



The University of the State of New York

The State Education Department

State Review Officer

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No. 24-401

Application of a STUDENT WITH A DISABILITY, by her 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:

The Law Office of Elisa Hyman, PC, attorneys for petitioner, by Erin O'Connor, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Ezra Zonana, 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 determined that the educational programs respondent's (the district's) Committee on Special Education (CSE) had recommended for her daughter for the 2022-23 and 2023-24 school years were appropriate. The appeal must be sustained in part.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local 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, 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 student received speech-language therapy, occupational therapy (OT), physical therapy (PT), and special instruction through early intervention beginning prior to her first birthday (Parent Ex. I at p. 1). The student was subsequently evaluated and found eligible for services by a Committee on Preschool Special Education (CPSE) (see Parent. Exs. J-O; Dist. Ex. 9 at p. 2). For the 2017-18 and 2018-19 school years, the student was mandated to receive services through the CPSE as a preschool student with a disability, which included special education itinerant teacher (SEIT) services, and related services of speech-language therapy, OT, and PT for the 12-month school year (see Parent Exs. AA at pp. 16-17; Dist. Ex. 9 at p. 2).

According to the parent, in prior due process complaint notices, the parent asserted that the district failed to provide and/or significantly delayed the implementation of services mandated on the student's IEP and, as a result, the student did not receive her related services during the 2017-18 and 2018-19 school years (Parent Ex. A at p. 4).

The parent also filed a due process complaint notice to challenge the district's provision of a free appropriate public education (FAPE) to the student for the 2020-2021 and 2021-2022 school years (Parent Ex. B). On or about November 5, 2021, a pendency order was issued in that proceeding, ordering the district to provide funding for the student's pendency placement retroactive to September 13, 2021, to consist of the following services on a 12-month basis: ten hours per week of individual SEIT services; three 30-minute sessions per week of individual speech-language therapy; two 30-minute sessions per week of individual OT; and two 30-minute sessions per week of individual PT (Parent Ex. D at p. 6).

As the parents believed that the student required more services than provided for through pendency, they elected to begin drawing from a bank of one-to-one special education services awarded in a prior proceeding, resulting in the student receiving approximately 15 hours per week of SEIT instruction during the 2021-22 and 2022-23 school years (Tr. p. 703; see Parent Ex. A at p. 11).¹ However, according to the parent, the pendency services were delivered inconsistently throughout the 2021-22 school year, resulting in gaps in services (Parent Ex. A at p. 11). For example, the parent testified that, during summer 2022, the student did not receive services because the student's summer camp did not allow providers into the camp and because the district did not offer providers for SEIT, OT, and PT (Tr. p. 704).

A CSE convened on June 1, 2022, found the student eligible for special education as a student with a speech or language impairment, and formulated an IEP for the student with a projected implementation date of September 8, 2022 (Dist. Ex. 11).² The June 2022 IEP recommended that the student receive the support of eight periods per week of integrated co-teaching (ICT) services for English Language Arts (ELA); eight periods per week of ICT services for math; four periods per week of ICT services for sciences; four periods per week of ICT services for social studies; one 30-minute session per week of individual counseling services; two 30-minute sessions per week of individual OT; one 30-minute session per week of group OT; two 30-minute sessions per week of individual PT; two 30-minute sessions per week of individual speech-language therapy; and one 30-minute session per week of group speech-language therapy (id. at pp. 16-17). The district provided the parent with a prior written notice and a school location letter, both dated July 15, 2022, notifying the parent of the June 2022 IEP's recommendations and identifying the assigned public school for implementation of the June 2022 IEP (see Dist. Ex. 12).

A CSE next convened on March 20, 2023, found the student continued to be eligible for special education as a student with a speech or language impairment, and developed an IEP for the student with a projected implementation date of September 7, 2023 (see Dist. Ex. 1). The March

¹ These hours included five hours from the bank in Case No. 186136 and 10 hours from the pendency order issued in this matter, Case No. 217542).

² 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]).

2023 CSE recommended that the student receive the support of ten periods per week of ICT services for math; ten periods per week of ICT services for ELA; five periods per week of ICT services for social studies; five periods per week of ICT services for sciences; along with one 30-minute session per week of individual counseling; two 30-minute sessions per week of individual OT; one 30-minute session per week of individual OT; two 30-minute sessions per week of individual PT; and three 30-minute sessions per week of individual speech-language therapy (*id.* at pp. 15-16).³ The district provided the parent with a prior written notice and school location letter, both dated July 28, 2023, notifying the parent of the March 2023 IEP's recommendations and identifying the assigned public school to implement the March 2023 IEP (Dist. Ex. 2 at pp. 1, 5).

On September 1, 2023, in the prior proceeding related to the 2020-21 and 2021-22 school years, an IHO ordered the district to provide the student with compensatory education and directed that an appropriate program for the student for the 2020-21 and 2021-22 school years consisted of a 12-month school year with "up to 20 hours per week" of special education teacher services; three 40-minute sessions per week of individual speech-language therapy; two 45-minute sessions per week of individual OT; one 30-minute session per week of individual counseling; one 30-minute session per week of group counseling; and two 30-minute sessions per week of individual PT, as well as transportation services, if needed (Parent Ex. B at p. 11).

A. Due Process Complaint Notice

In a due process complaint notice dated November 6, 2023, the parent alleged that the district denied the student a FAPE for the 2022-23 and 2023-24 school years (*see* Parent Ex. A). The parent requested pendency pursuant to the most recent unappealed IHO decision (*id.* at p. 18).⁴ Turning to the substance of the parent's allegations, the parent alleged that the student was denied a FAPE for the 2022-23 and 2023-24 school years because, among other things, the district failed to evaluate the student on a timely basis in all areas of suspected disability, create a legally appropriate IEP and placement, follow the procedural requirements of IDEA, address the student's behaviors through development of an FBA, provide the student with sufficient or appropriate individual services, continues the recommendation for SEIT services, or provide the student with 12-month services and the district predetermined the student's IEP (*id.* at pp. 14-17). The parent further argued that the district violated section 504 of the Rehabilitation Act of 1973 (section 504)

³ The March 2023 IEP includes two separate recommendations for individual speech-language therapy, one for two 30-minute sessions per week and one for one 30-minute session per week (Dist. Ex. 1 at p. 16). The district witness, who was both the district representative and the school psychologist for March 2023 CSE meeting, explained that it was probably a clerical error and the CSE most likely intended to recommend one session as a group session; however, the IEP indicates a recommendation for a total of three individual sessions per week (Tr. pp. 248-50).

⁴ Specifically, the parent requested pendency based on the unappealed September 2023 IHO decision (Parent Exs. A at p. 18; B at pp. 1, 11). Consistent with the parent's request, on November 29, 2023, the IHO issued an Order of Pendency retroactive to the date of the filing of the parent's due process complaint notice (Parent Ex. C).

(id. at p. 2). As relief, the parent requested a bank of compensatory services to be provided by providers of the parent's choice along with transportation costs (id. at p. 18).⁵

B. Impartial Hearing Officer Decision

The parties proceeded to an impartial hearing before an IHO with the Office of Administrative Trials and Hearings (OATH). A pre-hearing conference was held on December 8, 2023, and status conferences were held on January 16, 2024 and January 25, 2024, (Tr. pp. 1-57). An impartial hearing then commenced on March 18, 2024 and concluded on July 12, 2024 after five days of proceedings (Tr. pp. 58-778). In a decision dated August 14, 2024, the IHO found that the district provided a FAPE to the student for the 2022-23 and 2023-24 school years and that the student was not entitled to 12-month or compensatory services (IHO Decision at p. 7). Accordingly, the IHO dismissed the parent's due process complaint notice with prejudice (id. at p. 8).

IV. Appeal for State-Level Review

The parent appeals, alleging that the IHO erred in finding that the district met its burden of proving that it provided the student with a FAPE for the 2022-23 and 2023-24 school years. The parent asserts that the IHO ignored the parent's evidence, the district witnesses were not credible, and the IHO gave undue weight to the district's witnesses.⁶ According to the parent, the student was denied a FAPE due to the lack of 1:1 instruction and a failure to recommend sufficient related services for the 2022-23 and 2023-24 school years. The parent further argues that the IHO erred by failing to render a determination on the parent's predetermination and section 504 claims.⁷ The parent also alleges that the district denied the student a FAPE by failing to implement the June 2022 IEP and the March 2023 IEP, specifically noting that the student only received OT and PT once a week and the district's records for OT ended in April 2023.⁸ The parent asserts that she presented sufficient evidence in the hearing record to support her request for an award of

⁵ As clarified by the parent's attorney during her opening statement, the parent was not seeking tuition funding (Tr. p. 142).

⁶ Further, to the extent the parent asserts that the IHO's "conclusions [we]re not well reasoned and belied by the hearing record," this allegation need not be addressed specifically as I have conducted a full review of the hearing record in rendering my decision on the parent's appeal.

⁷ State law does not make provision for review of ADA or section 504 claims through the State-level appeals process authorized by the IDEA and the Education Law (see Educ. Law § 4404[2] [providing that SROs review IHO determinations "relating to the determination of the nature of a child's handicapping condition, selection of an appropriate special education program or service and the failure to provide such program"]). Therefore, an SRO has no jurisdiction to review any portion of the parents' claims regarding the ADA and section 504 and such claims by the parent's will not be further discussed herein (see A.M. v. New York City Dep't of Educ., 840 F. Supp. 2d 660, 672 n.17 [E.D.N.Y. 2012] ["Under New York State education law, the SRO's jurisdiction is limited to matters arising under the IDEA or its state counterpart"]; see also D.C. v. New York City Dep't of Educ., 950 F. Supp. 2d 494, 507 [S.D.N.Y. 2013]).

⁸ Because the student was parentally placed in a private school for both school years at issue, and the parent did not seek equitable services from the district, I will not address the parent's claims related to implementation.

compensatory education. The parent further alleges that the IHO erred in failing to find that the student was entitled to compensatory education under pendency.

V. Applicable Standards

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. 386, 399 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created"

(Endrew F., 580 U.S. at 404). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 580 U.S. at 403 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).⁹

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

VI. Discussion

A. 2022-23 school year

According to the parent, the student had "significant academic and social delays, weak fine and gross motor skills, significant sensory processing challenges, and difficulty with sustained attention," which made it so that she required 1:1 instruction to make progress. The parent argues that the IHO erred in finding that the June 2022 IEP offered the student a FAPE because the district did not provide an explanation as to why it did not continue the 15 hours per week of 1:1 SEIT services the student was receiving and because it did not increase the recommended related

⁹ The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 580 U.S. at 402).

services as per recommendations made by the student's providers. To properly address the parent's arguments, I must first review the student's needs as known to the June 2022 CSE.

1. Student's needs

According to the July 15, 2022 and September 7, 2022 prior written notices, the June 2022 CSE reviewed and considered a March 13, 2019 classroom observation, a March 13, 2019 psychological update, a March 13, 2019 teacher progress report, a January 25, 2022 PT progress report, a February 2, 2022 OT progress report, May 24, 2022 speech-language progress report, and a May 30, 2022 special education provider report (Parent Exs. S; T; X; Dist. Exs. 12; 13; 20; 22).^{10, 11, 12} In addition, testimony revealed that an October 3, 2021/March 3, 2022 OT evaluation was also reviewed and considered by the June 2022 CSE (Tr. pp. 197-99; Parent Ex. G). The parent testified that the SEIT, OT, and PT progress reports as well as the 2021-22 independent educational evaluations (IEEs) were reviewed and considered at the June 2022 CSE meeting (Tr. p. 705). The special education teacher who attended the June 2022 CSE meeting testified that the June 2022 CSE reviewed and considered the most current information that was submitted by the school or the provider (Tr. p. 639).

The district school psychologist who participated in the June 2022 CSE meeting testified that the 2022 CSE relied on sufficient information regarding the student's present levels of performance utilizing the student's SEIT progress report, speech-language therapy progress report, OT progress report, PT progress report, classroom observations, a psychological update, and a teacher progress report from 2019 (Parent Exs. S; T; X; Dist. Exs. 12; 13 at p. 2; 20; 22; 26 at ¶¶ 7). In addition, the school psychologist indicated that information about the student's needs was also provided by the parent and the student's SEIT provider (Dist. Ex. 26 at p. 7).

The student had recently received several IEEs which were ordered pursuant to a previous IHO decision concerning the 2017-18, 2018-19, and 2019-20 school years (Case No. 186136) (Parent Ex. A at p. 2). The IEEs included an August 23, 2021 PT evaluation, September 30, 2021 speech-language and auditory processing evaluations, and a September 2021/March 2022 OT evaluation (Parent Ex. A at p. 2; see Parent Exs. F-H).¹³ These IEEs were not listed on the prior written notices dated July 15, 2022 or September 7, 2022, as documents that were reviewed and

¹⁰ District exhibits 12 and 13 are both prior written notices for the June 2022 CSE meeting. District Exhibit 13 was created less than two months later and lists additional evaluations that were reviewed at the June 2022 CSE meeting (compare Dist. Ex. 12, with Dist. Ex. 13). The district representative for the June 2022 CSE meeting reported that after she sent the original prior written notice, she realized it did not contain the evaluations and reports that were used by the CSE in the creation of the student's IEP and therefore she edited the prior written notice to include the reports and sent the edited copy to the parent (Dist. Ex. 26 ¶¶ 6, 15; see Tr. pp. 182-84).

¹¹ The May 2019 classroom observation and teacher progress report are not included in the hearing record.

¹² The hearing record includes duplicative exhibits (see Dist. Ex. 4 ; Dist. Ex. 5 and Parent Ex. U; Dist. Ex. 6 and Parent Ex. HH; Dist. Ex. 9 and Parent Ex. I; Dist. Ex. 10 and Parent Ex. Q; Dist. Ex. 16 and Parent Ex. X; Dist. Ex. 17 and Parent Ex. S; Dist. Ex. 18 and Parent Ex. G; Dist. Ex. 19 and Parent Ex. T; Dist. Ex. 21 and Parent Ex. F). For the purpose of this decision, when there are duplicates, parent exhibits will be cited.

¹³ A July 2022 neuropsychological evaluation was also conducted as part of the IEE; however, that evaluation was not available to the June 2022 CSE (see Parent Ex. I).

considered during the June 2022 CSE meeting; however, as noted above, the parent testified that the 2021 IEEs were reviewed and considered at the June 2022 CSE meeting (see Tr. p. 705; Dist. Exs. 2; 12; 13). The results of these IEEs, as well as the results of the other evaluations reviewed and considered by the June 2022 CSE are described below.¹⁴

The March 13, 2019 psychological update report indicated that the student was assessed using subtests of the Brigance Comprehensive Inventory of Basic Skills (Brigance) and the Developmental Assessment of Young Children (DAY-C) as she was "turning 5" and aging out of preschool special education (Dist. Ex. 22 at p. 1).¹⁵ At the time of the evaluation, the student was attending a general education class at Yeshiva Head Start with 15 students, 1 teacher and 2 adults (*id.*). The student received SEIT and related services in the Head Start setting (*id.*). The school psychologist who evaluated the student reported that she was cooperative and attempted all tasks presented (*id.*). With regard to the student's performance on the Brigance, the evaluator reported that the student was unable to provide her age, birthdate, address, or phone number (*id.*). The student was able to distinguish right from left inconsistently, copy simple shapes, write her first name, and exhibit an adequate pencil grasp (*id.* at p. 2). In addition, the student could identify numerous shapes and body parts, label primary and secondary colors, rote count from one through five, and identify numbers zero to ten (*id.*). According to the evaluator, the student's teacher reported that the student spoke in one-to-two-word utterances and had started to socialize with her peers (*id.*). She was able to follow class rules and routines and answer concrete questions (*id.*).

The evaluator assessed the student's cognitive and social/emotional skills using the DAY-C (Dist. Ex. 22 at p. 2). She reported that in the cognitive domain the student's score of 87 represented mildly delayed abilities (*id.*). In the social/emotional domain, the student's score of 71 represented moderately delayed abilities (*id.*). The evaluator indicated that the student was unable to ask for assistance when having difficulty, play dress up, talk about her own feelings, select her own group of friends, wait for her turn when playing in group games, or explain rules of a game to others (*id.*). The student's teacher opined that the student would do best in a general education class, similar to the one she attended at the time, with support from a special education teacher, counseling, OT, and PT (*id.*).

According to the May 2022 special education progress report, the student exhibited significant academic and social delays, which required most of her instruction to be provided in one-to-one sessions (Parent Ex. X at p. 1). She struggled with language processing, reasoning, and critical thinking (particularly with "how and why" questions), story repetition, and identifying main ideas (*id.*). The special education progress report indicated that the student had difficulty with language processing and did not process conjunctions, negatives, and conditional terms when listening to auditory input (*id.*). The progress report stated that the student did not use "complicated" verbs (*id.*). In addition, the report noted that the student struggled with following directions and with temporal skills and was easily distracted in class (*id.*). With regard to

¹⁴ The parent testified that at the June 2022 CSE meeting, she asked the district to consider putting the recommendations from the PT, OT, and speech IEEs into the IEP, and to consider 12-month services and an increase in the student's 1:1 instruction, as recommended by the SEIT progress report, but the CSE failed to do so (Tr. pp. 706-08).

¹⁵ The evaluator did not indicate which edition of the assessments was used.

academics, the progress report indicated that the student was unable to sound out words, fill in rhyming words, or complete cloze sentences (id.). She struggled with reading, spelling, and basic math concepts (id.). The report stated that socially, the student did not interact with adults or peers, did not engage in play, and had issues with personal appearance and hygiene (id. at pp. 1-2). The student made progress in working without disrupting others, complying with school rules, and had some ability to read simple words and numerals (id. at p. 2). The progress report noted concerns that the student was not functioning at the class level, she was not socializing with other students, and she had a limited attention span (id.). The teacher opined that the student "required[d] significant one to one special education instruction pushed in to the classroom setting" and recommended increasing the student's 1:1 special education instruction to 25-30 hours per week, as the current 15 hours were insufficient, and further recommended that services continue during the summer months to prevent regression (id.).

The audiologist who conducted the September 30, 2021 auditory and speech-language processing evaluation concluded that the student had an auditory processing disorder in the areas of discrimination, figure-ground listening, and auditory and temporal integration (Parent Ex. H at p. 13). The audiologist further indicated that the student exhibited a language disorder with deficits in expressive, receptive, and pragmatic (social) language along with an articulation disorder (id.). Based on her assessment of the student, the audiologist reported that the student may have problems hearing a message clearly in less than optimum listening conditions, sorting relevant from irrelevant information, and integrating what she hears in both ears in a timely manner (id.). The audiologist indicated that the student's phonemic awareness was adequate but noted deficits in the student's auditory comprehension (id. at p. 13-14). The audiologist also noted relative strengths in the student's ability to use word structures and her knowledge of morpho-syntactic rules and deficiencies in the student's understanding of word classes, ability to formulate syntactically correct sentences, and ability to recall sentences (id. at p. 14). The student's knowledge and use of pragmatic rules of language was also an area of weakness (id.).

Results of assessment using the Goldman-Fristoe Test of Articulation - Third Edition (GFTA-3) showed that the student exhibited an articulation disorder (Parent Ex. H at p. 11). The audiologist reported that the student used more sound change errors than peers of the same age and gender and the student's overall articulation was characterized by weak articulatory contacts and on occasion final consonant deletions (id. at p. 12). She noted specific distortions and substitutions in the student's speech (id.). According to the audiologist, an informal assessment of the student's speech and language showed she was reticent in conversation, had syntactic errors, omitted syllables and final sounds, and displayed weak expressive skills and poor postural control (id. at pp. 12-13).

To manage and remediate the student's auditory processing and speech-language disorders, the audiologist recommended the student receive classroom accommodations, use of an FM system or noise-reducing hearing aids, speech-language therapy, reading instruction using a specific methodology, technology (specific applications), and games to improve auditory processing, and teaching self-advocacy skills (Parent Ex. H at pp. 14-15).

Turning to the May 2022 speech-language progress report, the report indicated that the student was receiving speech-language therapy three times per week for 30 minutes at home, and the progress report was based on formal and informal observations during speech sessions (Parent

Ex. S at pp. 1, 2). The progress report noted that the student had made progress in her auditory processing skills, as well as in her ability to define items according to the category, function, and by attributes; however, the report also noted the student's lack of vocabulary created some difficulties (id.). According to the progress report, the Crowley & Baigorri School-age Language assessment Measure (SLAM) sequencing cards were used to analyze the student's clausal density, ability to make inferences and meaningful predictions, as well as her ability to understand other's perspectives (theory of mind) (id.). The progress report noted that the student had difficulty comprehending stories as demonstrated by her inability to put pictures in proper sequence (id.). In addition, the student demonstrated difficulty with theory of mind (understanding how others feel and think) and inferencing (id.). Lastly, the progress report indicated the student had difficulty describing what was happening based on clues in a picture and she had difficulty with perspective-taking (id.).

The May 2022 speech-language progress report explained that during speech sessions the student had been working on improving her auditory processing skills (Parent Ex. S at p. 1). Overall, the student comprehended numerous language concepts; but had difficulty with word retrieval; and comprehension and expression of certain vocabulary (id. at p. 2). The progress report recommended that the student continue receiving speech and language services three times per week for 30 minutes per session to build her vocabulary and target her goals in a small, structured setting (id.).

Turning to OT, the October 2021/March 2022 independent OT evaluation report described the student as a hard-working student who did well in a 1:1 environment and who was able to follow classroom rules and transition well between activities (Parent Ex. G at p. 12). Based on her assessment of the student, the evaluating occupational therapist reported that she demonstrated severe and significant sensory processing challenges at school, difficulty with sustained attention, decreased eye-hand and bilateral coordination skills, decreased visual motor integration and motor coordination skills, poor handwriting, difficulty with peer social interaction and play skills, difficulties with organizing her materials at school, and decreased postural strength and endurance (Parent Ex. G at pp. 12-13).

The March 2022 independent OT evaluation report included results of formal and informal assessments used by the occupational therapist to assess the student including the Beery-Buktenica Developmental Test of Visual-Motor Integration (Beery VMI), Sensory Profile 2 questionnaires, interviews, and clinical observations (Parent Exs. G at p. 2; KK at pp. 5-6, 8-9). The report noted that during the evaluation, the student was observed to be shy but engaged, requiring prompts and breaks to maintain focus (Parent Exs. G at p. 2; KK at p. 5). The results of the Beery VMI showed that the student's visual-motor integration and visual perceptual skills were average, but her motor coordination was below average, indicating potential challenges in functional tasks (Parent Exs. G at pp. 3-4; KK at p. 6).

Next, the OT evaluation report included a review of the Sensory Profile 2 questionnaires, on which the student's mother reported no sensory issues at home, while her teacher noted difficulties with coordination and attention in school, and indicated that the student was more interested in sensory experiences and more likely to be bothered by sensory input than her peers (Parent Exs. G at pp. 4-5; KK at p. 9-10). The results of the Sensory Profile 2 School Companion indicated that the student had significant challenges in processing and responding to sensory

information in school (Parent Ex. G at p. 6; KK at p. 10). The student's SEIT provider reported that she struggled with verbal directions, task completion in noisy settings, and group activities (Parent Ex. G at pp. 6-7). The student had difficulties with visual tasks, organization, and maintaining eye contact (id. at pp. 6-8). According to the OT evaluation report, in a telephone interview the parent reported concerns with the student's handwriting skills and the time it took her to complete writing tasks (id. at p. 8). In a telephone interview with the student's SEIT provider, the provider highlighted the student's challenges with coordination, balance, interaction with peers, and her need for frequent refocusing prompts (id.). The SEIT provider also noted the student's difficulty with handwriting (id.).

Next, the independent OT evaluation report included information solicited from the student's occupational therapist (Parent Ex. G at pp. 8-9). The occupational therapist indicated that the student experienced ongoing challenges with sustained attention, handwriting, gross motor coordination, motor planning, core and body strength, and overall sensory processing and modulation (id. at p. 9). The student's occupational therapist reported that the student benefitted from specific interventions like highlighter paper to work on sizing and spacing of letters, visual schedules, access to a scribe, and copying from a near-point source (id.). The student's occupational therapist reported concerns regarding the student's oculomotor function (id.).

Based on clinical observation, the evaluating occupational therapist also reported concerns with the student's oculomotor function, as well as her gross motor skills (Parent Ex. G at pp. 9-10). The occupational therapist conducted an assessment of the student's handwriting, which showed issues with letter formation, reversals, and use of a hard static tripod grasp, indicating potential postural control and strength issues (id. at p. 10). According to the occupational therapist, the student's handwriting challenges, including use of excessive pressure, slow writing, and fatigue, which were consistent with teacher reports (id. at p. 11). The student struggled to keep pace with classroom activities, which was below the expected level for her age (id.). Turning to activities of daily living (ADLs), the evaluating occupational therapist reported that the student exhibited strengths in dressing, hygiene, grooming, feeding, and toileting, although she needed assistance with certain tasks like buttoning, tying shoelaces, and some hygiene routines (id.). The occupational therapist recommended the student continue to receive OT services including a sensory diet and the use of adaptive equipment and assistive technology (id. at p. 13). Goals for the student included improving coordination, handwriting, and organizational skills, with specific targets for therapy sessions (id. at p. 15).

According to the February 2022 OT progress report the student exhibited difficulty with attention (Parent Ex. T at p. 1). In addition, although the student made progress in her fine motor skills, she continued to exhibit sensory processing issues which affected her in-school functioning (id.). The OT progress report indicated the student had difficulty remaining on task when distractions were present, maintaining eye contact with the therapist, and choosing a task from a choice of two (id.). The student also had difficulty forming and spacing letters correctly (id.). The OT progress report noted the student exhibited "significant" weakness in motor planning and spatial orientation and had difficulty with simple obstacle courses (id.). In addition, the student exhibited weakness in the area of visual motor/perception skills, resulting in difficulty coloring within boundaries, completing jigsaw puzzles, connecting the dots, and with spatial relationships between objects (id. at p. 2). The OT progress report indicated that to facilitate mastery of skills the student needed verbal and tactile prompts, modeling, redirection, visual imagery, breathing

techniques, repetition, written instructions, increased structure throughout a task, positive reinforcement, graded activities, backward chaining techniques, forward chaining techniques, and decreased environmental distractions (id.).

Turning to the student's needs in the area of PT, at the time of the August 23, 2021 independent PT evaluation, the student was attending a general education class in a private religious school and receiving "SEIT" services 10 hours per week and related services of speech-language therapy, occupational therapy, and physical therapy (Parent Ex. F at p. 1). The independent PT evaluation report stated that, based on formal testing and informal observation the student presented with mild to moderate deficits in most areas of gross motor function including posture, ambulation, balance, strength, and endurance (id. at p. 10). The evaluating physical therapist identified the formal and informal assessments she used to assess the student including the Bruininks-Oseretsky Test of Motor Proficiency, Second Edition (BOT-2), Functional Reach Test (FRT), Timed Up and Down Stairs (TUDS), and Manual Muscle Testing (MMT)(id. at p. 2). The physical therapist reported that the student demonstrated difficulty with speed control while running and used an "egg-beater" pattern when ascending stairs (id. at p. 3). The student used a step-to pattern on descent (id.). According to the physical therapist, the student was able to balance briefly on one foot and balanced longer on her right foot than her left (id.). She showed moderate bilateral coordination challenges, particularly with activities requiring crossing the midline (id.). The physical therapist reported that the student demonstrated muscle weakness in her core and lower extremities, and limited strength in her shoulder girdle, core, and hip extensor muscles (id.). The physical therapist indicated the student could perform 10 toe raises with less than "good" strength (id.). She noted the student's performance on the BOT-2 yielded below-average scores in bilateral coordination, balance, and strength, with an average score in running speed and agility (id. at p. 4).

According to the independent PT evaluation report, the physical therapist used the Pediatric Balance Scale, a modified version of the Berg Balance Scale, to assess the student's functional reach (FRT), which based on her performance fell in the below average range (Parent Ex. F at p. 4-5). The physical therapist reported that the student's scores were average for TUDS test and that the student's test scores on the both the FRT and TUDS, aligned with her scores on similar subtests of the (BOT-2) (id. at p. 5). The student's performance on the Manual Muscle Testing (MMT) showed that she had mild strength deficits in her upper and lower extremities (id. at p. 5-6). The physical therapist explained that the Pediatric Evaluation of Disability Inventory - Computer Adapted Test (PEDI-CAT) assessed the student's daily activities and mobility, and her performance revealed moderate functional limitations, placing her in the 4th percentile for both dimensions (id. at p. 6). The physical therapist noted that the student was able to complete many activities throughout the day without demonstrating difficulty; however, her challenges with balance and coordination and muscle weakness in her core, chest, arms, and legs were limiting her progress and her ability to further engage in school and community (id. at p. 8).

According to the physical therapist, the student's scores on the (BOT-II) placed her skills in the below average category in body coordination, strength, and agility, and were indicative of moderate motor impairments (Parent Ex. F at p. 9). The physical therapist reported that the student struggled with bilateral coordination, balance, and proprioception, which affected foundational skills like stair climbing and running (id.). In addition, she noted the student's performance on

standardized tests, such as the PEDI-CAT, highlight the student's functional limitations in mobility and daily activities (id.).

The physical therapist recommended that the student receive two 30-minute sessions per week of individual PT to improve the student's motor functions, activity level, and participation; including individual sessions focused on muscle strength, balance, endurance, running, and ball skills, with an emphasis on self-regulating techniques (Parent Ex. F at p. 10). Goals recommended for the student included improving gross motor skills, coordination, strength, and balance to enhance participation in school and community activities, with specific targets including stair navigation, obstacle course completion, ball skills, and strength exercises (id. at pp. 11-12).

Turning next to the January 2022 PT progress report, the report noted that the student presented with gross motor deficits which needed to be addressed for the student to be able to participate in educational activities and function age appropriately in school and other settings (Dist. Ex. 20 at p. 1). The progress report indicated that the student exhibited difficulty transitioning during sessions, which affected her progress in therapy (id.). The report stated that the student exhibited decreased frustration tolerance and coping skills and required prompting and cueing when performing a challenging, nonpreferred, or unfamiliar activity (id.). According to the January 2022 PT progress report, the student's attention, focus on tasks, and motor organization usually improved after engaging in vestibular and proprioceptive input and engaging in "heavy work activities" (id.). A review of the student's then current goals indicated that the student exhibited limited progress with throwing and catching a ball, and delayed ability to run fast and smoothly (id.). The student demonstrated poor balancing skills (id. at pp. 1-2). Additional weaknesses were evident in the student's inability to bridge in supine position, walk on uneven surfaces, and throw or catch a medium size ball (id. at p. 2). The PT progress report indicated that interventions provided to the student and designed to elicit movement included using unstable surfaces, moving surfaces, moving equipment, and playground equipment; supervision; minimal to moderate lifting assist; modeling; verbal, tactile, and visual cues; prompts to begin, continue, and complete tasks; and games and toys designed to elicit movement (id.).

2. June 2022 IEP

As noted above, the CSE convened in June 2022 to develop the student's IEP for the 2022-23 school year (see Dist. Exs. 11; 12; 13). The description of the student's abilities and needs in the present levels of performance of the June 2022 IEP are consistent with the narratives found in her provider's progress reports (compare Dist. Ex. 11 at pp. 1-4, with Parent Exs. S; T; X and Dist. Exs. 20; 22).

Overall, the June 2022 CSE recommended that the student receive the support of ICT services for math and ELA eight times each per week and for social studies and science four times each per week (Dist. Ex. 11 at p. 16).¹⁶ In addition, the CSE recommended the student receive

¹⁶ State regulation defines ICT services as the provision of specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students and states that the maximum number of students with disabilities receiving ICT services in a class shall be determined in accordance with the students' individual needs as recommended on their IEPs, provided that the number of students with disabilities in such classes shall not exceed 12 students and that the school personnel assigned to each class shall minimally include a special education teacher and a general education teacher (8 NYCRR 200.6[g]).

one 30-minute session per week of individual counseling services; two 30-minute sessions per week of individual OT; one 30-minute session per week of group OT; two 30-minute sessions per week of individual PT; two 30-minute sessions per week of individual speech-language therapy; and one 30-minute session per week of group speech-language therapy (id. at pp. 16-17).

The June 2022 IEP noted that the student presented with social, language, and academic deficits and that her weak receptive and expressive language skills impacted her comprehension of written and orally presented texts (Dist. Ex. 11 at p. 4). According to the IEP, speech-language therapy was intended to target the student's language needs, including communication of thoughts and ideas, comprehension, and conversational skills (id.). The IEP stated that ICT services would have provided the student with reinforcement of concepts that she struggled with such as math calculations and spelling which were areas of relative weakness (id.). According to the IEP it was important for the student to be in a general education classroom to learn content first-hand and to develop academic independence to the greatest extent possible (id.). The IEP noted that support within the general education classroom, with ICT services, would have included repetition, instruction broken down, and the use of visual aids (id.). The IEP further indicated that the student's difficulty attending to and completing tasks would have been addressed through OT (id.). In addition, the IEP noted that the student's poor self-esteem and need to develop peer relationship skills would have been addressed through counseling and the student's gross motor deficits would have been addressed by PT (id.). The IEP indicated that the CSE considered recommending related services only for the student but found that related services only would not have met the student's needs (id. at p. 22). The CSE also considered a 12:1 special class placement for the student but determined that it would have been too restrictive (id.).

The June 2022 IEP featured eight annual goals aimed at addressing the student's sensory processing challenges at school, difficulty with sustained attention, decreased eye-hand and bilateral coordination skills, decreased visual motor integration and motor coordination skills, poor handwriting, difficulty with peer social interaction and play skills, difficulties with organizing her materials at school, decreased postural strength and endurance, improving her progress in the general education curriculum, and addressing her educational needs due to her speech or language impairment (Parent Ex. 11 at pp. 6-15).

To address her deficits in most areas of gross motor function, the IEP included goals that targeted the student's ability to ascend and descend stairs, navigate obstacle courses, and improve eye-hand coordination through activities like bouncing and catching a ball (Dist. Ex. 11 at p. 6). Additional goals addressed the student's lower extremity, core muscle, and shoulder girdle strength and targeted her ability to perform bridging exercises, sit-ups, knee push-ups, and to maintain a "Superman" position (id. at pp. 7-8). The June 2022 IEP outlined goals for improving the student's overall strength, balance, and endurance, with activities that targeted the student's ability to jump from heights, maintain balance on uneven surfaces, and participate in cross-body movements (id. at pp. 8-9). The IEP addressed the student's bilateral coordination, visual motor integration, and executive functioning skills through activities that required her to complete obstacle courses, catch and throw balls, and use adaptive equipment for writing and coloring (id. at pp. 10-11).

To increase the student's reading readiness, the CSE recommended goals that targeted her ability to blend letter sounds, answer questions about stories, and increase her knowledge of diphthongs, digraphs, prefixes, suffixes, and sight words (Dist. Ex. 11 at pp. 11-12). The student's

math readiness goals focused on her ability to add in story format, read and write numerals, count orally, and identify numbers (id. at pp. 12-13).

To address the student's overall social development including her inability to ask for assistance when having difficulty, play dress up, talk about her own feelings, select her own group of friends, wait for her turn when playing in group games, or explain rules of a game to others, the IEP included goals that targeted the student's ability to initiate play, maintain group play, and improve verbal interaction with classmates and teachers (Dist. Ex. 11 at pp. 13-14). To address the student's language disorder and auditory processing disorder with deficits in expressive, receptive, and pragmatic (social) language skills, the CSE recommended goals designed to enhance her expressive and receptive language skills to aid her participation in educational activities (id. at p. 14). To address her articulation disorder, the IEP included speech therapy goals that included improving the student's articulation and phonological delay and oral motor skills (id. at p. 15).

With respect to the parent's assertion that the student required 1:1 instruction in order to achieve an educational benefit, the information available to the June 2022 CSE does not support such an assertion. The school psychologist who attended the June 2022 CSE testified that the CSE reviewed the SEIT progress report and, after acknowledging that the report included a recommendation for increased SEIT services, she testified that the CSE determined, as a team, that the student did not require 1:1 instruction and could be educated in an ICT setting (Dist. Ex. 26 at ¶¶6-8, 14, 16; Tr. pp. 184, 186-87, 238, 240). The school psychologist explained that the CSE is tasked with making its recommendations on the data available to the CSE and not solely on the recommendations made by private providers (Tr. pp. 186-87, 198, 244-45, 280-81). The school psychologist testified that the recommendation for an ICT classroom, which included a full-time general education classroom with an additional special education teacher, would have provided instruction to the students in the class in groups based on their ability, or by pairing students who struggle in a specific area with a general education student who excels in that area, and a special education teacher to provide academic support (Tr. p. 265). The CSE determined that the student did not need a full-time, one to one special education teacher to provide instruction, but rather the special education teacher in the ICT could supplement the instruction of the general education teacher with additional support provided to the student, either individually or in a group, depending on numerous factors (Tr. pp. 266-67). The special education teacher who attended the June 2022 CSE meeting testified that based on review of the information before them, the CSE determined that the student did not require 1:1 instruction (Tr. pp. 634, 649-50, 659, 675).

Overall, review of the June 2022 IEP shows that it addressed the student's identified needs and was sufficiently supportive such that it would have been reasonable to expect the student to make progress. The parent's argument that the June 2022 IEP did not include sufficient related services recommendations is disputed by the hearing record. For example, the recommended frequency and duration of speech-language therapy was consistent with the student's May 2022 speech-language therapy progress report (Tr. pp. 256; compare Dist. Ex. 11 at p. 17, with Parent Ex. S at p. 2). Further, the January 2022 PT progress report and the February 2022 OT progress report were more recent than the IEE's obtained by the parents and were written by the student's then-current therapists who did not recommend an increase in frequency or duration of services (Tr. pp. 241-42, 247-48; Parent Ex. T at p. 2; Dist. Ex. 20 at p. 2).

Based on the above, I find that the student's recommended special education placement and services described above, with the support of ICT services, related services, and the identified management needs, would have addressed the student's needs and the hearing record supports upholding the IHO's determination that the district provided the student a FAPE for the 2022-23 school year.¹⁷

B. 2023-24 school year

1. Student's needs

Turning to the 2023-24 school year, according to testimony by the special education teacher who participated in the March 2023 CSE meeting, the present levels of performance for the March 2023 IEP were based on the information contained in the documents reviewed and considered at the March 2023 CSE meeting, including the July 2022 neuropsychological evaluation, a January 2023 PT progress report, a March 2023 special education teacher progress report, an undated OT progress report, and a March 2023 speech-language progress report (Tr. pp. 671-72; Dist. Ex. 1 at pp. 1-3; Parent Exs. I; Q; U; GG; HH).

The July 2022 independent neuropsychological evaluation revealed that the student had difficulty sustaining attention, articulation and phonological delays, expressive and receptive language deficits, disfluencies, and oral motor delays (Parent Ex. I at p. 12). In addition, the student's visual-motor, fine motor coordination skills, and fine motor dexterity also fell "well below average (id. at p. 13). According to the neuropsychological evaluation report, the student's narrative memory, working memory, and reading comprehension abilities were in the borderline to impaired range, as were her executive functions with respect to inhibiting her responses (id.). As a result of the evaluation, the student received diagnoses of developmental coordination disorder and language disorder (id. at p. 13).

The evaluators who conducted the neuropsychological evaluation reported using behavioral observations, parent interview, review of records, and standardized tests to assess the

¹⁷ Although the SEIT progress report indicated that the student should receive 12-month services because it was important for her to have consistent services and the student exhibited "regression" after long breaks and the March 2022 OT evaluation also recommended 12-month services for the student (Parent Exs. G at p. 14; X at p. 2); overall, the evaluative information before the June 2022 CSE did not indicate that the student would have experienced substantial regression such that 12-month services were required (see Parent Exs. F-H; S; T; X; Dist. Exs. 12; 13; 20; 22). The purpose of 12-month services is "to prevent substantial regression" (8 NYCRR 200.6[k][1]; see 8 NYCRR 200.1[eee]). "Substantial regression" is defined as "a student's inability to maintain developmental levels due to a loss of skill or knowledge during the months of July and August of such severity as to require an inordinate period of review at the beginning of the school year to reestablish and maintain IEP goals and objectives mastered at the end of the previous school year" (8 NYCRR 200.1[aaa]). Generally, a student is eligible for a 12-month school year service or program "when the period of review or reteaching required to recoup the skill or knowledge level attained by the end of the prior school year is beyond the time ordinarily reserved for that purpose at the beginning of the school year" ("Extended School Year Programs and Services Questions and Answers," at p. 3, VESID Mem. [Feb. 2006], available at <https://www.nysed.gov/sites/default/files/programs/special-education/extended-school-year-questions-and-answers-2024.pdf>). Typically, the "period of review or reteaching ranges between 20 and 40 school days," and in determining a student's eligibility for a 12-month school year program, "a review period of eight weeks or more would indicate that substantial regression has occurred" (id.; see *F.L. v. Bd. of Educ. of Great Neck Union Free Sch. Dist.*, 274 F. Supp. 3d 94, 125 [E.D.N.Y. 2017]).

student (Parent Ex. I at p. 5).¹⁸ They noted that the student demonstrated compliance and cooperation during testing, although articulation and fine motor tasks were challenging for her (*id.*). The evaluators cautioned that the student's weaknesses in verbal comprehension and fine motor skills should be taken into account when considering test results, as the student's scores with respect to her overall intellectual functioning and on some indices might be an underestimate of her true abilities (*id.* at pp. 5-6). According to the evaluators, evaluation procedures included administration of the Adaptive Behavioral Assessment Scale, Third Edition (ABAS-3), Behavioral Assessment Scale for Children, Third Edition, Parent Report (BASC-3), Beery-Buktenica Developmental Test of Visual-Motor Integration Developmental Neuropsychological Assessment, Second Edition (NEPSY-II), Wechsler Intelligence Scale for Children, Fifth Edition (WISC-V), and Wechsler Individual Achievement Test-Fourth Edition (WIAT-IV) (*id.* at p. 5).

The July 2022 neuropsychological evaluation report indicated that the student attained a full-scale IQ of 75 on the WISC-V, which placed her in the 5th percentile and at the borderline range of intellectual functioning (Parent Ex. I at p. 7). On the verbal comprehension index (VCI) the student scored in the borderline range (4th percentile), which suggested weaknesses in the student's understanding of verbal information, ability to think with words, and ability to express her thoughts with words (*id.*). The evaluation report noted that the student struggled with vocabulary and describing similarities between words (*id.*). On the visual spatial index (VSI), which reflected the student's ability to evaluate visual information/details and understand visual/spatial relationships, the student scored in the 55th percentile (*id.*). On the fluid reasoning index (FRI) the student scored in the borderline range (8th percentile), which indicated the student had difficulties with solving novel problems and using logic and reasoning (*id.* at p. 8). The evaluation report noted that on the working memory index (WMI) the student scored in the borderline range (4th percentile), which showed the student had challenges in holding and manipulating information, particularly with sequencing tasks (*id.* at pp. 8-9). On the processing speed index (PSI) the student scored in the borderline range (6th percentile), with fine motor skills affecting her ability to complete tasks quickly (*id.* at p. 9).

Next, the neuropsychological evaluation report indicated that the student's performance on the Beery visuomotor integration and visual perception tasks were in the impaired range, and a significant weakness for her (Parent Ex. I at p. 9). According to the evaluation report, the student's performance on these tasks reflected her significant fine motor delays, especially with respect to holding a pencil (*id.*). On the visuomotor integration tasks in which she was required to replicate shapes of varying complexity, the student was visibly frustrated and complained of her hand hurting (*id.*). The evaluation report stated that the student performed in the impaired range on a motor coordination task that elicited her controlled and accurate tracing within various shapes (*id.*). She was unable to draw lines within shapes or connect dots consistently (*id.*). Overall, the student showed significant weaknesses in fine motor skills, impacting her ability to replicate shapes and perform motor coordination tasks (*id.*).

The neuropsychological evaluation report noted that the student's attention and executive functioning was assessed using selected subtests of the NEPSY-II, the results of which highlighted her difficulties in cognitive flexibility, self-monitoring, and conceptual knowledge (Parent Ex. I at

¹⁸ The neuropsychological evaluation was conducted by a neuropsychologist and the neuropsychologist's doctoral intern, who conducted some of the testing (Parent Ex. LL ¶ 11).

p. 10). The student performed in the impaired range on tasks requiring organization and inhibition (id.). Evaluation of the student's memory skills revealed weaknesses in narrative memory, which aligned with her working memory challenges on the WISC-V (id.).

According to the neuropsychological evaluation report, the student's oral language skills as measured by the WIAT-IV and NEPSY-II were mixed; her receptive vocabulary was borderline, her oral expression was impaired, and her expressive vocabulary was impaired (Parent Ex. I at p. 11). Turning to academic skills, the evaluation report indicated that, as measured by the WIAT-IV, the student's reading abilities fell in the borderline range, with significant issues in reading comprehension (id.). In addition, her mathematics skills fell in the low average range, with relative strengths in performing basic calculations but difficulties in completing more complex tasks (id.). The student's written expression fell in the borderline range, with fine motor issues affecting her ability to complete tasks (id.). Although the student chose to dictate her responses on spelling and sentence comprehension tasks her performance fell in the borderline range (id.). The evaluation report noted that this method was likely more difficult and, as a result, the student's writing skills might be undervalued (id.).

Next, the evaluation report indicated that the student's social/emotional functioning was assessed using standardized questionnaires from the ABAS-3 and the BASC-3 (Parent Ex. I at p. 11). The report noted that the parent reported significant concerns related to the student's adaptive functioning across domains but identified social skills as a personal strength for the student (id. at pp. 11-12). According to the evaluation report, the student's SEIT's responses on the BASC-3 indicated clinically significant attention problems and internal distress, including depression and withdrawal (id. at p. 12). The student's SEIT noted the student's cooperative behavior but highlighted her delays in speech, physical skills, and processing, which affected her social interactions and learning (id.).

With regard to the evaluators diagnostic impressions, the evaluation report summarized the student's delays detailed above and offered diagnoses of developmental coordination disorder and language disorder (Parent Ex. I at p. 13). The evaluator made numerous recommendations to address the student's educational needs including that the student be placed in a highly structured classroom that included 20 hours of individual special education instruction weekly, and compensatory services for missed supports (id. at p. 14). The evaluator also recommended the student receive speech-language therapy, OT, and in-school counseling on a 12-month basis, testing accommodations such as extra time and a separate location, external prompts, clear communication, and consistent structure, and coordination among the student's treatment team (id.).

According to the January 2023 PT progress report, the student presented with pes planus, decreased strength and muscle endurance, gross motor delays, balance and coordination deficits, as well as issues with attention span, organizational skills, and problem-solving skills (Parent Ex. Q at p. 1). The progress report indicated that the student made partial progress towards her annual goals, which included developing age-appropriate gross motor skills in the areas of balance, running, jumping, bilateral play, eye-hand coordination skills, improving core and major muscle group strength and endurance, kicking a moving ball, jumping from a 16-inch step, hopping forward, hanging from a bar, and bouncing a tennis ball (id. at p. 1-2). The report included a recommendation that the student continue receiving PT services twice a week in 30-minute

sessions and that going forward the student's plan of care would focus on strengthening exercises, gross motor skills, balance activities, attention span, problem-solving skills, and functional activities (id.).

A March 2023 OT progress report indicates that the student presented with low muscle tone and issues with fine motor skills, particularly in handwriting and cutting tasks, and she required moderate verbal cues to maintain focus during activities (Parent Ex. GG at p. 1). The student's annual goals included improving fine motor skills in handwriting and cutting, as well as attention and concentration skills (id.). Her short-term objectives included copying sentences with correct letter size and spacing, cutting without guidance, and completing art and craft activities with minimal cues (id. at p. 1-2). According to the report, the student was self-motivated, followed multi-step directions, and participated in various activities with enthusiasm (id. at p. 2). The progress report noted that the student showed some progress in cutting skills but struggled with consistent letter sizing and pressure in writing (id.). Recommendations included increasing OT sessions to three times a week for 45 minutes each, focusing on fine motor activities, following directions, and adherence to routines (id.).

As for the student's progress in speech, the student was evaluated in March 2023 using formal and informal tests, including SLAM sequencing cards (Parent Ex. HH at p. 1). The student exhibited improved comprehension in sequencing stories and was able to perceive some feelings in pictures, but struggled with making inferences and explaining why the feelings were displayed (id.). She had difficulty recalling specific words and sometimes used incorrect labels for objects or concepts (id.). The student could explain the function of common items but had difficulty identifying similarities and differences between them (id.). The student was working on expanding her vocabulary, auditory processing, and word retrieval skills, showing progress in these areas (id.). The report included a recommendation that the student receive speech-language services three times a week for 40 minutes to further develop her vocabulary in a structured setting (id. at p. 2).

According to a March 17, 2023 SEIT progress report, the student struggled with language processing, reasoning, critical thinking, and social interaction, requiring heavy prompting to demonstrate knowledge (Parent Ex. U at p. 1). The student had difficulty with "how and why" questions, repeating stories, identifying main ideas, and processing conjunctions, negatives, and conditional terms (id.). The report indicated the student was unable to plan activities ahead, lacked awareness of time concepts, and became easily distracted in class (id.). Academically, the report noted that the student was unable to fill in missing rhyming words, complete cloze sentences, or attend to tasks without redirection; the student struggled with multiplication tables, verbal math problems, and counting by fives and tens (id.). Socially, the report noted that the student did not interact with adults outside of her immediate circle, initiate or maintain play with peers, or demonstrate pretend play (id. at p. 2). While the report noted that the student was able to work in a small group for 10 minutes with prompts, the report also noted that the student was extremely limited in the classroom and required a lot of 1:1 help (id.). The SEIT provider recommended increasing the student's educational support to 20 hours weekly (id.).

2. March 2023 IEP

A CSE convened on March 20, 2023 to determine the student's program and services for the 2023-24 school year, with a projected implementation date of September 7, 2023 (Dist. Ex. 1 at pp. 1, 21). The March 2023 CSE recommended the support of ICT services for math and ELA ten times each per week and, for social studies and science, five times each per week, as well as related services consisting of one 30-minute session per week of individual counseling; three 30-minute sessions per week individual OT; two 30-minute sessions per week of individual PT; and three 30-minute sessions per week of individual speech-language therapy (Dist. Ex. 1 at pp. 15-17, 20).

The March 2023 IEP also included management needs for the student, including reminders for coping strategies, advanced preparation for tasks, regular check-ins, reducing distractions, and using both verbal and visual modalities for presenting information (Dist. Ex. 1 at pp. 3-4). In addition, the IEP noted that the student needed steps written out for math problems, use of paper for problem-solving, and to be discouraged from using mental calculations for complex problems (*id.* at p. 4). The identified management needs also included reading strategies to enhance the student's fluency, decoding, and comprehension, such as tapping, re-reading, paired reading, and using visual aids like highlighting (*id.*). In addition, organizational needs were identified, including using outlines, semantic maps, and homework planners, with regular check-ins to ensure task completion (*id.*).

The March 2023 IEP featured measurable annual goals to address the student's difficulties in the areas of sustaining attention, identifying coping strategies, gross motor skills, core strength, fine motor skills, decoding, verbal comprehension, writing, vocabulary, math, speech articulation and phonological processes, expressive and receptive language, and oral motor skills (Dist. Ex. 1 at pp. 6-15). Review of the identified goals shows that they addressed the student's needs as identified in the evaluative information available to the March 2023 CSE. For example, to address the student's social/emotional development, the IEP included goals for her to accurately recognize her level of distractibility and impulsivity using a visual self-rating system, such as a feelings thermometer; and accurately identify appropriate coping strategies when faced with real or imagined situations (Dist. Ex. 1 at pp. 6-7). To address her reading needs, the student continued working on improving her decoding skills; focusing on reading multisyllabic words with various phonetic elements such as long vowels, vowel digraphs, and diphthongs; identifying conclusions that summarize the main idea; identifying main ideas and supporting details in informational texts; and improving her reading comprehension skills by learning strategies to retell a short story (*id.* at p. 10). The student's speech-language needs were targeted with goals to comprehend new words and use them in context; classify items into categories, identifying the similarities and differences; and improve receptive language skills by identifying language content, semantics, word retrieval, word knowledge, and relational terms from a text (*id.* at p. 12). In addition, the student was working on answering comprehension questions presented with picture cards; blending letter sounds; and increasing knowledge of diphthongs, prefixes, suffixes, and sight words (*id.* at pp. 13-14).

The hearing record reflects that the parent, SEIT instructor, and neuropsychologist believed that the student needed one to one SEIT instruction in order to receive a FAPE (Tr. pp. 180-81, 511; Parent Exs. I at p. 14; U at p. 2; X at p. 2; LL at p. 9; MM at p. 3). For example, according

to the July 2022 neuropsychological evaluation report and as reflected in the March 2023 IEP, the student exhibited significant academic and social delays, requiring one to one instruction (Tr. pp. 417-19; Parent Ex. I at p. 14; Dist. Ex. 1 at p. 1). The parent testified that at the March 2023 CSE meeting, she asked the district to consider including in the IEP the recommendations from the July 2022 neuropsychological evaluation report, as well as the PT, OT, and speech IEEs into the IEP, and to consider 12-month school year services and an increase in the student's one to one instruction, as recommended by the SEIT progress report (Tr. pp. 710-13; MM at p. 3).

Although the neuropsychologist who conducted the July 2022 neuropsychological evaluation and the student's SEIT provider both recommended that the student be recommended for 20 hours per week of 1:1 instruction to be provided in the student's general education classroom, the district provided a sufficient rationale for why they deviated from those recommendations. In particular, the district special education teacher, who participated in the both June 2022 and March 2023 CSE meetings, testified that the CSE recommended ICT services for the student in a general education classroom because of the extensive management needs contained in the student's IEPs, explaining that "management needs... should be accessed or utilized for everyone who comes in contact with the student, from the gen ed teacher to a SETSS provider or to a related service provider" (Tr. pp. 682-83, 687-88). The special education teacher testified that "[m]anagement needs [we]re created or determined based on the information [the district] g[ot] from the providers, the classroom teachers based on the learning style of the student and what would benefit them" (Tr. p. 673).

As noted above, the March 2023 IEP identified strategies to address the student's management needs and the hearing record shows that the management needs were developed with input from the student's teachers and providers and in consideration of her learning style, would have supported her success in a general education class with the support of ICT services (Tr. pp. 673, 677). Additionally, the special education teacher noted that those management needs could have been implemented for the student in a general education class with the support of ICT services (Tr. pp. 682-88). In this instance, the March 2023 CSE had a sufficient basis for recommending that the student receive the support of ICT services despite the recommendations of the student's SEIT provider and the neuropsychologist who conducted the July 2022 evaluation. Generally, district staff responsible for formulating the student's IEP in compliance with the requirements of the IDEA may be afforded some deference over the views of private experts (see Lessard v. Wilton-Lyndeborough Coop. Sch. Dist., 592 F.3d 267, 270 [1st Cir. 2010] [noting that "the underlying judgment" of those having primary responsibility for formulating a student's IEP "is given considerable weight"]; J.E. & C.E. v. Chappaqua Cent. Sch. Dist., 2016 WL 3636677, at *16 [S.D.N.Y. June 28, 2016], aff'd, 2017 WL 2569701 [2d Cir. June 14, 2017], citing E.S. v. Katonah-Lewisboro Sch. Dist., 742 F. Supp. 2d 417, 436 [S.D.N.Y. 2010] ["The mere fact that a separately hired expert has recommended different programming does nothing to change [the] deference to the district and its trained educators"], aff'd, 487 Fed. App'x 619 [2d Cir. July 6, 2012]; Z.D. v. Niskayuna Cent. Sch. Dist., 2009 WL 1748794, at *6 [N.D.N.Y. June 19, 2009] [explaining that deference is frequently given to the school district over the opinion of outside experts]).¹⁹

¹⁹ As for the parent's request for 12-month services for the 2022-23 school year, the information that was available to the March 2023 CSE included a recommendation by the neuropsychologist that the student's services should continue in the summer months to prevent regression (Parent Ex. I at p. 14); however, although the SEIT, OT,

C. Pendency

Having determined that the district offered the student a FAPE for both school years, I next turn to the parent's request for services pursuant to pendency. 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]).²⁰ 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 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).

PT, and speech-language therapy progress reports included recommendations, they did not indicate that the student exhibited regression or required 12-month services (Parent Exs. Q; U; GG; HH). At the hearing, the neuropsychologist testified that given the student's significant language deficits, she fit the profile of a student who would be significantly hindered if not provided a 12-month program (Tr. p. 420). However, the neuropsychologist was not able to pinpoint specific data which demonstrated that the student exhibited regression after long breaks (*id.*). Accordingly, as with the 2022-23 school year, the hearing record does not include sufficient information to show that the student exhibited substantial regression such that the March 2023 CSE's decision not to recommend 12-month services resulted in a denial of FAPE.

²⁰ 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).

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).

The parent requests a bank of compensatory education for the pendency services the student missed during the summers of the 2022-23 and 2023-24 school years (Req. for Rev. ¶ 17; Tr. p. 149). Pursuant to an unappealed pendency order dated November 5, 2021, the district was responsible for the provision or funding of a 12-month school year as follows: ten hours per week of SEIT services; three 30-minute sessions per week of individual speech-language therapy; two 30-minute sessions per week of individual PT; and two 30-minute sessions per week of individual OT (Parent Ex. D at p. 6; Tr. p. 701). During cross-examination, the parent explained that the student attended summer camp prior to turning school-aged and, while still in preschool, the camp allowed the student's SEIT services to be provided within the camp, but that after the student turned school-age the camp no longer allowed for the provision of SEIT services during camp hours (Tr. p. 720). The parent noted that the camp had never allowed OT, PT, or speech providers into the camp for the student (id.). The parent testified that the summer camp the student attended was not part of the student's private school (Tr. p. 724, 736).

The parent testified that during the summer of 2022 the student did not receive the SEIT, OT, or PT services mandated under pendency "[b]ecause the summer camp would not allow providers to come into the day camp. And also because the Department of Education never offered any providers for the SEIT, OT, and PT" (Tr. p. 704).

Regarding the summer of 2023, the parent testified that the student did not receive her mandated SEIT, OT, or PT services (Tr. pp. 701-02).²¹ When questioned why the student did not receive SEIT, OT, or PT under pendency, the parent responded "because the camp that I sent her to does not allow a therapist into the camp" and "also the – the Department of Education didn't offer any providers for [the student's] pendency mandates for the SEIT, OT, and PT" (Tr. p. 702).

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 (E. Lyme, 790 F.3d at 456 [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]).

The parent requests a bank of compensatory education for the special education and related services that the student missed during the summers of 2022 and 2023 (Req. for Rev. ¶ 17). According to the hearing record, the student did not receive any special education or related services during the summers of 2022 and 2023 and the student was entitled to these services under the November 4, 2021 pendency order as the prior proceeding was pending until a decision was issued on September 1, 2023 and this proceeding has been pending since the filing of the due process complaint notice on November 6, 2023 (see Parent Exs. A; B; D). In calculating the exact hours owed, I note that 12-month programming consists of 6 weeks over the summer (see Educ. Law § 3604[7]; 8 NYCRR 175.5 [a], [c]; 200.1[eee]). The November 4, 2021 pendency order, which governs the prior proceeding and the summer 2022, mandated ten hours a week of SEIT services, three 30-minute sessions per week of speech-language therapy, two 30-minute sessions per week of PT, and two 30-minute sessions per week of OT (Parent Ex. D at p. 6). However, in this proceeding, the pendency order mandates 20 hours per week of 1:1 SEIT services, three 40-minute sessions per week of 1:1 speech-language therapy, two 45-minute sessions per week of 1:1 OT, and two 30-minute sessions per week of 1:1 PT (Parent Ex. C). As such, under pendency, the student is entitled to a bank of 180 hours of SEIT services; 21 hours of speech-language therapy; 12 hours of PT; and 15 hours of OT to make up for the special education and related services the student missed during the summers of 2022 and 2023.

VII. Conclusion

Having determined that the evidence in the hearing record establishes that the district offered the student a FAPE for the 2022-23 and 2023-24 school years, and that the parent is entitled to a bank of compensatory education for special education services that the student should have

²¹ The pendency order in this matter mandates 20 hours per week of 1:1 SEIT services, three 40-minute sessions per week of 1:1 speech-language therapy, two 45-minute sessions per week of 1:1 OT, one 30-minute session per week of group counseling and one 30-minute session per week of 1:1 counseling, and two 30-minute sessions per week of 1:1 PT, all on a 12-month basis (Parent Ex. C). However, the parent made no mention of counseling, so the counseling services will not be further considered.

received pursuant to pendency for the summers of 2022 and 2023, the necessary inquiry is at an end.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision dated August 14, 2024 is modified to order the district to fund a bank of the following services the district owes the student under pendency for the summer of 2022 and the summer of 2023: 180 hours of SEIT services; 21 hours of speech-language therapy; 12 hours of PT; and 15 hours of OT.

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

STEVEN KROLAK
STATE REVIEW OFFICER