateness of the services provided by EdZone is warranted.

B. Unilaterally-Obtained Services

In this matter, the student has been parentally placed in a nonpublic school and the parent does not seek tuition reimbursement from the district for the cost of the parental placement. Instead, the parent alleged that the district failed to implement the student's mandated public special education services under the State's dual enrollment statute for the 2023-24 school year and, as a self-help remedy, she unilaterally obtained private services from EdZone for the student without the consent of the school district officials, and then commenced due process to obtain remuneration for the costs thereof.

Generally, districts that fail to comply with their statutory mandates to provide special education can be made to pay for special education services privately obtained for which a parent

⁸ The district did not present a case, relying instead on its documents which were the December 2022 IESP, the March 2024 IESP, and the October 2023 American Institutes for Research report (AIR report) (Tr. pp. 93, 106; Dist. Exs. 1; 2; 3).

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

The parent's request for district funding of privately-obtained services must be assessed under this framework. Thus, a board of education may be required to reimburse parents for their expenditures for private educational services they obtained for a student if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Carter, 510 U.S. 7; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 252 [2d Cir. 2009]).⁹ In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

Turning to a review of the appropriateness of the unilaterally-obtained services, the federal standard for adjudicating these types of disputes is instructive. A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129). Citing the Rowley standard, the Supreme Court has explained that "when a public school system has defaulted on its obligations under the Act, a private school placement is 'proper under the Act' if the education provided by the private school is 'reasonably calculated to enable the child to receive educational benefits'" (Carter, 510 U.S. at 11; see Rowley, 458 U.S. at 203-04; Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see also 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 parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (id. at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was

⁹ State law provides that the parent has the obligation to establish that a unilateral placement is appropriate, which in this case is the special education that the parent obtained from EdZone (Educ. Law § 4404[1][c]).

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., 459 F.3d at 364; 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). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

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

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

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

1. The Student's Needs

Although not in dispute, a description of the student's needs provides context for the issue to be resolved on appeal, namely whether the SETSS delivered by EdZone were appropriate.

The December 2022 IESP described the student as a sweet, happy, cooperative, and respectful child whose focusing skills and attention span were poor but improved with visual cues (Dist. Ex. 1 at pp. 1, 2). Academically, the IESP indicated that the student was "behind" in reading and had difficulty reading independently, causing him to fall behind his peers (id. at p. 2). He also struggled to write legibly as writing demands increased, but was "strong" in math (id.).

According to the December 2022 IESP the student was evaluated using the Beery Visual Motor Integration Test (VMI) and his subtest scores fell within the average range (visual perception), the low range (visual motor integration), and below average (motor coordination),

indicating "insufficiency" in areas of visual motor and motor coordination skills (Dist. Ex. 1 at pp. 1-2). The IESP indicated that the student exhibited delays in fine motor skills and struggled with self-help skills, far point copying, organizing materials, using scissors, and manipulating small buttons (id. at p. 2). The student also exhibited weakness in sensory processing skills, self-management, self-awareness, work behaviors, executive functioning, pencil control, and visual motor skills, which contributed to his difficulty with self-regulation, responding to sensory input, and difficulties with writing and copying (id.). Based on clinical observation using the "3rd grade screener," the student's handwriting skills were significantly delayed (id.).

According to a July 6, 2022 speech and language report reflected in the December 2022 IESP, the student exhibited delays in receptive and expressive language, word retrieval difficulties, articulation errors, and decoding difficulties (Dist. Ex. 1 at p. 2). The student's test scores revealed average receptive and expressive language skills, in addition to oral motor weakness, and a mild to moderate speech disorder (id.). The student exhibited speech sound substitutions, an interdental lisp on the /s/ phoneme, and a hoarse voice quality (id.). The student's speech intelligibility was reduced with increasing length and complexity of utterances (id.).

To address the student's learning challenges, the December 2022 CSE identified strategies to support his classroom management needs including repetition, verbal modeling and paraphrasing, limited auditory and visual distractions, modified workload and homework, preferential seating in close proximity to his teacher, simplified directions, counting before responding, verbalizing a plan of approach before starting his work, daily reading practice, frequent comprehension checks, a writing rubric, editing checklist, and shortened writing assignments (Dist. Ex. 1 at pp. 3-4).

The student's December 2022 IESP featured 16 measurable annual goals to address his needs in the areas of fine motor, gross motor, attention, reading, writing, speech-language, and social/emotional skills (Dist. Ex. 1 at pp. 5-9).

Specifically, as relevant to this appeal, to address his fine motor difficulties, the IESP included an annual goal to improve the student's eye-hand coordination and dexterity needed to manipulate objects for writing, eating, using scissors, and manipulating fasteners (Dist. Ex. 1 at p. 5). To address his needs in writing, an annual goal was developed for the student to improve using a "dynamic tripod grasp" to copy text from near or far point, and using proper letter formation, sizing, and alignment (id.). In addition, to address his needs in writing the CSE developed an annual goal for the student to improve writing and editing a three-paragraph response to literature comprising topic sentences, supporting details, and conclusions, and using a "dynamic tripod grasp" to copy sentences legibly (id. at pp. 8, 9). To address his ability to attend to tasks, an annual goal for the student was to improve his self-regulatory skills to focus for 20 minutes given redirection and staying seated during instruction despite distractions (id. at pp. 5, 7).

To address his articulation needs, the IESP included an annual goal for the student to use correct articulatory placement for production of specific sounds, perform tongue exercises, and decrease his "vocal abusive behaviors" (Dist. Ex. 1 at pp. 6-7). To address his needs in language, an annual goal was included to improve his ability to categorize and describe objects (id.). To address his reading ability, the student was expected to work on reading a passage at his instructional level with appropriate inflection and fluency (id. at p. 8). Finally, to address his social

skill needs, the student was to improve his ability to follow two to three step directions given fading prompts (id. at p. 9).

To address these needs, the December 2022 CSE recommended that the student receive five periods per week of SETSS in a group, two 30-minute sessions per week of individual speech-language therapy, and two 30-minute sessions per week of individual OT (id. at p. 10).

2. SETSS From EdZone

In a February 28, 2024 EdZone progress report, the SETSS teacher described the student as interested in learning and a "hard worker," but indicated that he struggled to function in the classroom and required one to one support to learn and make progress (Parent Ex. G at p. 1). Although the December 2022 IESP recommended that the student receive SETSS in a group, the student received SETSS individually, as the provider determined that, due to his distractibility, SETSS provided in a group would be unproductive (Tr. pp. 127-28, 130-32).

According to the progress report, the student was "pulled out of the classroom" to receive five hours per week of individual SETSS (Parent Ex. G at p. 1). The student struggled to stay focused during sessions, and needed "constant" prompting to stay on task, follow directions, and keep up with classroom demands (id.). The student also needed extra time, repetition, and reinforcement to understand and retain instruction (id.). Review of the progress report shows that his SETSS provider used re-teaching, modeling, mnemonics/songs, underlining key words, place value charts, visual aids, and repetition to help him remember and apply concepts (id. at pp. 1-3). The progress report recommended that the student continue to receive five individual SETSS sessions per week to understand, retain and apply new concepts that he had learned (id. at p. 3).

In the area of social development, the progress report described the student as "a respectful student who generally follows rules" (Parent Ex. G at p. 3). According to the progress report, the student became nervous during tests but benefitted from encouragement and prompting, and became frustrated when he made minor mistakes (id.). The student interacted and communicated well with his peers, and was well liked, but missed parts of conversations due to his tendency to lose focus easily (id.). The student was able to ask for help from teachers when needed (id.). The SETSS provider developed four goals for the student to address his needs in the areas of reading comprehension, math facts, word problems, and attention (Parent Ex. G at pp. 3-4). Additionally, according to session notes dated from November 2023 to March 2024, the student was working with his SETSS provider on decoding, reading comprehension, writing, punctuation, math facts, and math word problems skills (see Parent Ex. H).¹⁰

Regarding reading, the student was reportedly functioning at a third grade level and at a Fountas & Pinnell level M (Parent Ex. G at p. 1). The student struggled to answer comprehension questions, predict, infer, make connections, and identify the main idea (id. at pp. 1-2). To address his difficulty with decoding, accuracy, and fluency, his SETSS teacher used prompts, reminders, and modeling necessary for him to apply basic rules during reading (id.). Additionally, the SETSS

¹⁰ Each of the goals contained a "[r]ating" between numbers three and eight, but the session notes did not include a key to explain the ratings (see Parent Ex. H).

provider used guided reading instruction, and "reading together" with the student to increase his accuracy, fluency, and comprehension (id. at p. 2).

A review of session notes shows that in fall 2023, the student worked on correctly decoding and answering comprehension questions by highlighting unfamiliar words that did not "follow a rule" in grade level text (Parent Ex. H at p. 1). Additionally, the student worked on independently choosing the most efficient strategy such as picture clues and "flipping vowel sounds" to decode unfamiliar words (id.). To further address decoding skills, the student worked on decoding consonant-vowel-consonant (CVC) words, using strategies such as "tapping out the sounds" with his fingers and "placing a counter on a board" for each sound he heard, as well as correctly answering comprehension questions (id.). The SETSS provider taught sentence structure and phonemic awareness to the student, and reported that he needed repetition to retain information (Tr. p. 133; Parent Ex. H at p. 1).

In December 2023 and January 2024, the student independently read 15 out of 35 sight words, and more when presented in a passage (Parent Ex. H at p. 2). He continued to work toward a goal to independently read each word in a passage aloud, including CVC and grade level sight words, and correctly answer comprehension questions given an unfamiliar instructional-level decodable passage (id.). The SETSS provider continued to work with the student on decoding and comprehension using highlighting and review of unfamiliar words, review of grade level sight words, story diagramming, and story elements (id. at p. 4). The SETSS provider worked with the student to read irregular words on a "decodable board" (id.).

At the time of the mid-January 2024 session note, when reading text at his instructional level, the student was struggling to decode consonant-consonant-vowel-consonant (CCVC) words and his comprehension was "lacking greatly" (Parent Ex. H at p. 4). At that time, the student was able to answer five out of 10 comprehension questions and demonstrated the ability to look back at the text to find the answers (id.). By mid-February 2024, the student was demonstrating the ability to answer 60 percent of the comprehension questions he was presented after reading grade level text (id. at p. 5). By the end of March 2024, he was able to answer 70 percent of the questions he was presented (id. at p. 6).

In the area of writing, the student exhibited significant delays; struggling with appropriate letter formation, spacing, indentation, grammar, spelling, and capitalization, which often made his writing illegible and incomprehensible (Parent Ex. G at p. 2). The student had difficulty formulating ideas to write about, and struggled to develop topics and commit his thoughts to paper (Tr. p. 133; Parent Ex. G at p. 2). The student's SETSS provider addressed the student's needs related to the writing process by helping the student create topic sentences and story elements, and develop and express ideas in written format (see generally Parent Exs. G; H). To address the student's needs in writing mechanics, the SETSS provider used goals related to punctuation, hard laminated paper to guide the student's writing on the line, and reminders for indentation, capitalization, spacing, and spelling (id.). The student required repetition of directions, "constant" redirection, and support for him to engage in and produce written work (Parent Ex. G at p. 2). The student's SETSS provider facilitated his writing instruction by helping him develop ideas and express his ideas in written format (id.).

The session notes indicated that in fall 2023 the SETSS provider used visual aids to instruct the student to independently end sentences with the correct punctuation (Parent Ex. H at p. 1). The

student struggled and used incorrect grammar when writing five-sentences about a grade level passage (id.). To address his needs in the area of writing, the student worked on independently ending sentences with proper punctuation (id.). According to the session notes, the student had difficulty and needed a lot of support to write an appropriately structured sentence for a book report, and needed verbal prompts to use punctuation correctly in his written work (id.).

By January 2024, the student was able to independently use appropriate punctuation in four out of six sentences when writing, with minimal cues (Parent Ex. H at p. 4). The SETSS provider used graphic organizers and verbal rehearsal to support the student's ability to write a fiction story that included all story elements (id.). By mid-February 2024, the student was still struggling to use punctuation correctly, and his handwriting was still illegible (id. at p. 5). By mid-March 2024, the student was still able to independently use correct punctuation in only four out of six sentences (id. at p. 6). Review of the progress report and the session notes does not show that during writing and written language instruction the SETSS provider addressed the student's identified fine motor, visual perceptual, motor coordination, or executive functioning skills; his ability to use a "dynamic tripod grasp" or copy text from near and far point; or to use proper letter formation, sizing, and alignment (compare Dist. Ex. 1 at pp. 1-3, with Parent Exs. G; H).

According to the progress report—and contrary to his December 2022 IESP which noted the student was "strong in math"—the student exhibited "significant" delays in his math skills (compare Parent Ex. G at p. 2, with Dist. Ex. 1 at pp. 2, 4). The student needed to use manipulatives for addition and subtraction, and used his fingers or guessed his multiplication facts (Parent Ex. G at p. 2). The SETSS provider reported that the student was unable to multiply or divide money and decimals, and had difficulty understanding multiplication word problems (id.). To address these difficulties, the SETSS provider used visual aids and help with "mapping out the problem," to determine the operations needed and correctly solve the problem (id.). Additionally, the student benefitted from the visual aids, modeling, auditory learning, mnemonics, and songs his SETSS provider used to help him retain information, and place value charts (id. at pp. 2, 3). The SETSS provider also worked with the student on underlining key words to determine operations when solving word problems, and when prompted, the student successfully solved the word problems (id. at p. 2). The student was also working on independently using strategies such as pictures, number lines, and inverse operations to accurately solve word problems (id.).

The session notes show that by late December 2023, the student was able to determine what operations to use in a word problem when it was read to him, needing minimal help to map out the problem (Parent Ex. H at p. 3). At the time of the late January 2024 session notes, the student was now able to solve addition and subtraction problems, but continued to struggle "immensely" with multiplication and division problems and needed "lots of manipulatives, prompts, and support" (Tr. p. 133; Parent Ex. H at p. 5). The SETSS provider continued working with the student to improve his ability to independently use multiple strategies to accurately solve addition and subtraction word problems (Parent Ex. H at p. 5). To address his difficulty solving word problems, the SETSS provider taught the student the words to look for to identify how to solve the problem and created a "board" with words for the different operations (id. at p. 6). By mid-March 2024, the student was able to solve all the problems he was presented with, but he continued to struggle with two-step problems (id.). As of late February 2024, the student struggled to line up numbers to add, subtract or multiply, and needed reminders to use the boxes that the SETSS provider created in order to correctly place each digit, enabling him to solve the problems

(*id.*). At the time of the late March 2024 session note, the student still needed to be reminded "constantly" to use a "place value chart with empty boxes for each digit" to line up the numbers and solve math problems (*id.* at pp. 6-7).

The foregoing evidence in the hearing record does not demonstrate that the unilateral services obtained by the parent were specially designed to address the student's needs. As noted above, review of the SETSS progress report and session notes shows that while the SETSS delivered to the student was designed to address his academic needs, it did not address any of the student's communication needs including his language, oral motor and articulation delays and hoarse voice quality, or his fine motor, visual motor, sensory processing, motor coordination, and self-help needs (compare Parent Exs. G; H, with Dist. Ex. 1 at pp. 1-3). The hearing record reflects that the services EdZone delivered to the student were limited to SETSS, with no provision of speech-language therapy or OT (Tr. p. 118; Ex. F ¶¶ 7, 14). The evidence does not show that the parent otherwise obtained speech-language therapy or OT, or other services to address those needs, or that the parent was seeking to obtain such services but was unable to do so (see Tr. pp. 1-178; Parent Exs. A-I; Dist. Exs. 1-3).

In her due process complaint, the parent requested pendency under the May 2022 IESP, which recommended five sessions per week of SETSS and three 30-minute sessions per week of speech-language therapy (Parent Ex. A at pp. 2, 6). While the parent does not seek district funding for OT, I find that, under the totality of the circumstances, evidence that the student only received SETSS demonstrates that the unilateral placement as a whole was not appropriate to address the student's speech-language impairment and needs addressed by OT. In particular, the evidence in the hearing record does not demonstrate how the private services addressed the student's well-documented language and articulation delays, oral motor weakness, sensory processing deficits, and fine and visual motor weaknesses. The purpose of providing special education services to a student attending a nonpublic school is to support his or her meaningful access to the general education curriculum and classroom setting in a way that is reasonable under the circumstances. I am not convinced that reducing the student's special education services to SETSS alone was appropriate for the student under the totality of the circumstances.

C. Compensatory Education and Other Relief

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

in the first place"]; Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1497 [9th Cir. 1994]). Likewise, SROs have awarded compensatory services to students who remain eligible to attend school and have been denied appropriate services, if such deprivation of instruction could be remedied through the provision of additional services before the student becomes ineligible for instruction by reason of age or graduation (Bd. of Educ. of City Sch. Dist. of Buffalo v. Munoz, 16 A.D.3d 1142 [4th Dep't 2005] [finding it proper for an SRO to order a school district to provide "make-up services" to a student upon the school district's failure to provide those educational services to the student during home instruction]). Accordingly, an award of compensatory education should aim to place the student in the position he or she would have been in had the district complied with its obligations under the IDEA (see Newington, 546 F.3d at 123 [holding that compensatory education awards should be designed so as to "appropriately address[] the problems with the IEP"]; see also Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1289 [11th Cir. 2008] [holding that "[c]ompensatory awards should place children in the position they would have been in but for the violation of the Act"]; Bd. of Educ. of Fayette County v. L.M., 478 F.3d 307, 316 [6th Cir. 2007] [holding that "a flexible approach, rather than a rote hour-by-hour compensation award, is more likely to address [the student's] educational problems successfully"]; Reid, 401 F.3d at 518 [holding that compensatory education is a "replacement of educational services the child should have received in the first place" and that compensatory education awards "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA"]).

While some courts have fashioned compensatory education to include reimbursement or direct payment for educational expenses incurred in the past, the cases are in jurisdictions that place the burden of proof on all issues at the hearing on the party seeking relief, namely the parent, making the distinction between the different types of relief perhaps less consequential (Foster v. Bd. of Educ. of the City of Chicago, 611 Fed App'x 874, 878-79 [7th Cir. 2015]; Indep. Sch. Dist. No. 283 v. E.M.D.H., 2022 WL 1607292, at *3 [D. Minn. 2022]). In contrast, under State law in this jurisdiction, the burden of proof has been placed 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 Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.F. v. New York City Dep't of Educ., 746 F.3d 68, 76 [2d Cir. 2014]; R.E., 694 F.3d at 184-85). In treating the requested relief as compensatory education, it is problematic to place the burden of production and persuasion on the district to establish appropriate relief when the parent has already unilaterally chosen the provider and obtained the services and is the party in whose custody and control the evidence necessary to establish appropriateness resides.

In this case, the parent requested and obtained pendency by agreement dated February 13, 2024 for speech-language therapy as recommended in the student's March 18, 2022 IESP (Tr. p. 148; Pendency Implementation Form; Parent Ex. A at p. 6).¹¹ Specifically, the parent and the district agreed to have the student provided with three 30-minute sessions of individual speech language therapy during the 10-month 2023-24 school year (see Pendency Implementation Form).

¹¹ The parent and the district also agreed to five periods per week of SETSS under the pendency agreement, but as the parent secured SETSS under EdZone for the 2023-24 school year, those services will not be considered under compensatory education (Pendency Implementation Form).

The district failed to present any evidence that it provided any speech-language services to the student during the 2023-24 school year.

In view of the forgoing, I find that the student is entitled to 10-month services consisting of three 30-minute sessions per week of individual speech-language therapy for the 2023-24 school year, which should be based on a 36-week school year (see Educ. Law § 3604[7] [a 10-month school year consists of not less than 180 instructional days]). The compensatory education award shall be delivered by the district or as the parties might otherwise agree.

VII. Conclusion

The IHO erred in dismissing the parent's due process complaint notice with prejudice and her decision to do so is reversed. However, the parent failed to demonstrate the appropriateness of her unilaterally-obtained SETSS for the 2023-24 school year. Additionally, the student is entitled to services under pendency and the district failed to demonstrate that it provided the student with speech-language services pursuant to pendency for the 2023-24 school year and must provide the student with services to make up for not providing those services in the first instance. In light of these determinations, I need not address the parties' remaining contentions.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision dated June 19, 2024 is modified by reversing the IHO's dismissal of the parent's due process complaint notice with prejudice; and

IT IS FURTHER ORDERED that the IHO's decision dated June 19, 2024 is modified by reversing those portions indicating that the district established that it provided an appropriate educational program to the student for the 2023-24 school year; and

IT IS FURTHER ORDERED that unless the parties otherwise agree, the district shall provide the student with compensatory education consisting of 54 hours of individual speech-language therapy for services missed during the pendency of this proceeding.

Dated: **Albany, New York**
 September 11, 2024

CAROL H. HAUGE
STATE REVIEW OFFICER