



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 24-426

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

### **Appearances:**

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

Liz Vladeck, General Counsel, attorneys for respondent, by Brian Gauthier, Esq.

## **DECISION**

### **I. Introduction**

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which determined that the educational program and related services respondent's (the district's) Committee on Special Education (CSE) recommended for their son for the 2023-24 school year were appropriate. The district cross-appeals from that portion of the IHO's decision which found that the student was entitled to receive compensatory educational services for missed pendency services. The appeal must be dismissed. The cross-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[a]). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

### **III. Facts and Procedural History**

The student in this case began receiving special education—physical therapy (PT)—through the Early Intervention (EI) program; subsequently, during the 2016-17 school year, the student received services as a preschool student eligible for special education at a preschool program (nonpublic school 1), which consisted of a general education setting with special education itinerant teacher (SEIT) services, speech-language therapy, and occupational therapy

(OT) (see, e.g., Parent Exs. F at p. 1; G at pp. 2, 4; H at p. 1; I at p. 1; J at p. 1; K at p. 1).<sup>1</sup> For the 2017-18 and 2018-19 school years (kindergarten and first grade), the student attended a different nonpublic school (nonpublic school 2), and, as the student's stay put placement during the pendency of a prior due process proceeding, received special education services, consisting of individual SEIT services, speech-language therapy, OT, and PT (see generally Parent Exs. M-N; P).<sup>2</sup>

In spring 2019, a CSE reevaluation of the student took place to determine appropriate school-age special education services (see Parent Exs. O; P at p. 1). Overall, the reevaluation results indicated that the student had received a diagnosis of dyslexia; he was cognitively functioning in the average range; he was highly cooperative; and he had needs in the areas of early reading skills (fluency and comprehension), mathematics problem solving, alphabet writing fluency, phonological awareness skills, and visual perceptual/motor skills (see generally Parent Exs. O-S).

For the 2019-20 (second grade), 2020-21 (third grade), and 2021-22 (fourth grade) school years, the student resumed attending nonpublic school 1 and continued to receive special education services (see, e.g., Parent Exs. U at p. 1; V at p. 1; W at p. 1; X at p. 1). According to a "Teacher Progress Report," dated January 31, 2021 by the provider and dated May 30, 2021 by the provider's supervisor, the student had been receiving "[10] hours of 1:1 SEIT support weekly both in and out of the classroom since September 2016 due to his cognitive, academic, social, motor and language delays" (Parent Ex. V at pp. 1, 6). It was further noted that the student also received speech-language therapy and OT two times per week "to address his many needs" (*id.* at p. 1). In an "Auditory and Language Processing Evaluation," dated August 24, 2021, it was reported that the student was "in a summer program for reading (10 hours [per] week)" and was then-currently receiving OT and speech-language therapy (Parent Ex. W at pp. 1-2).

In September 2021, the student underwent an OT evaluation (see Parent Ex. X at p. 1). The evidence in the hearing record reflects that, in November 2021, the parents obtained a

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<sup>1</sup> State law defines SEIT services (or, as referenced in State regulation, "Special Education Itinerant Services" [SEIS]) as "an approved program provided by a certified special education teacher . . . , at a site . . . , including but not limited to an approved or licensed prekindergarten or head start program; the child's home; . . . or a child care location" (Educ. Law § 4410[1][k]; 8 NYCRR 200.16[i][3][ii]; see "[SEIS] for Preschool Children with Disabilities," Office of Special Educ. Field Advisory [Oct. 2015], available at <https://www.nysed.gov/special-education/special-education-itinerant-services-preschool-children-disabilities>). SEIT services are "for the purpose of providing specialized individual or group instruction and/or indirect services to preschool students with disabilities" (8 NYCRR 200.16[i][3][ii] [emphasis added]; see Educ. Law § 4410[1][k]). Although a school district would generally not deliver a service designed exclusively for preschool students to a school-aged student, here, the individual special education teacher services the student continued to receive as a school-aged student during the 2023-24 school year at the religious, nonpublic school are referred to in the hearing record as SEIT services.

<sup>2</sup> Evidence in the hearing record reflects that, during the 2017-18 and 2018-19 school years, the student received his "CPSE services pursuant to a pendency order," which included 10 hours per week of individual SEIT services (Parent Exs. P at p. 1; Z at pp. 5-6). Evidence also reflects that, in IEPs developed for the student in April 2018 and May 2019, CSEs recommended the following special education services for the student: a general education placement with integrated co-teaching (ICT) services, speech-language therapy, and OT (see Dist. Ex. 8 at pp. 2-3; see also Parent Exs. P at p. 1; Q at pp. 1-2).

neuropsychological evaluation of the student (November 2021 neuropsychological evaluation), which determined that, "consistent with prior evaluation findings," the student had "solidly average cognitive abilities to reason, solve problems, and learn useful information," and moreover, the student demonstrated "other strengths, including average learning and memory, expressive and receptive language, and verbal fluency" (Dist. Ex. 8 at pp. 1, 10). In addition, the evaluator noted that the student's "math computation and math fact fluency skills [we]re within the average range, reflecting gains he ha[d] made academically with individualized support" (*id.* at p. 10). The November 2021 neuropsychological evaluation report noted, however, that notwithstanding these strengths, the student demonstrated "weaknesses in several neurocognitive domains that disrupt[ed] his day-to-day functioning," including "significant challenges with the foundational skills close[ly] associated with literacy development," and "limited phonological processing or understanding of how sounds combine[d] to form letters, and rapid naming or [the] ability to quickly and efficiently recall information that should be automatic, such as letter and number names" (*id.* [emphasis in original]). According to the evaluator, students with "slow rapid naming" needed more time to retrieve information "even if they ha[d] fully mastered the material" and this "pattern likely explain[ed] why [the student] ha[d] difficulty acquiring new sight words and automatizing all basic skills for use in higher-level academic applications" (*id.*). The evaluator further indicated that, given these difficulties, the student "performed well below age expectation on tests of his reading, writing and math word problem solving skills" (*id.*). Additionally, the student exhibited "extremely poor and not remotely functional" handwriting, and he did not "reliably use the basic aspects of writing mechanics" (*id.*). According to the evaluation report, the student had "difficulty" with "executive functions," although it was also noted that the student "generally seem[ed] capable of paying attention but [he] bec[a]me[] increasingly overwhelmed as task demands increase[d]" and he had "difficulty inhibiting impulsive actions and being flexible in his thinking" (*id.*). At that time, the evaluator recommended, in part, that the student required "significant special instruction [and] academic tutoring so he c[ould] adequately access the curriculum" (*id.* at p. 11). More specifically, the evaluator recommended that the student attend a classroom with a "low student-to-teacher ratio" and receive "15 weekly hours of individual (1:1) special instruction [or] tutoring for intensive academic remediation" (*id.* at pp. 11-12). In addition, the evaluator noted that the student's "instruction should follow an evidence-based, multi-sensory approach (e.g., Orton-Gillingham, Lindamood-Bell, or Wilson Language Training)" (*id.* at p. 12).

As a fifth grade student during the 2022-23 school year, the student continued to attend nonpublic school 1 in a classroom of 22 students, 1 teacher and 1 SEIT provider (*see* Dist. Exs. 3 at p. 1; 7 at p. 1; 10 at p. 1). Evidence in the hearing record reflects that, during the 2022-23 school year, the student's SEIT services (12-month program) continued to be provided pursuant to pendency (*see generally* Parent Exs. D; AA-BB). The evidence further reflects that the SEIT services were delivered to the student at school and at home by a private agency (*see generally* Parent Exs. BB; FF). In addition, the student received speech-language therapy during the 2022-23 school year but, according to the parents, he did not receive OT services "because [they were] unable to secure [an] OT provider for [the student]" that could deliver services in a manner "convenient" given the student's schedule (Dist. Exs. 3 at p. 1; 9 at pp. 1-2; *see* Dist. Ex. 7 at p. 2).

On June 12, 2023, the parents executed a "Payment Agreement" with EdZone, LLC, to deliver services to the student "in accordance with the last agreed upon IEP/IESP/FOFD" for the 2023-24 school year (12-month basis) (Parent Ex. EE at pp. 1-3).

On June 15, 2023, a CSE convened and developed the student's IEP for the 2023-24 school year (see Dist. Exs. 1 at pp. 3, 24; 2; 3 at p. 1). As reflected in the June 2023 IEP, the student—a fifth grader—was, "per teacher report," "reading on a fourth grade level" and "performing on a fourth grade level in math" (Dist. Ex. 1 at pp. 1, 3). Finding that the student remained eligible for special education as a student with an other health impairment, the June 2023 CSE recommended a general education placement with ICT services for instruction in English language arts (ELA) (10 periods per week), mathematics (10 periods per week), social studies (five periods per week), and sciences (five periods per week) (*id.* at p. 18).<sup>3</sup> The CSE also recommended related services, including two 30-minute sessions per week of individual OT and two 30-minute sessions per week of individual speech-language therapy (*id.* at pp. 18-19).

The student continued to attend nonpublic school 1 for the 2023-24 school year (see Parent Ex. A at p. 1).

### **A. Due Process Complaint Notices**

By due process complaint notice dated September 6, 2023, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2022-23 and 2023-24 school year based on numerous procedural and substantive violations (see generally Parent Ex. A). The parties proceeded to an impartial hearing on October 12, 2023, before an IHO with the Office of Administrative Trials and Hearings (OATH) (see Tr. p. 1). At that time, the IHO conducted a prehearing conference, during which the parents' attorney indicated the potential need to amend the due process complaint notice to provide "further clarity" with regard to the "banks of missed pendency-mandated services for the summer of 2022" when the student did not receive any OT or speech-language therapy services and for the 2022-23 school year (10-month portion) when the student did not receive any counseling or OT services (Tr. pp. 15-16). She further noted that the parents were seeking compensatory educational services for any "missed one-to-one instruction from the 15-hour weekly mandate" (Tr. p. 16).

In an amended due process complaint notice dated November 15, 2023, the parents alleged that the district failed to offer the student a FAPE for the 2022-23 and 2023-24 school years based on the same procedural and substantive violations as set forth in the September 2023 due process complaint notice, together with various additional violations (compare Parent Ex. B at pp. 1, 11-18, with Parent Ex. A at pp. 1, 12-17). As relevant to the instant appeal, the parents sought the following relief for the district's alleged failure to offer the student a FAPE for the 2022-23 and 2023-24 school years: district funding of the student's pendency services, consisting of 15 hours per week of individual SEIT services, one 45-minute session per week of individual speech-language therapy, two 45-minute sessions per week of speech-language therapy in a group, three 30-minute sessions per week of individual OT, one 30-minute session per week of individual counseling services, one 30-minute session per week of counseling services in a group; the provision of pendency services on a 12-month basis, and the provision of testing and classroom accommodations as recommended in the November 2021 neuropsychological evaluation report; and district funding of compensatory educational services (including tuition at the nonpublic

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<sup>3</sup> The student's eligibility for special education as a student with an other health impairment is not in dispute (see 34 CFR 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

school) for the failure to offer the student a FAPE and for any missed pendency services (see Parent Ex. B at pp. 18-19).

On December 4, 2023, the district agreed that the student's pendency placement was based on an unappealed IHO decision dated July 20, 2022 and consisted of the services and accommodations sought in the parents' amended due process complaint notice (compare Pend. Impl. Form, with Parent Ex. B at p. 19).

## **B. Impartial Hearing Officer Decision**

After the parents submitted the amended due process complaint notice, the impartial hearing resumed on December 20, 2023, and concluded on July 16, 2024, after 10 total days of proceedings (see Tr. pp. 30-676). In a decision dated August 28, 2024, the IHO found that the district failed to offer the student a FAPE for the 2022-23 school year, but that the district offered the student a FAPE for the 2023-24 school year (see IHO Decision at pp. 11-13).<sup>4</sup> For the 2022-23 school year, the IHO noted that the district did not defend its offer of a FAPE and did not present evidence that it convened a CSE meeting to develop an IEP for the student (id. at p. 12).

With respect to the 2023-24 school year, the IHO found that the June 2023 CSE included all of the required members and that the "documentary evidence combined with the testimony of [district witnesses who attended the CSE meeting] provide[d] thorough insight into what the CSE considered before making their recommendations" in the June 2023 IEP (IHO Decision at p. 12). More specifically, the IHO determined that the June 2023 CSE considered the November 2021 neuropsychological evaluation, a May 2023 speech-language progress report, a June 2023 teacher report, a June 2023 classroom observation, and a June 2023 social history (id.). Additionally, the IHO concluded that the June 2023 CSE "discussed the [s]tudent's weaknesses in reading, writing, math, language, and graphomotor skills, and discussed the various programs available," including general education with related services, special education teacher support services (SETSS), ICT services, and a more restrictive 12:1+1 special class placement (id.).<sup>5</sup> The IHO also found that the parents had the opportunity to "meaningful[ly] participate" at the meeting, and had specifically asked the CSE to continue the student's SEIT services, which the CSE explained it was unable to provide at the "CSE level" (id.). The IHO noted, however, that the CSE indicated it could recommend SETSS, but further indicated that the "ICT setting would be more restrictive" for the student "than SETSS" (id.). As determined by the IHO, the June 2023 CSE recommended ICT services "because a general education class would have one teacher with roughly 25 or more students, while an ICT class would have two teachers, one general education teacher and one special education teacher" (id. at pp. 12-13).

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<sup>4</sup> The IHO also concluded that the parents' "discrimination claims regarding the [district's] alleged violations of Section 504 [of the Rehabilitation Act of 1973] . . . [were] largely duplicative of their IDEA claims, and [sought] the same relief" (IHO Decision at p. 15). Due to the duplicity of claims, the IHO dismissed the parents' section 504 allegations of discrimination regarding the 2022-23 and 2023-24 school years (id.).

<sup>5</sup> SETSS is not defined in the State continuum of special education services (see 8 NYCRR 200.6). As has been laid out in prior administrative proceedings, the term is not used anywhere other than within this school district and a static and reliable definition of "SETSS" does not exist among parents, practitioners, and the district.

The IHO indicated that, at the impartial hearing, the district school psychologist explained that, "since the evaluative data indicated that the [s]tudent benefit[ed] from small group instruction, the [s]tudent 'could have small group instruction with his peers' in the ICT classroom" (IHO Decision at p. 13). In addition, the IHO found that the CSE recommended ICT services, as opposed to SETSS, because the "ICT setting would provide the [s]tudent with a special education teacher within the classroom throughout the school day while with SETSS, the [s]tudent would likely be pulled out of the classroom for small group instruction" (id.). According to the evidence, the composition of the ICT class, with both general education and special education students, allowed for the student to be instructed within a small group or individually with the special education teacher, or to receive reinforcement of lessons by the special education teacher (id.). The IHO noted further that the "teachers in an ICT setting [we]re trained in evidence-based programs and '[we]re equipped to offer the proper reading intervention'" (id.).

Next, the IHO found that the June 2023 IEP "contained accurate present levels of performance based on the evaluative data and the goals created by the CSE were tailored specifically to address the [s]tudent's needs in reading, language, writing, math, and graphomotor skills" (IHO Decision at p. 13). The IHO also found that the evidence demonstrated that the student's annual goals were appropriate because they were "based on his present levels of performance and directly address[ed] concerns noted in his IEP" (id.).

Overall, the IHO found that the evidence in the hearing record presented a "cogent and responsive explanation for [the district's] decisions' in creating" the June 2023 IEP, and the IEP offered the student a FAPE for the 2023-24 school year (IHO Decision at p. 13).

With respect to relief, the IHO concluded that the parents had failed to establish that the student's nonpublic school (i.e., unilateral placement) was appropriate, and moreover, that equitable considerations did not weigh in favor of the parents' requested relief (IHO Decision at pp. 15-17). As a result, the IHO denied the parents' request for tuition reimbursement for the 2022-23 school year (id. at p. 17).

Next, the IHO addressed the parents' request for compensatory educational services "to remedy the denial of a FAPE" (IHO Decision at pp. 18-21). Here, the IHO found that the student was entitled to compensatory educational services for missed pendency services during the 2022-23 and 2023-24 school years (id.). First, with respect to the parents' request for 15 hours per week of 1:1 SEIT services "for 46 weeks over two school years," the IHO found that, based on the evidence presented, the student was entitled to 584.93 hours of compensatory services under pendency for the 2022-23 and 2023-24 school years (id. at pp. 19-20).

With respect to the parents' request for 92 hours of compensatory counseling services, the IHO found that the evaluative information in the hearing record did not support a finding that the student required counseling services (see IHO Decision at p. 20). Nevertheless, because the student was entitled to receive counseling services pursuant to pendency, the IHO determined that the hearing record was devoid of evidence that the student had received any counseling services under pendency during the 2022-23 and 2023-24 school years, and therefore, was entitled to compensatory educational services for those missed services (id.).

Next, the IHO turned to the parents' request for 69 hours of compensatory OT services (see IHO Decision at p. 20). Here, the IHO found that the student was entitled to receive 138 hours of compensatory OT services for missed pendency services during the 2022-23 and 2023-24 school years (id. at p. 21).

Finally, the IHO addressed the parents' request for declaratory relief establishing the student's "appropriate program for the 2023-2024 school year" (IHO Decision at p. 21). The IHO denied the parents' request, noting that it sought a prospective placement, which was not warranted under the circumstances of this matter (id. at pp. 21-22).

Based upon the foregoing conclusions, the IHO concluded that the district failed to offer the student a FAPE for the 2022-23 school year, and the district offered the student a FAPE for the 2023-24 school year (see IHO Decision at p. 22). As relief, the IHO ordered the district to fund compensatory educational services, as listed therein, for the district's failure to provide the student with "all of the hours required under pendency" during the 2022-23 and 2023-24 school years, and ordered that the compensatory educational services had no expiration date (id.). Finally, to the extent that the district had yet convened to develop the student's program for the 2024-25 school year, the IHO ordered the district to convene a CSE meeting within 35 days of the date of the decision (id.).

#### **IV. Appeal for State-Level Review**

The parents appeal, alleging that the IHO erred in finding that the district offered the student a FAPE for the 2023-24 school year.<sup>6</sup> In support of this allegation, the parents initially argue that the student's most recent evaluation—the November 2021 neuropsychological—as well as the student's SEIT provider, both indicated that the student required 1:1 instruction to make educational progress, as he was performing significantly below grade level. In addition, the parents argue that district witnesses testified that they were precluded from recommending 1:1 instruction on school-age IEPs. Next, the parents contend that the evidence established that the student required 12-month programming. Thus, the parents assert that the June 2023 CSE's failure to recommend 1:1 instruction and 12-month programming denied the student a FAPE for the 2023-24 school year.

The parents further allege that the district improperly engaged in predetermination by refusing to offer the student SEIT services. The parents argue that the district's predetermination and "blanket policy denying 1:1 instruction to school-age students" denied the student a FAPE for the 2023-24 school year.

With respect to 12-month programming, the parents argue that both the November 2021 neuropsychological evaluation report and the student's SEIT provider recommended that the

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<sup>6</sup> To the extent that the parents do not challenge or appeal the IHO's finding that they were not entitled to an award of tuition reimbursement or funding for the costs of the student's attendance at a nonpublic school during the 2022-23 school year, and relatedly, that equitable considerations did not weigh in favor of their requested relief for the 2022-23 school year, these findings have become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at \*6-\*7, \*10 [S.D.N.Y. Mar. 21, 2013]).



student receive services on a 12-month basis. According to the parents, any student who performs below grade level should receive 12-month programming.

In addition, the parents more generally argue that the district witnesses were not credible, and, therefore, the IHO's reliance on that testimonial evidence led to a decision that was not well-reasoned. The parents further argue that the IHO erred by denying their request for declaratory relief. The parents contend that the IHO misunderstood the declaratory request, and the parents were not seeking prospective relief or attempting to circumvent the CSE process. Instead, the parents assert that they were seeking a determination that an appropriate program for the student included 1:1 instruction, 12-month programming, and counseling services.

As a final point, the parents allege that the IHO erred by finding that their section 504 claims were duplicative and that they failed to sustain their burden to establish the district's violations of section 504.<sup>7</sup> As relief, the parents seek to reverse the IHO's finding that the district offered the student a FAPE for the 2023-24 school year, and to find that the student's appropriate program was consistent with the program recommended by independent evaluators.

In an answer, the district responds to the parents' allegations and generally argues to uphold IHO's findings that the district offered the student a FAPE for the 2023-24 school year, that the parents were not entitled to an award of declaratory relief, and that the district did not violate section 504. As a cross-appeal, the district contends that the IHO erred by awarding compensatory educational services for missed pendency services, and moreover, that the IHO erred by calculating such award based on a 46-week school year, as opposed to a 42-week school year.

In a reply to the district's answer, the parents respond to the district's arguments and generally continues to argue that the IHO erred by finding that the district offered the student a FAPE. As an answer to the district's cross-appeal, the parents assert that the IHO properly awarded compensatory educational services for missed pendency services.

## **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.

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<sup>7</sup> To the extent that the parents appeal the IHO's findings with respect to section 504, it is well settled that an SRO lacks jurisdiction to consider a parent's challenge to an IHO's failure or refusal to rule on section 504, as an SRO's jurisdiction is limited by State law to matters arising under the IDEA and Article 89 of the Education Law (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"]). Courts have also recognized that the Education Law makes no provision for State-level administrative review of IHO decisions with regard to section 504 (see A.M. v. New York City Dep't of Educ., 840 F. Supp. 2d 660, 672 & n.17 [E.D.N.Y. 2012] [noting that "[u]nder New York State education law, the SRO's jurisdiction is limited to matters arising under the IDEA or its state counterpart"], aff'd, 513 Fed. App'x 95 [2d Cir. 2013]; see also F.C. v. New York City Dep't of Educ., 2016 WL 8716232, at \*11 [S.D.N.Y. Aug. 5, 2016]). Consequently, the parents' section 504 claims will not be reviewed or discussed herein.

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]).<sup>8</sup>

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**

Initially, as a general matter, the parents contends that the IHO's reliance on certain testimony at the impartial hearing resulted in the decision that was not well-reasoned. In response to the parents' allegations, the district asserts that the hearing record does not include any evidence or any non-testimonial evidence to overturn the IHO's well-reasoned decision. The district further asserts that the parents' attempts to discredit witness testimony misrepresents the actual testimony in the hearing record.

Turning to the IHO's decision, upon review it is notable that the IHO did not make any specific credibility finding (see generally IHO Decision). Generally, an SRO gives due deference to the credibility findings of an IHO, unless non-testimonial evidence in the hearing record justifies a contrary conclusion or the hearing record, read in its entirety, compels a contrary conclusion (see Carlisle Area Sch. v. Scott P., 62 F.3d 520, 524, 528-29 [3d Cir. 1995]; P.G. v. City Sch. Dist. of New York, 2015 WL 787008, at \*16 [S.D.N.Y. Feb. 25, 2015]; M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 330 [E.D.N.Y. 2012], aff'd 725 F.3d 131 [2d Cir. 2013]; Bd. of Educ. of Hicksville Union Free Sch. Dist. v. Schaefer, 84 A.D.3d 795, 796 [2d Dep't 2011]; Application of a Student with a Disability, Appeal No. 12-076). In this instance, the IHO did not assess the credibility of the evidence, and rather afforded more weight to certain evidence presented. Accordingly, to the extent that the parents agree or disagree with IHO's findings of fact, it is based on the weight accorded to the evidence, not specific findings by the IHO that one or more of the

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<sup>8</sup> 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).

witnesses specifically failed to offer credible testimony (see L.K. v. Ne Sch. Dist., 932 F. Supp. 2d 467, 487-88 [S.D.N.Y. 2013]; E.C. v. Bd. of Educ. of City Sch. Dist. of New Rochelle, 2013 WL 1091321, at \*18 [S.D.N.Y. Mar. 15, 2013]; J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at \*9-\*10 [S.D.N.Y. Feb. 20, 2013]; F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 581 [S.D.N.Y. 2013]). Therefore, to the extent that the parents argue that the IHO's decision regarding a FAPE must be reversed because it was based, in part, on testimonial evidence that was not credible, the parents' argument is without support. The specific testimony cited by the parent is discussed below to the extent relevant to the issues raised on appeal.

## **A. June 2023 CSE Process**

### **1. Predetermination**

The parents contend on appeal that the June 2023 CSE's refusal to consider offering 1:1 instruction or SEIT services in an IEP constitutes predetermination, and in this matter, denied the student a FAPE. In support of this contention, the parents point to testimony at the impartial hearing that the district's "'dropdown' menu" did not include such options for an IEP.

As to predetermination, the consideration of possible recommendations for a student prior to a CSE meeting is not prohibited as long as the CSE understands that changes may occur at the CSE meeting (T.P., 554 F.3d at 253; A.P. v. New York City Dep't of Educ., 2015 WL 4597545, at \*8-\*9 [S.D.N.Y. July 30, 2015]; see 34 CFR 300.501[b][1], [3]; 8 NYCRR 200.5[d][1], [2]). The key factor with regard to predetermination is whether the district has "an open mind as to the content of [the student's] IEP" (T.P., 554 F.3d at 253; see D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at \*10-\*11 [E.D.N.Y. Sept. 2, 2022], aff'd, 506 Fed. App'x 80, 81 [2d Cir. Dec. 26, 2012]; R.R. v. Scarsdale Union Free Sch. Dist., 615 F. Supp. 2d 283, 294 [E.D.N.Y. 2009], aff'd, 366 Fed. App'x 239 [2d Cir. Feb. 18, 2010]). Districts may "'prepare reports and come with pre[-]formed opinions regarding the best course of action for the child as long as they are willing to listen to the parents and parents have the opportunity to make objections and suggestions'" (DiRocco v. Bd. of Educ. of Beacon City Sch. Dist., 2013 WL 25959, at \*18 [S.D.N.Y. Jan. 2, 2013] [alteration in the original], quoting M.M. v. New York City Dept. of Educ. Region 9 (Dist. 2), 583 F. Supp. 2d 498, 506; [S.D.N.Y. 2008]; see B.K. v. New York City Dep't of Educ., 12 F. Supp. 3d 343, 358-59 [E.D.N.Y. 2014] [holding that "active and meaningful" parent participation undermines a claim of predetermination]).

The district school psychologist testified that the parents had an opportunity to be heard at the CSE meeting and that the district members of the committee asked for the parents' academic concerns (Tr. pp. 323-34). The June 2023 CSE meeting notes reflect the parents had the opportunity to participate in CSE meeting and included their input that the student benefitted from academic support and modifications received in school, had weak reading and writing skills, had math skills which were "not quite on grade level," related well socially, had weak motor skills and low muscle tone, needed to improve his handwriting, and continued to benefit from OT services (Dist. 3 at p. 1, 3-4). At the impartial hearing, when testifying about whether she had an opportunity to participate in the CSE meeting, the mother stated that "[she] did, 100 percent" and that she "100 percent" felt her opinions were listened to during the meeting and that she believed the person running the meeting was "excellent" (Tr. pp. 591-92).

Additionally, the June 2023 CSE meeting notes referenced input from the school resource coordinator from nonpublic school 1 (coordinator), as well as from the student's SEIT provider, regarding the student's progress and levels of performance (Dist. Ex. 3 at pp. 1-6). The meeting notes indicated that the June 2023 CSE reviewed recent evaluation information, reviewed academic annual goals, and described and discussed placement options including general education with related services, SETSS and ICT services models, SEIT services, and a 12:1+1 special class (*id.*). The district special education teacher testified that she did not recall whether the ICT services "breakdowns" among ELA, math, social studies, and science were discussed at the CSE meeting (Tr. pp. 369-70). In explaining how the CSE came up with the breakdown of frequencies for the ICT services listed on the June 2023 IEP, the district school psychologist testified that she would usually call the zoned public school and ask for the "breakdown in terms of the subjects," and she noted that that was determined after the CSE meeting (Tr. pp. 513-15).

Regarding the annual goals, the district school psychologist testified that the June 2023 CSE "discussed it together" at the meeting, and the district special education teacher took the lead in mentioning the annual goals, getting feedback from all involved, and "tweaking them" (Tr. p. 262; *see* Dist. Ex. 3 at p. 6). The district special education teacher testified that she created the annual goals with the input of the student's SEIT provider, teacher, and parent, as well as the evaluative information (Tr. pp. 307-09, 311-12, 319-20, 364, 410). The district special education teacher testified that she wrote the annual goals immediately after the meeting (Tr. p. 321). While the parents argue that they were deprived of a meaningful opportunity to participate in the development of the IEP because "not all of the goals were discussed at the meeting and the drafter was unaware of [the student's] benchmark abilities and skills when creating [the] goals," the weight of the evidence in the hearing record indicates that, because the parents attended the June 2023 CSE meeting and participated in the meeting—and there is no allegation that the annual goals were not appropriate to meet the student's needs—any failure to discuss the particular annual goals included in the June 2023 IEP at the CSE meeting did not significantly impede the parents' opportunity to participate in the development of the student's IEP (*see E.A.M. v. New York City Dep't of Educ.*, 2012 WL 4571794, at \* 8 [S.D.N.Y. Sept. 29, 2012] [recognizing that the IDEA does not require that annual goals be drafted at the CSE meeting]).

With respect to the June 2023 CSE's decision to not recommend SEIT services, as previously noted, SEIT services are "for the purpose of providing specialized individual or group instruction and/or indirect services to preschool students with disabilities" (8 NYCRR 200.16[i][3][ii] [emphasis added]; *see* Educ. Law § 4410[1][k]). At the impartial hearing, the district school psychologist testified that the June 2023 CSE did not recommend SEIT services for the student because he was a school-aged student, and not a preschool student for whom a CPSE might initiate that service (*see* Tr. p. 265). She explained that similar services existed for school-aged students, such as paraprofessionals, but it would depend upon a student's needs (*see* Tr. p. 267). The district special education teacher also testified that SETSS would also be a similar type of service for a school-aged student, but that service would be delivered in a group setting (*see* Tr. pp. 410-12).

With regard to the June 2023 CSE's ability to recommend individual instruction in an IEP, the district special education teacher testified that, other than recommending individual related services for the student, the CSE did not have the "ability to recommend any individual consultant teacher services" for the student (Tr. pp. 397-98).

On the other hand, the district school psychologist testified that, ultimately, the CSE's recommendation would be based on the student's needs "given his profile and the data" before the CSE and that the student's needs in this matter did not warrant a recommendation for individual instruction (Tr. p. 467).

According to the June 2023 CSE meeting notes, the parent asked the CSE at the meeting whether "a SEIT" could be recommended and that the CSE discussed SEIT services, along with other program options, including general education with related services, SETSS, and ICT services models, and a 12:1+1 special class placement (Dist. Ex. 3 at pp. 5-6). In the end, the June 2023 CSE recommended ICT services, along with speech-language therapy and OT, to address the student's needs (Dist. Exs. 1 at pp. 18-19, 24; 3 at p. 5).

While the testimony of the district witnesses at times reflects an overly limited view of the ability of the CSE to recommend particular services, other evidence in the hearing record, including the testimony of the district school psychologist, demonstrates that the CSE found the student's needs did not warrant individual instruction and the CSE discussed several different program and service options for the student. Even if the testimony reflected predetermination, such a procedural violation would not rise to the level of a denial of a FAPE in this instance given that, as discussed below, the CSE recommended a program and services reasonably calculated to enable the student to make progress appropriate in light of his circumstances.

## **2. Evaluative Information**

Although the parents do not assert any challenges to the evaluative information relied upon by the June 2023 CSE or the IHO's finding that the June 2023 IEP accurately identified the student's needs in the present levels of performance, a description of the student's needs facilitates the discussion of the issue to be resolved—namely, whether the IHO erred by finding that the district offered the student a FAPE absent recommendations for 1:1 instruction and 12-month programming.

The evidence in the hearing record demonstrates that, in developing the student's June 2023 IEP, the CSE relied on several sources of evaluative information, including the November 2021 neuropsychological evaluation, a May 2023 speech-language progress report, a June 2023 teacher report, a June 2023 classroom observation, and a June 2023 social history progress report (see Tr. pp. 248, 250-51; Dist. Exs. 1 at pp. 1-6, 26; 2; 3 at pp. 2-4; 6-10). The evidence also reflects that the June 2023 CSE considered input from the coordinator at nonpublic school 1, the student's then-current SEIT provider, and the parent in attendance at the meeting (see Dist. Exs. 1 at pp. 5-6; 2; 3 at pp. 1-6).

As reflected in the November 2021 neuropsychological evaluation report, it was noted that the student was receiving one-on-one academic support and continued to struggle even with this level of intensive support, and moreover, it was with great effort and intensive services that the student could achieve at his present level (see Dist. Ex. 8 at p. 11). Based on the testing results, the evaluator included several recommendations to address the student's needs, including the following: a classroom with a low student-to-teacher ratio that provided ample special education supports and individualized attention; 15 hours per week of individual special instruction or tutoring for intensive academic remediation; evidence-based, multisensory reading interventions

implemented by a reading specialist; and related services of speech-language therapy, OT, and individual and group counseling all on a 12-month basis (id. at pp. 11-12).

The May 2023 speech-language progress report ("Annual Review Progress Report") indicated that the student presented with "delays in decoding and comprehension of grade level texts" and "delays in his writing skills" (Dist. Ex. 9 at p. 1). The speech-language provider reported that the student had been "working on improving his decoding skills, specifically breaking down longer unknown words"; "improving his reading comprehension skills to be able to identify the main idea, supporting details, [and] inference information and make predictions on given text"; and "using correct grammar, syntax and punctuation in his writings" (id.). The speech-language provider recommended a continuation of services to help the student succeed academically (id. at p. 2). The May 2023 speech-language progress report reflected dates of service from September 1, 2022 through June 25, 2023 (id. at p. 1).

According to the June 3, 2023 teacher report, although the student demonstrated a "below average" rate of progress in acquiring skills and work pace, his "ability to retain information taught or presented" was "average" (Dist. Ex. 10 at pp. 1-2, 7). The teacher reported that the student could "concentrate [and] focus" during whole group, small group, and independent work (id. at p. 1). According to the teacher, the student could focus, but he "tend[ed] to work with greater accuracy when directions [we]re repeated or when he receive[d] one on one instruction" (id.). The report also indicated that the student—as a fifth grader—performed at a fourth-grade level in reading (id. at p. 2). With respect to sight word reading, decoding, vocabulary, reading comprehension, and oral reading fluency, the student's skills were estimated to be below his peers (id. at p. 2). In reading, the student got "stuck on new or unfamiliar words," and he "enjoy[ed] reading out loud but decoding c[ould] slow him down" (id.). It was also noted that the student "[s]ometimes" required adult support with reading (id.).

In mathematics, the June 2023 teacher report indicated that the student's calculation skills and applied math skills, such as word problems and applying strategies, were at a fourth grade level, he "benefit[ed] from instruction repeated in a small group setting," and that he "[o]ften" required adult support with math (Dist. Ex. 10 at p. 3). According to the teacher report, the student's skills fell below his peers in the areas of calculations and operations, problem solving, math fluency and automaticity, and concepts (id.).

In writing, the June 2023 teacher report noted that the student performed at a beginning fourth grade level (see Dist. Ex. 10 at p. 3). It was also noted that the student could copy notes from the board, but had a "difficult time with spelling, grammar [and] overall sentence [and] paragraph structure" (id. at p. 4). When compared to his peers, the student's graphomotor skills were comparable; his writing fluency and stamina, syntax and grammar skills, and his mechanics (such as punctuation and capitalization) were all rated as below his peers; and the student's spelling, and development of ideas (such as creative writing, narratives, and expository writing) were all rated as significantly below his peers (id. at pp. 3-4).

With respect to language skills, the June 2023 teacher report indicated that the student's expressive and receptive skills were below that of his peers in the areas of demonstrating an understanding of content area vocabulary and instructional material, using content area vocabulary appropriately when speaking, and in requiring repetition and simplified language or rephrasing

(see Dist. Ex. 10 at p. 4). However, the student demonstrated skills comparable to his peers in the areas of understanding directions, engaging in reciprocal conversations, expressing his ideas completely and fluently when speaking, expressing his ideas in a concise manner when speaking, and asking questions in a logical manner (id. at pp. 4-5). According to the report, the student's teacher had no concerns about his "attention, planning, organizing, executing task[s], shifting between tasks, or executive functions"; the teacher commented that the student was "quite organized" and could "transition between subjects nicely" (id. at p. 5).

In the area of social/emotional functioning, the June 2023 teacher report reflected that the student's ability to relate to adults and peers, follow directions, and tolerate frustration were "usually appropriate" and his social and pragmatic language skills were comparable to his peers in all areas rated (Dist. Ex. 10 at pp. 5-6). In addition, the teacher indicated that the student did not "display any kinds of disruptive or aberrant behaviors" (id. at p. 6). With respect to activities of daily living skills—such as dressing and undressing, and caring for personal needs—the student demonstrated age-appropriate skills (id.). In the area of physical functioning—such as fine and gross motor development, and health and physical skills or limitations pertaining to the learning process (i.e., writing skills, transitioning between classes, negotiating stairs, and participating in gym)—the teacher noted that "writing [wa]s more difficult" because although the student "enjoy[ed] it," he often ran "out of stamina"; however, all of the student's other skills were "normal" (id. at p. 7).

Finally, the June 2023 teacher report indicated that the student received a "modified curriculum;" "shortened" classwork, homework, and quizzes; and that he also received in-class supports, such as "questions repeated, tests read aloud, [and] additional time" (Dist. Ex. 10 at p. 7). It was also noted that the student's "skills [we]re showing steady progress" (id.).

Next, the June 2023 social history update, which was completed as part of a reevaluation process, noted that, per parent report, fifth grade had been "hard" for the student (Dist. Ex. 7 at p. 1). According to the parent, the student was "not really having academic strength now but mainly academic difficulties" (id. at p. 2). In addition to completing a social history update, the district performed a classroom observation of the student in June 2023 as part of the reevaluation process; according to the report, the student was observed taking a final exam (see Dist. Ex. 6 at p. 1). During the exam, the student was observed to "work nicely" on math equations while using his fingers to count (id.). The student finished his test, even though the teacher indicated that students could finish the exam the next day (id.). After finishing the exam and handing it in to the teacher, the student returned to his desk to color, borrowed another "color pen" from a classmate, and sat down to color while his classmates finished their exams (id.).

In addition to the foregoing, the hearing record includes a May 2023 report prepared by two of the student's then-current SEIT providers on May 16, 2023 for the 2022-23 school year (see Parent Exs. FF at pp. 1, 3; KK ¶10). Although the report was not submitted to the district prior to the June 2023 CSE meeting, evidence reflects that the SEIT provider attended the meeting and participated at the meeting, and the CSE received a copy of the May 2023 report in the afternoon following the meeting (see Tr. pp. 256, 259-60; Dist. Ex. 3 at pp. 2-3, 6). The district school psychologist testified that the May 2023 report was reviewed, but the CSE did not reconvene (see Tr. pp. 256-57).



According to the May 2023 SEIT report, the student struggled with language skills and had "difficulty grasping new material that [wa]s presented in more traditional modalities" (Parent Ex. FF at p. 1). It further noted that the student needed "time and individualized attention to review each step of the learning process," and the student was "mandated to receive SEIT to help him bring language skills up to grade level" (*id.*). According to the report, the student received SEIT service "both in school and after school" and "[c]ontinued 1:1 support [wa]s necessary for [the student] to work towards grade level expectations" (*id.*).

With respect to academics, the May 2023 SEIT report reflected the student's strengths and weaknesses, and specifically indicated that "[c]ontinued SEIT support [wa]s needed to provide the 1:1 instruction [the student] need[ed] to target his spelling and writing delays" (Parent Ex. FF at p. 1). Similarly, in mathematics, the report reflected that the student needed "lesson[s] to be repeated in a 1:1 setting" (*id.*). In sum, the SEIT report indicated that it was "crucial for [the student] to continue to receive 15 hours of SEIT on a 12[-]month basis in order to ensure that he [wa]s absorbing the information and skills taught in the general education setting as well as learning the skills he [wa]s still missing," in order to "bring his skills up to grade level" (*id.* at p. 2).

As noted in the May 2023 SEIT report, the provider used a "variety of instructional strategies and modifications" with the student, such as teaching skills both "auditor[ily] and visually," reviewing "each step of every process . . . multiple times in a variety of settings," checking for understanding at each step, and showing the student how he "could use that strategy while learning independently" (Parent Ex. FF at p. 2). The report also reflected that the student worked "well with a multi-sensory approach in a one-on-one setting" (*id.*).

## **B. June 2023 IEP**

### **1. 1:1 Instruction**

The parents argue that the June 2023 IEP failed to offer the student a FAPE because it did not include any 1:1 instruction, as recommended in the November 2021 neuropsychological evaluation report and as recommended by the student's SEIT.

Consistent with the parents' argument, the November 2021 neuropsychological evaluation report included a recommendation for the student to receive 15 hours per week of individual special instruction or tutoring for intensive academic remediation (*see* Dist. Ex. 8 at p. 11). In developing the recommendations for a student's IEP, State and federal regulations mandate that a CSE must consider private evaluations, whether obtained at public or private expense, provided that such evaluations meet the district's criteria, in any decision made with respect to the provision of a FAPE to a student (34 CFR 300.502[c]; 8 NYCRR 200.5[g][1][vi]). However, consideration does not require substantive discussion, or that every member of the CSE read the document, or that the CSE accord the private evaluation any particular weight or adopt their recommendations (*Mr. P. v. W. Hartford Bd. of Educ.*, 885 F.3d 735, 753 [2d Cir. 2018], citing *T.S. v. Ridgefield Bd. of Educ.*, 10 F.3d 87, 89-90 [2d Cir. 1993]; *Watson v. Kingston City Sch. Dist.*, 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004] [noting that even if a district relies on a privately obtained evaluation to determine a student's levels of functional performance, it need not adopt wholesale the ultimate recommendations made by the private evaluator], *aff'd*, 142 Fed. App'x 9 [2d Cir. July 25, 2005]; *see Michael P. v. Dep't of Educ., State of Hawaii*, 656 F.3d 1057, 1066 n.9 [9th Cir. 2011]; *K.E.*

v. Indep. Sch. Dist. No. 15, 647 F.3d 795, 805-06 [8th Cir. 2011]; Evans v. Dist. No. 17, 841 F.2d 824, 830 [8th Cir. 1988]; James D. v. Bd. of Educ. of Aptakisic-Tripp Community Consol. Sch. Dist. No. 102, 642 F. Supp. 2d 804, 818 [N.D. Ill. 2009]).

As explained above, the June 2023 CSE had various sources of evaluative information to rely upon to develop the student's IEP, including the November 2021 neuropsychological evaluation report. Significantly, however, the November 2021 neuropsychological evaluation was the only report that included a recommendation for the student to receive individual special education instruction, aside from the verbal recommendation for continued 1:1 instruction made by the SEIT at the June 2023 CSE meeting (compare Dist. Ex. 8 at pp. 11-12, and Parent Ex. KK ¶ 13, with Dist. Ex. 6, and Dist. Ex. 7, and Dist. Ex. 9, and Dist. Ex. 10). The June 2023 CSE—having considered the neuropsychological evaluation report and the SEIT's input—was not required to accord the private evaluation any particular weight or adopt the recommendations contained within the report, including the recommendations for individual instruction.

Furthermore, the evidence in the hearing record demonstrates that the overall picture of the student's needs identified in the evaluative information reviewed by the June 2023 CSE portrayed a student who, while having difficulties in reading, mathematics, and writing, performed well within a larger classroom setting with appropriate adult support, and thus, did not require 1:1 instruction to make progress appropriate in light of the child's circumstances pursuant to Andrew F. (see Dist. Exs. 3; 10). For example, at the time of the June 2023 CSE meeting, the student had been attending a classroom with 21 to 22 students, one teacher, and his SEIT (see Dist. Ex. 3 at pp. 1, 4).<sup>9</sup> According to the June 2023 CSE meeting notes, the SEIT indicated at the meeting that the student was "working more independently this year," and the coordinator from nonpublic school 1 reported that the student "work[ed] hard in school, but continue[d] to struggle academically" (id. at pp. 1-2). The coordinator also reported that the student's "rate of progress [wa]s . . . below average," and he "focuse[d] well in small groups" (id. at p. 1). In addition, the coordinator noted that the student was then-currently "reading on a Fountas & Pinnell level R, which [wa]s equivalent to a mid-fourth grade level," but his "poor decoding skills impede[d] the student's] spelling" (id. at pp. 1-2). As described in the June 2023 teacher report, which was reviewed by the CSE, the student worked with "greater accuracy" when given repeated directions or "one on one instruction," and he required more adult support in mathematics than in reading (Dist. Ex. 10 at pp. 2-3). However, it was also noted that the student could concentrate and focus during whole group, small group, and independent work; the student could copy notes from the board; and he had no executive functioning concerns, but rather, he was "quite organized" and could "transition between subjects nicely" (id. at pp. 1, 3-4). In addition, the June 2023 teacher report reflected that, socially, the student's ability to relate to adults and peers was "usually appropriate," and his ability to follow directions and rules and to tolerate frustration was also

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<sup>9</sup> Although the hearing record includes invoices for the student's SEIT services delivered during the 2022-23 school year, it is difficult to discern specifically when a SEIT provided services to the student at school, as the hearing record does not provide any information about nonpublic school 1's daily schedule or hours of operation during the week (see generally Parent Exs. BB-CC). For example, while the SEIT invoices reflect services delivered at specific times—i.e., 2:30 p.m. to 4:30 p.m., 11:15 a.m. to 12:15 p.m., and 7:30 a.m. to 8:30 a.m., the hearing record also reflects that the SEITs delivered services to the student both at home and at school (compare Parent Ex. CC at pp. 13-16, with Parent Ex. FF at p. 1).

"usually appropriate" (id. at p. 5). With regard to pragmatic language skills, the teacher report indicated that the student's skills were comparable to his peers (id. at pp. 5-6).

Given the student's needs, the June 2023 CSE recommended a general education placement with ICT services for instruction in all academic areas, with increased ICT services specific to his areas of delay, namely, ELA (10 periods per week), mathematics (10 periods per week), social studies (five periods per week), and science (five periods per week) (see Dist. Ex. 1 at p. 18). The evidence reflects that the June 2023 CSE reached the recommendation for ICT services after discussing less restrictive and more restrictive settings, and explaining that ICT services offered the student the "support of a full time special education teacher" (id. at pp. 25-26; see Dist. Ex. 3 at p. 5).

At the impartial hearing, the district school psychologist testified that, at the June 2023 CSE meeting, it was explained that ICT services would be "most appropriate" to meet the student's needs—as opposed to a general education placement—because it would provide the student with two teachers for support in a classroom of "25 or more students," and "within an ICT setting, [the student] could have small group instruction with his peers" (Tr. pp. 263-64). The district special education teacher testified at the impartial hearing that, in a classroom with ICT services, the special education teacher could work "with a small group or individually" based on a student's needs, and "offer reinforcement of the lesson" (Tr. pp. 368-69).

To further support the student in the classroom, the June 2023 CSE recommended strategies to address his management needs, including preferential seating in front of room near the teacher, multisensory approaches to learning, chunking of information, an extra set of class notes, graphic organizers, sentence starters, checklists, extra time for exams, modeling, visual and verbal aids, frequent checks for comprehension, small group instruction and opportunities to peer model, repetition, clear expectations and checking for understanding, redirection and refocusing prompts, highlighting key information in mathematics word problems and providing a word bank with mathematics terminology defined, praise and encouragement, rereading for comprehension, and movement breaks as needed (see Dist. Ex. 1 at pp. 6-7).

In addition, the June 2023 CSE recommended related services of two 30-minute sessions per week of individual OT and two 30-minute sessions per week of individual speech-language therapy (see Dist. Ex. 1 at pp. 18-19).

Next, with regard to the parents' request for SEIT services, the evidence in the hearing record reflects that, when the parent asked whether a SEIT could be recommended at the June 2023 CSE meeting, the CSE "shared that [a] SEIT [p]rovider could not be recommended at [the] CSE level" (Dist. Ex. 3 at p. 6). When the parent then asked the June 2023 CSE about "SETSS services," the CSE "shared that [ICT] was more restrictive than SETSS" (id.).

Initially, it is unclear from the evidence in the hearing record whether the parents' request for SEIT services or SETSS at the June 2023 CSE meeting represented a request for a specific special education service or whether it was parents' way of requesting 1:1 instruction for the student. Although it remains unclear on appeal, the June 2023 CSE properly informed the parent at that time that the CSE was not able to recommend SEIT services, because pursuant to State law and regulations, SEIT services are "for the purpose of providing specialized individual or group

instruction and/or indirect services to preschool students with disabilities" (8 NYCRR 200.16[i][3][ii]; see Educ. Law § 4410[1][k]). Therefore, it was appropriate for the June 2023 CSE to not consider recommending SEIT services as a specific special education service for a school-aged student, regardless of what the SEIT understood as the province of such services, which, according to the SEIT, included the provision of services to school-aged students (see Tr. pp. 643; Parent Ex. KK ¶ 3). Notably, at the impartial hearing, the SEIT testified that she did not "know" whether SEIT services were "only for a specific age," but rather, understood that the service was for "students that need these services" (Tr. p. 642). She clarified that, to her knowledge, "SEIT services address[ed] both the social-emotional needs of students, as well as the academic" and "it would be based on the student's needs" (Tr. p. 643). The SEIT further clarified, however, that when she worked with the student during fifth grade, he was "not working on preschool-aged skills"; however, she also testified that the student had a "lot of social and emotional delays, and therefore, [she believed] that [the student] d[id] require the SEIT services to get the social-emotional support as well as academic support" (Tr. pp. 647-48). She noted that the student "still c[ame] to tears at times when he's . . . anxious or frustrated . . . in the classroom" and therefore, she believed the student continued to require SEIT services (Tr. pp. 652-53).<sup>10</sup> However, the SEIT further testified that, this student was the only fifth or sixth grade student that she was ever a SEIT services provider for, and that over the course of her "over 15 [years] of experience," more than a majority of her SEIT cases were for preschool-aged students (Tr. pp. 653-55). The SEIT provider could not identify the credentials of the other two providers who delivered services to the student (see Tr. p. 655; Parent Ex. KK ¶ 10).

Putting aside the question of whether the June 2023 CSE could recommend SEIT services for the purpose of delivering 1:1 special education instruction for the student, the district school psychologist testified at the impartial hearing that a recommendation for "push-in, one-to-one SETSS instruction" was not warranted based on the student's "profile and the data" available to the CSE (Tr. p. 467). The witness clarified upon further questioning that she could not recall whether the continuum of special education services "dropdown menu" allowed the CSE to select "individual, push-in SETSS" as an option, but indicated that SETSS was usually delivered in a group setting (Tr. p. 469). The district school psychologist described SETSS as a "special education teacher [who] would work with a group of students, usually eight students . . . to address their academic weaknesses" (Tr. p. 533). She also distinguished SETSS as "instruction" that was "usually a pull-out service, where the [student] w[ould] be offered supports, academic supports, in a small group"; in comparison, ICT services provided the student with "additional supports within the classroom setting" (Tr. p. 466).

In light of the foregoing, the weight of the evidence in the hearing record supports the June 2023 CSE's decision to not recommend 1:1 instruction in the June 2023 IEP, in any form, and that, instead, the CSE recommended ICT services for all academic subjects as well as related services and supports, which were designed to enable the student to make progress appropriate in light of his circumstances.

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<sup>10</sup> The June 2023 teacher report directly contradicts the SEIT provider's testimony with respect to the student's social/emotional functioning and his ability to tolerate frustration within the classroom setting (compare Dist. Ex. 10 at pp. 5-6, with Tr. pp. 652-53).

## 2. 12-Month Programming

The parents argue that the evidence in the hearing record—and in particular, the November 2021 neuropsychological evaluation and the May 2023 SEIT reports—established that the student needed 12-month programming. More specifically, the parents assert the student required 12-month programming to address his significant delays in areas where he was performing below grade level. According to the parents, those individuals who evaluated and worked with the student stated that he needed services on a 12-month basis in order to "try to catch up to grade level and to address his significant deficits and delays," and further noted that "[a]ny student performing below grade level should receive" 12-month programming.

State regulations provide that, students "shall be considered for 12-month special services and/or programs in accordance with their need to prevent substantial regression" (8 NYCRR 200.6[k][1]). "Substantial regression" is defined as "student's inability to maintain developmental levels due to a loss of skill or knowledge during the months of July and August of such severity as to require an inordinate period of review at the beginning of the school year to reestablish and maintain IEP goals and objectives mastered at the end of the previous school year" (8 NYCRR 200.1[aaa], [eee]). State guidance indicates that "an inordinate period of review" is considered to be a period of eight weeks or more (see "Extended School Year Programs and Services Questions and Answers," at p. 3, Office of Special Educ. [Updated June 2023], available at <https://www.nysed.gov/sites/default/files/programs/special-education/extended-school-year-questions-and-answers-2023.pdf>).

The parents argue that the student's SEIT report indicated that it was "crucial" for the student to have a 12-month program "to make the necessary academic progress, given his significant delays," however, the SEIT report did not indicate the basis for the provider's conclusion in this regard.

At the impartial hearing, the district school psychologist testified that, in order to recommend a student for a 12-month program, it was necessary to establish that the student experienced a regression of skills over a period of eight weeks and that the student in this matter did not demonstrate any regression of skills based on the data the June 2023 CSE had available (see Tr. pp. 261-62). The district school psychologist testified that if they had the data, the CSE would consider a 12-month program, but further stated that there was no data to support a regression of skills (see Tr. pp. 484-85). In addition, the district school psychologist testified that, "if we have the data, we would [have] consider[ed] it" (Tr. p. 484). Regarding whether the CSE considered ICT services on a 12-month basis, she responded "no" and added that there was no data to support that there was a regression of skills (Tr. pp. 484-86). Indeed, within the June 2023 teacher report, the student's then-current teacher described the student's ability to retain information taught or presented as average (see Dist. Ex. 10 at p. 2).

The district school psychologist testified that it was not indicated in the student's related service reports that he needed 12-month services and that during the CSE meeting it was not mentioned by the parent, or by the other participants, that the student needed those specific related services provided on a 12-month basis (Tr. p. 488-89; see Dist. Ex. 3 at pp. 1-6). The district school psychologist testified that she does not do a "regression assessment" of students and added that the provider who was working with the student would be in the best position to determine

whether or not a student was showing a regression of skills, and that in terms of the progress reports from the related services providers, "that should be indicated within there if the child needs it" (Tr. pp. 536-38). The district school psychologist testified that although the providers were in the best position to determine whether or not the student needed a 12-month program, the provider had to present data that showed that the student had regressed over a specific period of time; however, in this matter, the June 2023 CSE did not have that type of data (Tr. pp. 540-41; see Tr. p. 534).

In light of the foregoing evidence, the hearing record does not contain any evidence that the student experienced substantial regression such that the June 2023 CSE was required to consider or recommend 12-month programming for the student for the 2023-24 school year. Thus, the parents' arguments on this issue are dismissed.

### **C. Pendency and Compensatory Educational Services**

Turning to the district's cross-appeal, the district argues that the IHO erred by awarding any compensatory educational services for missed pendency services, as the award was speculative because the hearing record lacked evidence regarding how many services were missed or why services were missed. Additionally, the district asserts that the IHO erred by calculating any such award on a 46-week basis as opposed to a 42-week basis. In response, the parents contend that, contrary to the district's assertion, the compensatory educational services award was not speculative, and note that the hearing record contains evidence that the district did not provide the student with OT and counseling services pursuant to pendency. The parents also argue that the district has the burden to establish that it implemented pendency and failed to submit any evidence demonstrating that the district—or another provider—implemented the mandated services. Similarly, the parents contend that the district bore the burden to establish any appropriate remedy or that the student was entitled to something less than a "full 1:1 return on the missed services."

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]).<sup>11</sup> 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

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<sup>11</sup> 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).

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]).

Contrary to the district's argument that the parents' claims regarding pendency were speculative, the amended due process complaint notice in this matter contains allegations regarding the district's failure to implement the student's pendency during the 2022-23 school year and the parents' inability to secure all of the services due to a lack of providers (Parent Ex. B at p. 12). As previously noted, the parties executed a pendency implementation form in this matter, which indicated that an unappealed IHO decision formed the basis of the student's pendency services retroactive to the date of the original due process complaint notice (September 6, 2023) (see Pendency Impl. Form). The district does not dispute that the student was entitled to pendency services or otherwise dispute the pendency services the student was entitled to receive, which included 15 hours per week of individual special education instruction, speech-language therapy, OT (three 30-minute sessions per week, individually), counseling (one 30-minute session per week individually, one 30-minute session per week in a group), and testing and classroom accommodations, on a 12-month basis (id.). Instead, the district contends that the hearing record is silent as to how many services the student missed and why the student missed pendency services. However, the hearing record was developed regarding services delivered to the student during the 2022-23 and 2023-24 school years.

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

In awarding compensatory educational services as relief, the IHO appears to have relied on calculations in the parents' closing brief to formulate the relief, which was derived in part from documentary evidence in the hearing record, such as invoices for SEIT services delivered to the student from July 2022 through March 2024 (see Parent Exs. BB-CC; KK; compare IHO Decision at pp. 19-21, with IHO Ex. VI at pp. 15-16). The IHO did not, however, refer to the 83-page document included in the hearing record, which comprised of various related services authorizations (RSAs) purportedly issued by the district to the parents in order to implement pendency services consisting of speech-language therapy, OT, PT, and counseling services for the time frame between summer 2022 and the conclusion of the impartial hearing (see generally IHO Ex. I). At least one provider approval letter reflects an "approved start date" for the specific service (speech-language therapy) as September 6, 2023, and an RSA issuance date of December 8, 2023 (id. at p. 4). Several other RSAs identify the particular case number under which the RSA was being issued, as well as the effective dates (id. 14, 17, 20). The RSAs were produced by the district

in compliance with a subpoena issued by the parents at the impartial hearing (id. at pp. 1-2; see generally Parent Ex. GG).

At the impartial hearing, the parents' attorney argued that these documents were relevant because the issuance of an RSA was "oftentimes the first step in a parent's ability to attempt to secure providers pursuant to pendency when the district does not furnish a provider" (Tr. p. 129). She also argued that, as in this case, the district did not timely issue the RSAs, which prevented the parents from "being able to try to find providers to service the related services pursuant to pendency" (id.). For example, the parents' attorney noted that if the district issued RSAs four or five months after the date of a due process complaint notice, it "cause[d] a situation where all the providers in that area have their cases full by the time the parent has that funding mechanism" in place (Tr. pp. 129-30). Accordingly, evidence of the RSAs was necessary to protect the parents' equitable considerations, especially if the district intended to ask about why the student's pendency services were delayed or about gaps in delivery of services being implemented (see Tr. pp. 129-30, 134-35). At least one RSA reflects an issuance date of December 8, 2023 (see, e.g., IHO Ex. I at p. 4).

As noted above, pendency has the effect of an automatic injunction (Zvi D., 694 F.2d at 906). Accordingly, the district was obligated in this instance to deliver the student's pendency services during the course of the proceeding and through the current appeal, unless the parties agreed otherwise. Having failed to take any steps during the process of the hearing to challenge the student's pendency placement or to develop the hearing record with regard to pendency services delivered to the student, and having specifically agreed to pendency services for the student based on an unappealed IHO decision, the district is, under the law, responsible for the implementation of pendency. The district was required to implement pendency services from the date of the due process complaint notice, September 6, 2023, through the date of this decision. Therefore, under pendency, the district is required to deliver compensatory education services to the student pursuant to the pendency implementation form, unless the parties otherwise agree.

As a final point, the district correctly argues that the IHO erred by ordering compensatory educational services on a 46-week basis, as a 12-month program consists of 42 weeks. Therefore, the IHO's award must be modified accordingly. Based on a 42-week school year, the student was entitled to receive a total of 630 hours of SEIT services per year, for a total of 1260 hours (15x42x2) for the 2022-23 and 2023-24 school years. For counseling, the student was entitled to receive a total of 42 hours per year, or 84 hours (1x42x2) for the 2022-23 and 2023-24 school years. For OT, the student was entitled to receive a total of 63 hours per year, or 126 hours (1.5x42x2) for the 2022-23 and 2023-24 school years.

## **VII. Conclusion**

Having determined that the evidence in the hearing record establishes that the district offered the student a FAPE in the LRE for the 2023-24 school year, the necessary inquiry is at an end and there is no need to address the parents' request for declaratory relief.

**THE APPEAL IS DISMISSED.**

**THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.**



**IT IS ORDERED** that the IHO's decision dated August 28, 2024, is modified by vacating that portion which calculated compensatory pendency services based on a 46 week school year and ordered the district to fund 584.93 hours of 1:1 special education instruction; 92 hours of counseling services, and 138 hours of OT.

**IT IS FURTHER ORDERED** that the district shall fund compensatory pendency services based on a 42 week school year, which for the 2022-23 and 2023-24 school years shall include including a total of 1260 hours of 1:1 special education instruction, 84 hours of counseling services, and 126 hours of OT, minus those hours that the student already received during the 2022-23 and 2023-24 school years.

**Dated:**           **Albany, New York**  
                          **December 2, 2024**

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**SARAH L. HARRINGTON**  
**STATE REVIEW OFFICER**