



The University of the State of New York

The State Education Department

State Review Officer

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No. 24-344

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:

Law Office of Philippe Gerschel, attorneys for petitioner, by Philippe Gerschel, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Cynthia Sheps, 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 his requests that respondent (the district) fund the costs of his son's private services delivered by Urban Student Support (USS) for the 2023-24 school year and for compensatory education services. The district cross-appeals from that portion of the IHO's decision which found that the parent demonstrated the unilaterally obtained services were appropriate. The appeal must be sustained in part. The cross-appeal must be sustained.

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 September 23, 2019, found the student eligible for special education services as a student with an other health-impairment, and developed an IESP to be implemented beginning on October 7, 2019 (Parent Ex. B at p. 1).¹ The IESP noted that the student was in fourth grade at a nonpublic school at the time of the meeting (*id.*). The CSE recommended that the student receive five periods per week of direct group special education teacher support services (SETSS) together with one 30-minute session per week of individual speech-language therapy, two 30-minute sessions per week of group speech-language therapy, two 30-minute sessions per week of individual counseling services, one 30-minute session per week of group counseling services, and two 30-minute sessions per week of individual occupational therapy (OT) (*id.* at pp. 6-7).²

The hearing record does not include any information regarding the student's education from the September 2019 IESP through the 2023-24 school year (Parent Exs. A-J).

In a letter, signed by the parent on May 22, 2023, the parent notified the district that he had placed the student in a nonpublic school at his expense and that he wanted the student's special education services to be continued for the 2023-24 school year (Parent Ex. D at p. 2).

On August 22, 2023, the parent signed a contract with USS for USS to "implement the [student's IESP] via Services to whatever extent is reasonably possible" (Parent Ex. E at pp. 1, 4). The contract further provided that the fee structure for services was SETSS at the rate of \$195 per hour, speech-language therapy at the rate of \$300 per hour, OT at the rate of \$300 per hour, and counseling services at the rate of \$300 per hour for the 2023-24 school year (*id.* at p. 1).³

In a letter dated September 11, 2023, the parent, through his attorney, notified the district that he consented to the district implementing SETSS and related services pursuant to the student's September 2019 IESP (Parent Ex. C at p. 2). The letter indicated that the parent had no way of implementing the recommendations and he attempted to obtain providers at the district's standard rates; however, was unable to do so (*id.*). The letter also notified the district of the parent's intent to implement the IESP and seek reimbursement or direct payment for those services (*id.*).

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

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

³ The Commissioner of Education has not approved USS as an agency or school with which school districts may contract to instruct students with disabilities (*see* 8 NYCRR 200.1[d], 200.7).

A. Due Process Complaint Notice

In a due process complaint notice dated September 11, 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). Initially, the parent requested pendency services pursuant to the September 2019 IESP (id. at p. 2). Turning to the substance of the complaint, the parent alleged that the district failed to convene a CSE and recommend a placement for the student, that the September 2019 IESP was outdated and expired, and that the district had failed to implement the student's September 2019 IESP SETSS and related services for the 2023-24 school year (id. at p. 2). The parent asserted that "[w]ithout supports, the parental mainstream placement [wa]s untenable" and the district has failed to implement the recommendations and he was unable to locate a provider on his own (id.). As relief, the parent sought an order directing the district to fund the program outlined in the September 2019 IESP "at reasonable market rate" and fund a bank of compensatory educational services for any services the student was entitled to under pendency but not provided to the student during the 2023-24 school year (id. at p. 3).

B. Impartial Hearing Officer Decision

An impartial hearing convened on October 16, 2023 and concluded on June 20, 2023 after twelve days of proceedings (see Tr. pp. 1-63). In a decision dated July 7, 2024, the IHO found that the district failed to offer the student a FAPE (IHO Decision at p. 8).⁴ Next, the IHO noted that the district did not challenge the parent's contention that the unilaterally obtained services were appropriate (id. at p. 9). The IHO found that the testimony and documentary evidence from the parent established that the unilaterally obtained services were appropriate and provided the student with educational instruction that was designed to meet the student's unique needs (id.). Therefore, the IHO found that the parent met "the second of the three Burlington/Carter criteria for tuition reimbursement" (id. at p. 10).

As for equitable considerations, the IHO found that they supported the parents' claim for tuition reimbursement (IHO Decision at p. 10). The IHO noted that the district did not raise any issues that would preclude tuition reimbursement and "did not oppose tuition reimbursement on equitable grounds" (id.). Further, the IHO held that the documentary and testimonial evidence demonstrated that the parent cooperated with the CSE and provided the district with timely written notice that he would implement the student's IESP and seek reimbursement (id.). The IHO determined that the parent was entitled to reimbursement/direct funding for the cost of the student's unilateral services (id.).

However, the IHO then indicated that the parent was requesting an order to implement the student's program at the contracted for rate and a bank of appropriate SETSS and OT services at the rates of \$195 and \$300 per hour, respectively, because the student only began receiving SETSS during the first week of February 2024 and began receiving OT services on December 19, 2023 (IHO Decision at p. 10). The IHO stated that she did not understand the parent's request, as there was no testimony about why the student missed the services, the parent did not testify, and the parent's witness did not "shed any light on the timing of the services provided"; therefore, the IHO

⁴ The IHO noted that the district did not assert that it had offered a FAPE, did not submit any documentary evidence, did not offer any witnesses, and did not submit a closing brief (IHO Decision at p. 3).

denied the parent's request (id. at pp. 10-11). The IHO also denied the parent's request for a bank of speech-language therapy and counseling services, as there was no testimony in the hearing record as to why the services were missed (id. at p. 11). As such, the IHO dismissed the due process complaint notice (id.).

IV. Appeal for State-Level Review

The parent appeals, arguing that he is entitled to funding for the unilaterally obtained services at the contracted rate because the IHO found that he "passed the three prongs of [t]he Burlington Carter test." According to the parent, the IHO found that the parent was entitled to funding as the IHO found in favor of the parent on all three prongs of the Burlington/Carter test. The parent further contends that the IHO decision indicated that the parent was entitled to direct funding at the contracted for rates and, therefore, the IHO clearly erred by ordering the dismissal of the due process complaint notice. Based on the discussion in the decision, the parent asserts the IHO intended to grant funding for the services provided by the agency at the contracted rates.

Next, the parent contends that the IHO erred by not awarding a bank of compensatory education services that were missed under pendency. Specifically, the parent asserts that there was a gap in delivery of the student's services as SETSS did not start until February 2024 and OT started in December 2023, as such, the student is entitled to compensatory education for those missed services. Further, the parent argues that the services should have been provided under pendency. The parent contends that he was entitled to a pendency order, the lack of one was a clerical omission, the district was required to provide those services, and the parent is entitled a bank of compensatory hours due to that failure.

The parent requests an order directing the district to fund the student's SETSS at the rate of \$195 per hour and OT at the rate of \$300 per hour. Further, the parent requests an order for a bank of compensatory education hours for services that were missed under pendency, specifically: 60 hours of speech-language therapy and 60 hours of counseling services at rates not to exceed \$300 per hour. Lastly, the parent requests an order that the district continue to fund these services for the rest of the 2023-24 school year per the September 2019 IESP.

The district submits an answer and cross appeal. In its answer, the district asserts that the IHO properly denied compensatory speech-language therapy and counseling relief as there was no evidence in the hearing record regarding the need or reasoning for such relief. Further, the district contends that the parent is not entitled to compensatory pendency services as relief asserting that it was not responsible for providing pendency services because the parent contracted with the agency in August 2023 to deliver the student's services for the 2023-24 school year. The district argues that since the parent contracted with an agency for the delivery of services, the parent elected to carry the responsibility of ensuring the delivery of stay-put services. Therefore, the district contends it was only responsible for funding pendency services, and should not be required to fund compensatory education to make-up any missed services resulting from the parent's chosen private provider.

The district cross-appeals from the IHO's finding that the unilaterally obtained services were appropriate for the student. The district contends that the hearing record fails to provide any details as to how the services met the student's individual needs and notes that the hearing record

lacks invoices or sessions notes. Therefore, the district argues that the parent failed to meet his burden that the unilaterally obtained services were appropriate for the student. The district requests that the due process complaint notice be dismissed with prejudice.

In a reply, the parent repeats many of the allegations raised in the request for review. In addition, the parent responds to the district's cross-appeal and asserts that if the district had questions regarding the appropriateness of the unilaterally obtained services, the district should have attended the hearing and raised them during cross-examination.

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 [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an [IEP]" (Educ. Law § 3602-c[2][b][1]). The CSE must "assure that special education programs and services are made available to students with disabilities attending nonpublic schools located within the school district on an equitable basis, as compared to special education programs and services provided to other students with disabilities attending public or nonpublic schools located within the school district (id.).⁶ Thus, under State law an eligible New

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]).

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

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

Initially, neither party has appealed from the IHO's finding that the district denied the student a FAPE for the 2023-24 school year and that equitable considerations favor the parent; accordingly, these findings 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]).

A. Unilateral Placement

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, he unilaterally obtained private services from USS 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 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]

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.

[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]).⁷ 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 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 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). A private placement is appropriate if it provides instruction

⁷ 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 Urban Student Support (Educ. Law § 4404[1][c]).

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

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

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

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

1. Student's Needs

While not in dispute, a discussion of the student's needs provides context to determine whether the unilaterally obtained services delivered by USS were appropriate services for the 2023-24 school year.

The student's September 2019 IESP indicated that he was in fourth grade at a nonpublic school, eligible for special education as a student with an other health-impairment, and exhibited delays in reading, writing, and math (Parent Ex. B at p. 1). Specifically, the IESP reflected a 2019 SETSS report which indicated that the student did not read with fluency, had difficulty with decoding and comprehension, and needed prompts to help him "gain clarity of the story" (id.). At that time, the student's writing was reportedly "[p]oor" as he had difficulty "collecting his thoughts and putting them onto paper," lacked writing "flow," transition words, and "endings," and "constantly jump[ed] from one topic to the next" (id.). According to the IESP, the student was functioning on a third grade level in math (id.).

A 2019 speech-language report, reflected in the IESP, indicated that the student presented with pragmatic, expressive, and receptive language delays, including difficulty following multiple step directions, interpreting figurative language, body language and facial expressions, taking turns in conversation, and remaining on a topic, as he interjected conversations or lessons with unrelated information (Parent Ex. B at pp. 1-2). Regarding social/emotional development, according to the IESP, the student presented as anxious, "unable to use flexible thinking," and needing to complete

tasks first, which impacted his ability to create and maintain friendships (id.). Additionally, the student reacted emotionally when he did not excel on a test or class assignment, struggled some to control his emotions, and his "self-esteem could use some bolstering" (id. at p. 2).

Regarding physical development, the September 2019 IESP reflected the parent's report that the student had received a diagnosis of ADHD for which he was administered medication (Parent Ex. B at p. 3). Information from the OT sessions included in the IESP indicated that the student could properly form upper and lowercase letters when prompted and given visual cues, although he had difficulty sizing his letters and spacing them properly on the line (id.). The student also had difficulty focusing and maintaining attention to task but was able to be redirected with prompting (id.). Further, the student had visual motor and visual processing difficulties including scanning and completing figure-ground activities (id.).

The 2019 CSE determined that the student's language and attention deficits negatively affected his progress in the general education environment, and recommended supports to address the student's management needs including consistent praise and feedback, modeling to ensure learning, visual and concrete aids, concrete and specific language during instruction, direct/explicit and systematic instruction, multisensory approach, and scaffolding of instruction (Parent Ex. B at p. 3). At that time, the CSE recommended that the student receive five periods per week of direct, group SETSS, individual and group speech-language therapy and counseling, and individual OT (id. at pp. 6-7).

2. Services From USS

Turning to the services provided to the student during the 2023-24 school year, the USS supervisor testified by affidavit that USS provided five hours per week of SETSS and two 30-minute sessions per week of OT to the student during the 2023-24 school year (Parent Ex. I ¶¶ 11, 12).⁸ According to the supervisor, USS delivered the student's SETSS and OT "typically . . . outside of the classroom" on an individual basis rather than in a group, as the agency was "not able to locate a similarly situated group of students" (id. ¶ 13, 19). The supervisor testified that the student's services were "individualized sessions that include[d] a great deal of specialized instruction" (id. ¶ 19). Further, the supervisor testified that "[i]n addition to providing direct 1:1 services" to the student, "his providers also prepare[d] for sessions, create[d] goals, wr[ote] progress reports, and m[et] with teachers and parents" (id. ¶ 16). According to the supervisor, goals were developed for the student during the 2023-24 school year and reviewed quarterly, and the progress reports entered into evidence were "an accurate representation" of what the student's providers had been working on with him over the course of the school year (id. ¶ 18). Additionally, the supervisor testified that the student's "progress [wa]s measured through quarterly assessments, consistent meetings with the providers and support staff, observation of the student in the classroom, and daily session notes" (id. ¶ 20). The supervisor testified that the student "ha[d] already shown signs of progress with his service providers"; however, his delays warranted the continuation of services (id. ¶¶ 21, 22).

⁸ The district did not appear at the April 15, 2024 hearing date (Tr. pp. 49-50). As that hearing date had been designated for cross-examination of the SETSS provider, the IHO determined that the district had "defaulted" on its cross-examination of that witness (Tr. pp. 50-51).

In a February 19, 2024 SETSS progress report, the SETSS provider, who holds New York State students with disabilities (all grades) teacher certification and was "trained and experienced to teach literacy and comprehension to school aged children and adolescents," indicated that the student received five hours per week of SETSS at the nonpublic school "to help him with his academic delays" (Parent Exs. F; G at p. 1; I ¶¶ 3, 14). The SETSS report reflected results of the Scholastic 3 Minute Reading Assessment, Grade 8, and the SETSS provider concluded that the student was performing on a sixth grade level in reading fluency and comprehension (Parent Ex. G at pp. 1-2). According to the report, the student exhibited decoding challenges when reading paragraphs, as he guessed or skipped over words (*id.* at p. 2). Regarding comprehension, the SETSS provider reported that the student's skills were "far below grade level," and that he had a difficult time inferring, analyzing, and evaluating information from text, struggled to identify the main idea of grade-level stories, required more time than peers for reading assignments, and his reading was not "even paced" (*id.*). Annual goals included in the report were to improve the student's use of a dictionary, and ability to locate information from text to support answers, identify important plot details and story elements, and describe character changes, if any (*id.* at pp. 2-3). Short-term objectives were to improve the student's ability to answer simple questions about a text, describe a story structure, read unfamiliar multisyllabic words, respond to inferential questions, and use context clues to understand new words or phrases (*id.* at p. 2).

According to the SETSS progress report, the student was performing on a seventh grade level in writing, and achieved a 10 out of 16 on an eighth grade writing assessment (Parent Ex. G at p. 5). The SETSS provider reported that the student's sentences were "short and simple," his use of appropriate paragraph structure was inconsistent, he struggled to remember to use grade-appropriate transition words, and he omitted periods at the end of sentences (*id.* at pp. 5-6). The student's word choices reflected his lack of grade-level vocabulary, his writing was repetitive, he had difficulty expanding ideas without assistance, and he did not show consistent knowledge of grammar and punctuation rules (*id.*). Annual goals for the student included that he would edit a final draft for correct spelling, capitalization, and punctuation, write a paragraph and punctuate dialogue, write about a sequential topic with a variety of transition words, identify prepositional phrases, and include an introduction and conclusion in his writing (*id.* at p. 6). Short-term objectives included self-correcting spelling errors, differentiating between fragments and complete sentences, correctly placing commas, using describing words to expand sentences, and consistently placing periods at the end of sentences (*id.*).

With regard to math, the SETSS progress report indicated that the student was functioning at approximately a fifth to sixth grade level, and math was his weakest academic area (Parent Ex. G at p. 4). He achieved 10 out of 33 multiple choice questions correctly on the New York State Grade 8 Mathematics Test and struggled with questions involving statistics, probability, linear equations, functions, and geometry (*id.* at p. 3). The report indicated that the student struggled with multiplication and division problems, fractions, and adding/subtracting decimals without assistance, and his ability to solve simple algebraic equations was inconsistent (*id.* at p. 4). The SETSS provider reported that the student required frequent repetition and review in order to retain the concepts he learned in math (*id.*). Annual goals for the student included improving skills to find the least common multiple/greatest common factor, and solving problems involving geometric figures, ratios of fractions, multi-step equations, and word problems involving fractions (*id.*). The SETSS provider developed short-term objectives for the student to improve his ability to solve

complex multiplication problems, simple algebraic equations, and long division problems, and to add and subtract decimals (id.).

The SETSS provider reported that the student relied "on SETSS instruction to teach him the skills that he lack[ed]" (Parent Ex. G at p. 7). To address the student's needs, the SETSS provider reported using "different strategies and methods" with the student, including visual manipulatives, multi-sensory instruction, positive reinforcement and praise, and assisting the student to gain confidence in his academic skills (id. at p. 1). According to the report, the "individualized help, strategies, and modifications from the SETSS provider help[ed] [the student] progress in the areas of reading, math, and writing," and he was making "incremental progress toward achieving his academic goals" (id. at pp. 1, 5).

In a February 19, 2024 progress report, the licensed occupational therapist described the "inaugural session" that included conducting "a comprehensive assessment of the student's functioning abilities" (Parent Exs. F at p. 2; H at p. 1). According to the occupational therapist, the student "demonstrated considerable needs in the area of fine motor" skills on a measure his ability to write simple sentences, including an improper pencil grasp, poor spacing and legibility, and "weak intrinsic hand muscle strength" (Parent Ex. H at p. 1). Additionally, the student exhibited difficulty with attention, which indicated "an 'under-registered' sensory processing system" (id.). The occupational therapist reported that the student participated in intensive proprioceptive exercises—such as wall push-ups, wall stands, and exercises involving heavy muscle work—designed to provide deep pressure input and muscle engagement to support sensory regulation and processing (id.). OT annual goals developed for the student included that he would improve attention and focusing skills, fine motor skills for handwriting, and sensory processing/self-regulation skills to reduce impulsive tendencies (id. at pp. 1-2). The occupational therapist recommended that OT continue to reach those goals, as his delays affected the student's ability to maintain his independence (id. at p. 1).

Turning to the district's cross-appeal of the IHO's finding that the unilaterally obtained services from USS were appropriate, review of the hearing record shows that there are significant limitations in the evidence as to what services were delivered to the student during the 2023-24 school year. In an affidavit, dated February 22, 2024, the parent testified that the student began receiving OT on December 19, 2023, which would continue "for the duration of the 2023-24 school year"; however, aside from the February 19, 2024 OT progress report discussed above, the hearing record does not contain any information about any OT services provided to the student other than between December 19, 2023 and February 19, 2024 (Parent Ex. J ¶ 8; see Parent Exs. A-J). Additionally, the February 19, 2024 SETSS progress report indicated the student was making progress with SETSS support and the USS supervisor testified by affidavit, dated February 21, 2024, that the student was making progress with SETSS; however, the parent testified that the student began receiving SETSS on February 21, 2024 calling into question the accuracy of the progress reports (Parent Exs. G at p. 1; I ¶ 21, p. 4; J ¶ 9). Additionally, there is no evidence about SETSS being delivered to the student after the February 19, 2024 progress report (see Parent Exs. A-J). Accordingly, the hearing record only includes evidence that the student received OT services between December 19, 2023 and February 19, 2024 and that the student may have received SETSS for a brief period of time around February 21, 2024.

Additionally, review of the reports shows that aside from identifying the student's needs and developing goals for the student, the progress reports generally lacked information about any specially designed instruction USS may have delivered to the student, and the hearing record did not contain the quarterly assessments, reports of observations of the student in the classroom, or daily session notes referred to by the supervisor (Parent Ex. I ¶ 20; see Parent Exs. G; H). Further, in September 2023, as part of his due process complaint notice, the parent asserted that "[w]ithout the supports," recommended in the student's 2019 IESP, "the parental mainstream placement is untenable," yet the hearing record does not include any indication that the parent either obtained or attempted to obtain either the September 2019 IESP recommended counseling or speech-language therapy for the student (Parent Exs. A at pp. 1, 2; B at pp. 6-7; J ¶ 14). Therefore, under the totality of the circumstances, the parent did not provide sufficient evidence that the services delivered by USS appropriately addressed the student's special education needs and the evidence in the hearing record does not support the IHO's finding that USS delivered appropriate unilaterally obtained services to the student.

B. Pendency

Although the parent is not entitled to funding for unilaterally obtained services because he did not meet his burden of proving the appropriateness of those services, as part of the due process complaint notice and on appeal, the parent has also requested that the district provide compensatory education for any services the student was entitled to under pendency but were not delivered to the student.

The IDEA and the New York State Education Law require that a student remain in his or her then current educational placement, unless the student's parents and the board of education otherwise agree, during the pendency of any proceedings relating to the identification, evaluation or placement of the student (20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; see Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 531 [2d Cir. 2020]; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 170-71 [2d Cir. 2014]; Mackey v. Bd. of Educ. for Arlington Cent. Sch. Dist., 386 F.3d 158, 163 [2d Cir. 2004], citing Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]; M.G. v. New York City Dep't of Educ., 982 F. Supp. 2d 240, 246-47 [S.D.N.Y. 2013]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *20 [E.D.N.Y. Oct. 30, 2008]; Bd. of Educ. of Poughkeepsie City Sch. Dist. v. O'Shea, 353 F. Supp. 2d 449, 455-56 [S.D.N.Y. 2005]).⁹ Pendency has the effect of an automatic injunction, and the party requesting it need not meet the requirements for injunctive relief such as irreparable harm, likelihood of success on the merits, and a balancing of the hardships (Zvi D., 694 F.2d at 906; see Wagner v. Bd. of Educ. of Montgomery County, 335 F.3d 297, 301 [4th Cir. 2003]; Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 [3d Cir. 1996]). The purpose of the pendency provision is to provide stability and consistency in the education of a student with a disability and "strip schools of the unilateral authority they had traditionally employed to exclude disabled students . . . from school" (Honig v. Doe, 484 U.S. 305, 323 [1987] [emphasis in original]; Evans v. Bd. of Educ. of Rhinebeck Cent. Sch. Dist., 921 F. Supp. 1184, 1187 [S.D.N.Y. 1996], citing Bd. of Educ. of City of New York v. Ambach, 612 F. Supp. 230, 233 [E.D.N.Y. 1985]). A student's placement pursuant

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

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

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

In this case, there were twelve days of proceedings held; however, the district failed to appear at six of them (see Tr. pp. 1-63). Notably, the district appeared at the pendency hearing and did not object to the parent's assertion as to what constituted the student's pendency placement (see Tr. pp. 6-12). The district also appeared at the next hearing and again did not object to the parent's request for a pendency order (Tr. pp. 13-17). Accordingly, as requested by the parent, the student's placement for the pendency of this proceeding is based on the services outlined in the September 2019 IESP (see Parent Ex. B).

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]).

In its answer, the district did not dispute what constituted pendency, only that it was not required to provide such services. The district asserts that because the parent contracted with USS for the delivery of services on August 22, 2023, the parent took over responsibility for delivering services to the student for the 2023-24 school year. However, in the September 11, 2023 due process complaint notice, the parent requested that the student be provided with pendency services pursuant to the September 2019 IESP and made it clear that the parent was asserting a failure to deliver the same services as recommended in the September 2019 IESP for the 2023-24 school year (Parent Ex. A). If the district wanted to object to the student's pendency placement, by asserting that the parent had assumed the responsibility for pendency, the district should have raised this argument in the first instance at the impartial hearing. As noted above, pendency has the effect of an automatic injunction (Zvi D., 694 F.2d at 906). Accordingly, the district was obligated in this instance to deliver the student's pendency services during the course of the proceeding and through the current appeal. Having failed to take any steps during the process of the hearing to challenge the student's pendency placement, the district has an implied agreement as to pendency for the student based on the September 2019 IESP and, under the law, is responsible for the implementation of pendency. The district was required to implement pendency services from the date of the due process complaint notice, September 11, 2023 through the date of this decision. Therefore, under pendency, the district is required to deliver compensatory education services to the student pursuant to the recommendations of the September 2019 IESP, unless the parties otherwise agree.

VII. Conclusion

The IHO improperly found that the parent met his burden to demonstrate that the unilaterally obtained services were appropriate. Moreover, I find that the district was required to implement pendency services from the date of the due process complaint notice, September 11, 2023 through the date of this decision and therefore, is required to deliver compensatory education to the student pursuant to the recommendations of the September 2019 IESP unless the parties otherwise agree.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision dated July 7, 2024 is modified by reversing that portion which found that that the parent demonstrated that the unilaterally obtained services from USS for the 2023-24 school year were appropriate; and

IT IS FURTHER ORDERED that the student's placement during the pendency of this proceeding constituted the services listed in the September 2019 IESP and the district was required to provide the student with the services recommended in the September 2019 IESP during the pendency of this proceeding; and

IT IS FURTHER ORDERED that unless the parties otherwise agree, the district shall deliver compensatory education services to the student consisting of five periods per week of direct group SETSS, one 30-minute session per week of individual speech-language therapy, two 30-minute sessions per week of group speech-language therapy, two 30-minute sessions per week of individual counseling services, one 30-minute session per week of group counseling services, and two 30-minute sessions per week of individual OT as computed from the date of the due process complaint notice through the date of this decision (exclusive of 12 month services), less any services actually provided by the district under pendency, which compensatory education shall be completed prior to April 1, 2026.

Dated: **Albany, New York**
 September 27, 2024

JUSTYN P. BATES
STATE REVIEW OFFICER