



The University of the State of New York

The State Education Department

State Review Officer

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No. 24-504

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

Appearances:

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

Liz Vladeck, General Counsel, attorneys for respondent, by 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 denied her request that respondent (the district) fund the costs of her son's private services delivered by Future Plus Services (Future Plus) for the 2024-25 school year. The district cross-appeals from that portion of the IHO's decision which awarded compensatory education services and denied the district's request for a reduction in the award based on equitable considerations. The appeal must be sustained in part. The cross-appeal must be sustained in part.

II. Overview—Administrative Procedures

When a student who resides in New York is eligible for special education services and attends a nonpublic school, Article 73 of the New York State Education Law allows for the creation of an individualized education services program (IESP) under the State's so-called "dual enrollment" statute (see Educ. Law § 3602-c). The task of creating an IESP is assigned to the same committee that designs educational programming for students with disabilities under the IDEA (20 U.S.C. §§ 1400-1482), namely a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3,

200.4[d][2]). If disputes occur between parents and school districts, State law provides that "[r]eview of the recommendation of the committee on special education may be obtained by the parent or person in parental relation of the pupil pursuant to the provisions of [Education Law § 4404]," which effectuates the due process provisions called for by the IDEA (Educ. Law § 3602-c[2][b][1]). Incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

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

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

III. Facts and Procedural History

A Committee on Preschool Special Education (CPSE) convened on May 14, 2019, found the student eligible for special education as a preschool student with a disability, and developed an IEP (see Parent Ex. B). The CPSE recommended 12-month programming consisting of four hours per day for 1.5 days per week of individual direct special education itinerant teacher (SEIT) services in Yiddish and one hour per day on one day of the week of individual direct SEIT services in Yiddish (id. at pp. 17, 18). For related services, the CPSE recommended two 30-minute sessions per week of individual speech-language therapy and two 30-minute sessions per week of individual occupational therapy (OT) (id.).¹

There is no evidence in the hearing record as to the student's education between the May 2019 CPSE and March, 2023.

A CSE convened on March 14, 2023, found that the student was eligible for special education as a student with a speech or language impairment, and developed an IESP with an implementation date of March 28, 2023 (see Parent Ex. D).^{2, 3} The CSE recommended three periods per week of direct group special education teacher support services (SETSS) in Yiddish, with two 30-minute sessions per week of individual speech-language therapy in Yiddish, one 30-minute session per week of group speech-language therapy in Yiddish, and two 30-minute sessions per week of individual OT in English (id. at p. 7). The CSE noted that, at that time, the student was parentally placed in a nonpublic school (id. at p. 10).

In a letter electronically signed on May 12, 2024, the parent indicated that she had placed the student at a nonpublic school at her expense and wanted the student's special education services to be provided by the district for the 2024-25 school year (Parent Ex. E at p. 2). The parent's attorney emailed the letter to the district on May 22, 2024 (id. at p. 1).

The parent electronically signed a contract with Future Plus on July 9, 2024 (see Parent Ex. F).⁴ The contract indicated that the parent understood that the student was entitled to receive funding or reimbursement for seven hours per week of individual SEIT services in Yiddish, two 30-minute sessions per week of individual speech-language therapy in Yiddish, and two 30-minute sessions per week of individual OT in English, all on a 12-month basis (id. at p. 1). The contract indicated that Future Plus would "make every effort to implement the recommended services" for the 12-month 2024-25 school year (id. at p. 2). The contract provided that the rates for the 12-

¹ All of the services were recommended to take place in a childcare center selected by the parent (Parent Ex. B at p. 17).

² The district also entered the May 2023 IESP into the hearing record; for the sake of clarity, only the parent exhibit will be referred to (see Tr. p. 6: see also Dist. Ex. 3).

³ 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]).

⁴ The Commissioner of Education has not approved Future Plus as a school or agency with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d]; 200.7).

month 2024-25 school year were \$300 per hour for speech-language therapy, \$195 per hour for SETSS/SEIT services, and \$300 per hour for OT services (id.).

The parent sent the district a notice of private placement on July 10, 2024 (see Parent Ex. C).⁵ The letter, dated July 9, 2024, indicated that the parent was seeking services for the 2024-25 school year and that the last CSE meeting for the student was held on March 14, 2023 (id. at p. 2). The parent indicated that she was concerned that the March 2023 CSE removed SEIT services and recommended fewer hours of SETSS (id.). Additionally, the parent asserted that the CSE removed the student's "summer program completely"; however, she believed that the student required a continuation of SEIT services or an appropriate special education/general education hybrid program in order to address the student's special education needs in a mainstream environment (id. at pp. 2-3). The parent notified the district that she was rejecting the reduction in services and was placing the student in a nonpublic school (id. at p. 3). The parent indicated that she would attempt to find providers to implement the services but was "eager for the [d]istrict to provide any and all services" (id.). The parent indicated that she would be seeking reimbursement/direct funding for the student's special education and related services program (id.).

A. Due Process Complaint Notice

In a due process complaint notice dated July 9, 2024, the parent alleged that the district denied the student a free appropriate public education (FAPE) for the 2024-25 school year (see Parent Ex. A). The parent asserted that the district last convened a CSE in March 2023, when the CSE reduced services from seven periods of SEIT services to three periods of SETSS and removed summer services (id. at pp. 2-3). The parent alleged that the student required either continuation of SEIT services or placement in a hybrid special education/general education program (id. at p. 3). According to the parent, as the district failed to recommend an appropriate placement, she had no choice but to implement a 12-month program independently and was seeking reimbursement (id. at p. 3). The parent further asserted that the student was entitled to pendency pursuant to the May 2019 CPSE IEP, which included a 12-month program consisting of seven periods per week of individual SEIT services, two 30-minute sessions per week of individual speech-language therapy and two 30-minute sessions per week of individual OT (id. at p. 2). Moreover, the parent noted that due to the difficulty in locating "SETSS and related services" providers, she reserved the right to ask for compensatory SETSS and related services for any services not provided during the 2024-25 school year, including the services the student was entitled to under pendency (id.).

As relief, the parent requested a finding that the student was denied a FAPE for the 2024-25 school year, that the recommendations of the May 2019 IEP be funded at the provider's contracted rate for the complete 2024-25 school year, and that, in the event the parent is unable to locate providers to deliver services, the parent requested a bank of services the student was entitled to under pendency (id. at p. 4).

⁵ The letter was sent by the office of the parent's attorney via email on July 10, 2024 and the district sent an acknowledgment of receipt on that day (Parent Ex. C at p. 1).

B. Impartial Hearing Officer Decision

An impartial hearing convened and concluded before the Office of Administrative Trials and Hearings (OATH) on August 30, 2024 (see Tr. pp. 1-17). In a decision dated September 23, 2024, the IHO held that the district denied the student a FAPE for the 2024-25 school year and that the parent was entitled to funding for the unilaterally obtained 10-month program pursuant to the services recommended in the March 2023 IESP (IHO Decision at pp. 5-9).⁶ Regarding the district's obligation to provide the student a FAPE on an equitable basis, the IHO found that it was undisputed that the March 2023 IESP was the student's most recent IESP, that the student was entitled to services pursuant to the March 2023 IESP, and that the district did not submit any evidence to prove that services were implemented and, as such, it was undisputed that the district "failed to implement the services set forth in the [March 2023] IESP" (id.). Turning to the appropriateness of the unilaterally-obtained services, the IHO found that some of the services obtained by the parent were appropriate, specifically three hours per week of SETSS and two 30-minute sessions per week of speech-language therapy as those were mandated in the March 2023 IESP (IHO Decision at pp. 5-6). However, the IHO found that the parent's provider did not sufficiently explain why the additional four hours of SETSS per week were warranted (IHO Decision at p. 6). The IHO determined that the provider was relying on an outdated IEP from May 2019 to justify the increased number of SETSS and for extended school year services (id.). Accordingly, the IHO found that the parent failed to meet her burden that the additional services were appropriate (id.).

As to extended school year services, the IHO noted that there was no testimony that the student exhibited regression when the services were not provided and found that the parent failed to meet her burden that she was entitled to extended school year services (IHO Decision at pp. 6-7).

The IHO next addressed the district's argument that the rate charged by the agency was excessive and found that equitable considerations did not warrant a reduction in the contracted for rate for the services the parent obtained unilaterally (IHO Decision at pp. 7-9). In particular, the IHO noted that the parent sent the district a May 2024 request for equitable services, a July 2024 ten-day notice, and that she was contractually obligated to pay the provider agency for the services delivered at the contracted for rates (id. at pp. 8-9).

The IHO ordered the district to fund: three periods of SETSS per week by the providers of the parent's choosing at the rate of \$195 per hour for the 2024-25 10-month school year; two 30-minute sessions per week of speech-language therapy by the providers of the parent's choosing at the rate of \$300 per hour for the 10-month 2024-25 school year, and a bank of 36 hours of OT by the providers of the parent's choosing at a reasonable market rate to expire two years from the date of the IHO's decision (IHO Decision at p. 9).

⁶ The IHO noted that she "generally [found] the documents relevant, detailed, and consistent with the allegations in the [due process complaint notice]," and that there was "no reason to doubt [the] veracity" of the witness (IHO Decision at p. 5). Therefore, the IHO credited all of the parent's evidence admitted at the impartial hearing (id.).

IV. Appeal for State-Level Review

The parent appeals. First, the parent argues that she is entitled to pendency automatically, irrespective of whether she prevails on her underlying merits claims. Next, the parent contends that the IHO misconstrued the parent's request as the parent was not seeking additional hours "separate and distinct" from what the student was receiving. According to the parent, the student has been receiving seven hours of SETSS for several years and the reduction to three hours was a "drastic change" that was a "massive reduction from what [the student] requires" to maintain his current placement. The parent asserts that the case law disfavors finding that the district provided a FAPE when it does not present any witness testimony, and that it did not do so in this instance. The parent further contends that the hearing record does not support the reduction in services and the March 2023 IESP was not appropriate, resulting in a denial of FAPE. The parent notes that she is seeking to maintain the status quo of seven hours of services and the district has never explained or defended the reduction in services. Moreover, the parent points out that the district has not updated any evaluations to justify a change in program.

Turning to the IHO's finding as to the appropriateness of the unilaterally obtained services, the parent argues that the hearing record demonstrates that a reduction of the student's services from seven hours to three hours per week would have been "catastrophic" The parent further asserts that the student required seven hours of services in order to make progress and stay in his mainstream placement. The parent requests that the IHO's decision to only fund three hours of SETSS be modified to find that the student is entitled to seven periods per week of SETSS for the entire 12-month school year. Further, the parent requests the SRO order pendency dating back to the date of the due process complaint notice.

The district submits an answer and cross-appeal.⁷ Initially, the district argues that the student is not entitled to pendency or services provided on a 12-month basis. Regarding pendency, the district notes that although the issue was raised in the due process complaint notice, the parent failed to put forth an argument for pendency at any point during the impartial hearing. The district asserts that the request for a pendency award should be rejected as the parent failed to discuss the issue at the hearing and it is unclear what services the student should have received during pendency as the CPSE IEP was not included in the hearing record or submitted on appeal. Additionally, the district notes that the parent failed to appeal the IHO's order for funding of speech-language therapy for only the 10-month school year and that finding should be final and binding. The district further asserts that the parent also failed to provide a justification for overturning the IHO's determination that the student was only entitled to SETSS on a 10-month basis as the parent only raises the issue in the parent's requested relief and it is not sufficient to merely request services without providing grounds for reversal of the IHO's decision.

The district next contends that the IHO's decision⁷ to award funding for three periods of SETSS per week was supported by the hearing record. The district reiterates the IHO's findings that the parent relied on an outdated IEP to support the request for additional hours of services and that the parent failed to meet her burden of proving that seven periods of SETSS per week were appropriate. The district raises further arguments as to the appropriateness of the unilaterally-obtained services, such as an assertion that the parent failed to present attendance records. The

⁷ The district notes that it is not cross-appealing the IHO's finding that it did not offer a FAPE.

district argues that, at a minimum, the hearing record supports the IHO's decision to reduce the number of SETSS to three hours per week pursuant to the 2023 IESP.

For its cross-appeal, the district argues that the IHO erred by not reducing the rate for services. According to the district, the IHO should have credited the AIR Report admitted into evidence during the impartial hearing and limited the rate for SETSS to \$125 per hour. The district asserts that witness testimony was not required to authenticate the report and that the report is relevant to establish appropriate rates.

Lastly, the district cross-appeals from the IHO's order for compensatory education consisting of OT services. The district contends that there is no evidence that the student did not receive OT services and at the impartial hearing it no longer appeared that the parent was interested in seeking that service for her son. The parent did not provide an explanation as to why the agency only provided SETSS and speech-language therapy. Additionally, the due process complaint notice did not include a request for OT services. As a result of the foregoing, the district argues that the IHO's award of compensatory education should be reversed.

V. Applicable Standards

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

However, under State law, parents of a student with a disability who have privately enrolled their child in a nonpublic school may seek to obtain educational "services" for their child by filing a request for such services in the public school district of location where the nonpublic school is located on or before the first day of June preceding the school year for which the request for services is made (Educ. Law § 3602-c[2]).⁸ "Boards of education of all school districts of the state shall furnish services to students who are residents of this state and who attend nonpublic schools located in such school districts, upon the written request of the parent" (Educ. Law § 3602-c[2][a]). In such circumstances, the district of location's CSE must review the request for services and "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an [IEP]" (Educ. Law § 3602-c[2][b][1]). The CSE must "assure that special education programs and services are made available to students with disabilities attending nonpublic schools located within the school district on an equitable basis, as compared to special education programs and services provided to other students with disabilities attending public or

⁸ State law provides that "services" includes "education for students with disabilities," which means "special educational programs designed to serve persons who meet the definition of children with disabilities set forth in [Education Law § 4401(1)]" (Educ. Law § 3602-c[1][a], [d]).

nonpublic schools located within the school district (*id.*).⁹ Thus, under State law an eligible New York State resident student may be voluntarily enrolled by a parent in a nonpublic school, but at the same time the student is also enrolled in the public school district, that is dually enrolled, for the purpose of receiving special education programming under Education Law § 3602-c, dual enrollment services for which a public school district may be held accountable through an impartial hearing.

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

VI. Discussion

A. FAPE

The IHO found that the district denied the student a FAPE for the 2024-25 school year (IHO Decision at p. 5). The district has not appealed from that decision and therefore, that finding has 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]).¹⁰

B. Unilaterally-Obtained Services

In this matter, the student has been parentally placed in a nonpublic school and the parent does not seek tuition reimbursement from the district for the cost of the parental placement. Instead, the parent alleged that the district failed to implement the student's mandated public special education services under the State's dual enrollment statute for the 2024-25 school year and that the district's March 2023 recommendations were not appropriate to meet the student's special education needs. As a self-help remedy, the parent unilaterally obtained private services

⁹ State guidance explains that providing services on an "equitable basis" means that "special education services are provided to parentally placed nonpublic school students with disabilities in the same manner as compared to other students with disabilities attending public or nonpublic schools located within the school district" ("Chapter 378 of the Laws of 2007—Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the Individuals with Disabilities Education Act (IDEA) 2004 and New York State (NYS) Education Law Section 3602-c," Attachment 1 (Questions and Answers), VESID Mem. [Sept. 2007], available at <https://www.nysed.gov/special-education/guidance-parentally-placed-nonpublic-elementary-and-secondary-school-students>). The guidance document further provides that "parentally placed nonpublic students must be provided services based on need and the same range of services provided by the district of location to its public school students must be made available to nonpublic students, taking into account the student's placement in the nonpublic school program" (*id.*). The guidance has recently been reorganized on the State's web site and the paginated pdf versions of the documents previously available do not currently appear there, having been updated with web based versions.

¹⁰ To the extent that the parent appealed from the IHO's decision only addressing the issue of implementation with respect to FAPE and not addressing the appropriateness of the March 2023 IESP, it is not necessary to address further reasons for a denial of FAPE in this matter as the relief sought is reimbursement and the standard for the appropriateness of the unilaterally-obtained services, as discussed further below, does not change based on the basis for finding a denial of FAPE.

from Future Plus for the student without the consent of the school district officials, and then commenced due process to obtain remuneration for the costs thereof. Generally, districts that fail to comply with their statutory mandates to provide special education can be made to pay for special education services privately obtained for which a parent paid or became legally obligated to pay, a process that is essentially the same as the federal process under IDEA. Accordingly, the issue in this matter is whether the parent is entitled to public funding of the costs of the private services. "Parents who are dissatisfied with their child's education can unilaterally change their child's placement . . . and can, for example, pay for private services, including private schooling. They do so, however, at their own financial risk. They can obtain retroactive reimbursement from the school district after the [IESP] dispute is resolved, if they satisfy a three-part test that has come to be known as the Burlington-Carter test" (Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 526 [2d Cir. 2020] [internal quotations and citations omitted]; see Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 14 [1993] [finding that the "Parents' failure to select a program known to be approved by the State in favor of an unapproved option is not itself a bar to reimbursement."]).

The parent's request for district funding of privately-obtained services must be assessed under this framework. Thus, a board of education may be required to reimburse parents for their expenditures for private educational services they obtained for a student if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Carter, 510 U.S. 7; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 252 [2d Cir. 2009]).¹¹ In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

Turning to a review of the appropriateness of the unilaterally-obtained services, the federal standard for adjudicating these types of disputes is instructive.

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129). Citing the Rowley standard, the Supreme Court has explained that "when a public school system has defaulted on its obligations under the Act, a private school placement is 'proper under the Act' if the education provided by the private school is 'reasonably calculated to enable the child to receive educational benefits'" (Carter, 510 U.S. at 11; see Rowley, 458 U.S. at 203-04; Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see also Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] ["evidence of academic progress at a private school does not itself establish that the private placement offers adequate and

¹¹ State law provides that the parent has the obligation to establish that a unilateral placement is appropriate, which in this case is the special education that the parent obtained from Future Plus (Educ. Law § 4404[1][c]).

appropriate education under the IDEA"]). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (id. at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G., 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

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

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

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

Having determined the framework for the analysis of this matter, I note that given the IHO's unappealed finding that the district failed to offer the student a FAPE, the questions on appeal are no longer whether three or seven hours of SETSS were appropriate or whether 12-month services were necessary, but whether Future Plus delivered specially designed instruction to the student to address his special education needs.¹²

¹² As the Second Circuit has explained, "[t]he first two prongs of the [Burlington/Carter] test generally constitute a binary inquiry that determines whether or not relief is warranted, while the third enables a court to determine the appropriate amount of reimbursement, if any"; however in this case the IHO broke the request into discrete

1. Student's Needs

While not in dispute, a brief discussion of the student's needs provides context for the issue to be resolved. The student's May 2019 preschool IEP, developed when he was 4.6 years old, reflected that he was a bilingual Yiddish speaker who presented with cognitive, communication, social/emotional and behavioral deficits, expressive/receptive language and motor delays, and delays in completing activities of daily living (ADL) (Parent Ex. B at p. 1). The student's disposition, at that time, was "best described" as somewhat immature, shy, apprehensive, and unfocused (id.). The IEP reflected that the student's then-current preferred learning style appeared to be visual and kinesthetic/tactile (id.).

According to the March 14, 2023 IESP, administration of the Wechsler Preschool and Primary Scale of Intelligence-Fourth Edition to the student in November 2017 yielded a full scale IQ of 82 (low average) (id.). A "speech assessment" conducted in December 2017 "revealed scattered skills in both receptive and expressive language domains," and "his vocabulary was below age expectancy with pragmatic language difficulties" (id.). Administration of the Peabody Developmental Motor Scales and the Hawaii Early Learning Profile to the student in December 2017 "indicated markedly decreased focus and immature grasp patterns" (id.). Additionally, the student "was found to overwhelm easily in multi-sensory environments and exhibited difficulty modulating tactile sensory information" (id.).

The March 2023 IESP reflected reports that the student presented with cognitive, attention span, and auditory listening deficits (Parent Ex. D at p. 1, 3). Additional areas of need included understanding basic concepts, sequencing pictures, sorting objects, and naming categories and groups (id. at p. 1). The IESP described the student as having difficulty following directions or class rules (id. at p. 2). When reviewing what was told to him, the student was only able to "maintain a few pieces of information," and visual aids were being used to support the student (id.).

According to the March 2023 IESP, the student's reading skills were not on grade level (Parent Ex. D at p. 2). Decoding was very difficult for the student, as he confused letters and their sounds and his teacher broke up syllables "to help [the student] better identify them" (id.). Further, the student was unable to retell a story or sentence (id.). In math, the student counted to 20-30 but only identified numbers up to 10 (id.). The student differentiated between addition and subtraction but had difficulty applying it (id.). The IESP noted that the student could "add[] up his points" when he went to "the prize store" (id.). The student's preferred learning style appeared to be visual and auditory (id. at p. 1).

Regarding communication skills, the March 2023 IESP indicated that the student displayed poor muscle tone, articulation skills, poor tongue retraction, and oral motor weakness as well as expressive and receptive language delays (Parent Ex. D at p. 1). The student also exhibited unclear speech and an inability to "express himself properly" (id. at p. 2). In addition, the student was described as having difficulty asking clearly for what he wanted and needed but when he was

findings for each service delivered to the student without considering the totality of the circumstances (see A.P. v. New York City Dep't of Educ., 2024 WL 763386 at *2 [2d Cir. Feb. 26, 2024]). This splintering of the IHO's conclusion regarding the appropriateness of the unilaterally-obtained services was error.

prompted, he performed better (*id.*). Socially, the IESP described the student as "generally immature" and "a bit playful"; he reportedly enjoyed playing games and joining in on activities but "need[ed] to continue maturing his social cues to act appropriately" (*id.* at pp. 1, 2). The March 2023 IESP also noted that "when last evaluated, the student "tend[ed] to tantrum when he d[id] not get what he want[ed]" (*id.* at p. 2).

Physically, the May 2023 IESP described the student as "healthy overall," that he liked to play ball and run around, and that he did not have allergies nor did he take medications (Parent Ex. D at p. 2). In the area of ADLs, the student had difficulty wiping and blowing his nose, covering his mouth when coughing or sneezing, identifying which foods were healthy to eat, and "demonstrating an awareness for the need for personal manners" (*id.* at pp. 1-2). The student's fine motor development and handwriting skills were also areas of need, and he exhibited a poor pencil grip and difficulty with writing (*id.* at pp. 2-3). In addition, when writing the student used upper/lower case without a pattern and had difficulty with spacing (*id.* at p. 2). The student also demonstrated significant delays in skills such as tracing and copying complex shapes, copying simple lines, administering adequate pressure, forming letters correctly, and coloring with a crayon (*id.*). The student was described as having "sensory issues" and "often touch[ed] things" and became distracted (*id.* at p. 3).

The March 2023 CSE identified the modifications and resources needed to address the student's management needs including: small group work to enhance peer to peer interactions; partner work to enhance peer to peer interaction and skill acquisition; manipulatives such as base 10 cubes, counters, grids, extra paper, etc.; visual aids to enhance content knowledge; fine motor activities; articulation drills to address the misarticulation of phonemes; leveled texts to enhance decoding skills and reading comprehension; redirection when unfocused; repetition of material and directions; breakdown of material to enhance learning; verbal and gestural prompts to enhance attention/focus; oral motor activities to address expressive delays; positive reinforcements to enhance self-esteem; multisensory learning approach; preferential seating nearest to the instructor during assessments and instruction (Parent Ex. D at p. 4).

The March 2023 CSE developed seven annual goals to improve the student's articulation, reading comprehension, math word problem solving, writing, and handwriting skills and to increase his attention span (Parent Ex. D at pp. 4-6). The March 2023 CSE recommended that the student receive three periods per week of group SETSS, two 30-minute sessions per week of individual speech-language therapy, one 30-minute session per week of group speech-language therapy, and two 30-minute sessions per week of individual OT (*id.* at p. 7).

2. Services From Future Plus

According to the executive director of Future Plus (director), Future Plus began delivering seven hours per week of individual SETSS and two 30-minute sessions per week of individual speech-language therapy to the student beginning on July 6, 2024 (Parent Ex. K ¶¶ 4, 12, 17). The student's SETSS and speech-language therapy were delivered by a provider who held both State certification to teach students with disabilities and licensure as a speech-language pathologist (Parent Ex. G). The evidence entered into the hearing regarding the services Future Plus delivered were two progress reports both dated August 13, 2024 (Parent Exs. H; I).

The August 2024 SETSS progress report documented that the student received SETSS and speech-language therapy services "weekly" (Parent Ex. H at pp. 1, 4). According to the progress report, the student had challenges in reading with both decoding skills and reading comprehension, as well as in his expressive and receptive language skills (id. at p. 1). The student was reported to often skip and mispronounce unfamiliar words which affected his reading comprehension (id.). The provider reported using a multisensory approach and providing high levels of positive reinforcement (id.). Regarding progress, the provider reported that the student had shown improvement in reading accuracy and fluency over the summer, specifically, with the support of the Orton-Gillingham approach he "skip[ped] fewer words and [wa]s becoming more comfortable with decoding strategies" (id.). When assessed using the Fountas and Pinnell Benchmark Assessment System, he read first grade level K reading passages at 95 words per minute and was next assessed at level M, reading 80 words per minute (id.). The provider reported that although the student had made progress, level M was "several years below the expected reading level" for the student's grade (id.). The progress report also documented that the student's reading comprehension had improved "slightly" as he was beginning to retain more of what he read (id.). According to the provider, "[c]ontinued focus on targeted interventions and consistent practice w[ould] be essential for the student to close the gap in his reading skills" (id.).

In writing, the August 2024 SETSS progress report reflected that the student struggled with spelling and misspelled common words (Parent Ex. H at p. 1). The student also had difficulty with sentence structure, and organizing his thoughts into coherent sentences and paragraphs (id.). The provider reported that the student's handwriting had become more consistent, his spelling of sight words had improved, and he wrote more complete sentences, although he still needed guidance to organize his thoughts into paragraphs and benefited from the use of graphic organizers (id.).

Regarding math skills, the August 2024 SETSS progress report indicated that the student had a "basic understanding of math concepts, but he often ma[de] errors in calculation due to rushing through problems" and his problem solving skills were below grade level (Parent Ex. H at p. 2). However, the provider reported that while his problem solving abilities were still developing, there was "noticeable progress in [the student's] approach to solving multi-step problems" (id.). Additionally, the progress report indicated that "[o]ver the summer" the student had improved his addition and subtraction calculation skills and became more careful in checking his work, which reduced the number of careless mistakes (id.).

The August 2024 SETSS progress report indicated that the student displayed difficulties with both expressive and receptive language, in that he struggled to form complete sentences and follow multi-step directions (Parent Ex. H at p. 2). The provider reported improvement in the student's expressive language by "constructing more complete sentences and using a wider vocabulary" (id.). The provider also reported that the student was "better at following multi-step directions, especially when provided with visual or written cues"; however, "he still occasionally need[ed] repetition or clarification for complex instructions" (id.).

Socially, according to the August 2024 SETSS progress report, the student "interact[ed] positively with his peers and teachers, but he sometimes struggle[d] with maintaining attention during tasks and managing frustration when faced with challenging activities" (Parent Ex. H at p. 2). The provider reported that the student's ability to stay focused during tasks had "improved slightly over the summer" and that he was "beginning to use strategies like taking short breaks to

manage his frustration" (id.). It was reported that the student's "interactions with peers ha[d] remained positive, and he [wa]s increasingly able to participate in group activities with less support" (id.).

Due to the student's delays in reading, writing, mathematics, and language skills and because the student had made progress with his then-current mandate of SETSS and speech-language services, the provider recommended that those services continue (Parent Ex. H at p. 2). The provider created reading goals for the student including improving his ability to read a third-grade level text with accuracy and comprehension, use words analysis skills to decode words, improve reading accuracy and fluency, and use context to self-correct reading, make inferences, compare and contrast story elements, and answer "wh" questions about text (id. at pp. 3-4). Writing goals included increasing critical thinking skills by brainstorming ideas, improving spelling and sentence structure, and writing a structured paragraph (id. at pp. 2, 4). Additionally, the provider developed math annual goals to increase the student's use of "math and money problem solving strategies," and improve computation skills and concepts involving ratios, fractions, multiplication, and division (id. at pp. 2-3).

Turning to the August 2024 "[c]ommunication [p]rogress" report, the provider reported that the student had made notable progress in his receptive language skills such as understanding spatial concepts, matching photos appropriately, and comprehending object functions (Parent Ex. I at pp. 1, 2). The student reportedly still had delays in understanding cause-and-effect relationships, gender pronouns, and a variety of descriptive concepts such as size, color, and opposites, which hindered his ability to draw appropriate conclusions and comprehend questions presented in the classroom (id. at p. 1). The provider reported that with regard to expressive language, the student demonstrated the ability to request appropriately, ask questions, answer /wh/ questions on grade-level passages, and be "intelligibly understood by others" (id.). According to the progress report, the student was also aware of how speech could distract listeners, and he asked for help and asked questions (id.). The provider reported that the student had difficulty staying on topic, describing and repairing semantic absurdities, and naming items within categories (id.). Further, the provider indicated that the student's "expressive language skills show[ed] moderate performance levels and need[ed] improvement in comprehending gender pronouns, making inferences, and understanding inclusion/exclusion words" (id.).

Regarding articulation, the August 2024 communication progress report indicated that the student was proficient in producing the target sound /s/ in isolation and at the word level in all positions, and produced multisyllabic words without omission (Parent Ex. I at p. 1). The progress report noted, "[d]espite these improvements, the student continue[d] to struggle with producing the /th/ sound in all positions, as well as 'sh', 'ch', 'l', and 'dz' sounds across various contexts, including isolation, syllables, words, phrases, sentences, and spontaneous speech" (id.).

According to the August 2024 communication progress report, to address the student's deficits, intervention strategies included: articulation drills, picture cards, games, books, songs, worksheets, and language games, as well as various prompts, including hand-over-hand, modeling, verbal, visual, and auditory cues (Parent Ex. I at p. 1). The provider concluded that the student had significant weaknesses in receptive language, articulation, and expressive language that impacted the student's academic progress, and recommended that the student continue to receive speech-language therapy "to support his ability to function effectively in the classroom

environment" (*id.*). The provider created annual goals for the student that focused on: improving understanding of cause-and-effect relationships, comprehension of gender pronouns, and questions asked in the classroom; use of descriptive concepts and ability to turn take during conversations and name category items; articulation skills for production of the /th/, /sh/, /ch/, /dz/ sounds with self-correction of errors (Parent Ex. I at p. 3).

As described above, the August 2024 SETSS and communication progress reports adequately described the student's needs, the specially designed instruction the student received, and the progress the student made with the services delivered by Future Plus during summer 2024, the 12-month portion of the 2024-25 school year. As there are no invoices, attendance records, or time sheets regarding the services Future Plus delivered to the student during summer 2024, the parent may obtain funding for the summer services upon proof of delivery.

Finally, although the hearing record supports finding that the services actually delivered to the student were appropriate, given the structure of the unilaterally-obtained services, it does not support a finding that the parent met her burden to show that future services she was going to obtain for the student were appropriate for the 10-month portion of the school year beginning in September 2024. Specifically, the hearing was held and concluded on August 30, 2024, prior to the start of the 10-month portion of the school year and, therefore, the record is devoid of any information regarding what services the provider delivered or what the provider was doing with the student during the 10-month portion of the 2024-25 school year. In this case, the contract notes that the parent was requesting Future Plus deliver services "to whatever extent possible" and that Future Plus would "make every effort to implement the recommended services [] with suitable qualified providers" for the 2024-25 school year, which is not a guarantee that the student's SETSS and speech-language therapy services would continue or that the student would receive some set minimum level of services (Parent Ex. F at p. 2). The contract with Future Plus is a fee for services agreement, and it cannot be determined at this time based on what is in the hearing record, that these services continued during the 2024-25 10-month school year as they did over the summer portion of the school year. Thus, the parent has not met her burden to prove that any services delivered to the student after September 2024 were sufficient to meet the student's special education needs and could therefore be deemed appropriate for purposes of direct funding by the district.

C. Equitable Considerations

The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; *see* Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]; L.K. v. New York City Dep't of Educ., 674 Fed. App'x 100, 101 [2d Cir. Jan. 19, 2017]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; E.M. v. New

York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014] [identifying factors relevant to equitable considerations, including whether the withdrawal of the student from public school was justified, whether the parent provided adequate notice, whether the amount of the private school tuition was reasonable, possible scholarships or other financial aid from the private school, and any fraud or collusion on the part of the parent or private school]; C.L., 744 F.3d at 840 [noting that "[i]mportant to the equitable consideration is whether the parents obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA"]).

Next, it must be determined if there are any equitable bars to the parent's request for funding for the services obtained by Future Plus. It is noted that the parent in this case provided a 10-day notice of unilateral placement in July 2024, which was acknowledged as received by the district (see Parent Ex. C). The district did not argue that this was not adequate notice.

The district argues that the rates charged by Future Plus are excessive and that the analysis used in Application of a Student with a Disability, Appeal No. 24-222, should be utilized in this case. However, the district declined to cross examine the parent's witnesses in this case and the hearing record fails to establish what amount the providers were paid out of the total amount charged by Future Plus (see Parent Ex. K). Without that information, the calculation requested by the district cannot be made. Accordingly, a reduction of the contracted for rate as requested by the district cannot be made. For the summer 2024 services, the district is ordered to fund the services of seven hours of SETSS per week at the contracted rate of \$195 per hour and two 30-minute sessions per week of speech-language therapy per week at the contracted rate of \$300 per hour, upon proof of delivery of services.¹³

¹³ Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). The purpose of an award of compensatory education is to provide an appropriate remedy for a denial of a FAPE (see E.M., 758 F.3d at 451; P. v. Newington Bd. of Educ., 546 F.3d 111, 123 [2d Cir. 2008] [holding that compensatory education is a remedy designed to "make up for" a denial of a FAPE]; see also Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 456 [2d Cir. 2015]; Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005] [holding that, in fashioning an appropriate compensatory education remedy, "the inquiry must be fact-specific, and to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"]; Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1497 [9th Cir. 1994]). Accordingly, an award of compensatory education should aim to place the student in the position he or she would have been in had the district complied with its obligations under the IDEA (see Newington, 546 F.3d at 123 [holding that compensatory education awards should be designed so as to "appropriately address[] the problems with the IEP"]; see also Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1289 [11th Cir. 2008] [holding that "[c]ompensatory awards should place children in the position they would have been in but for the violation of the Act"]; Bd. of Educ. of Fayette County v. L.M., 478 F.3d 307, 316 [6th Cir. 2007] [holding that "a flexible approach, rather than a rote hour-by-hour compensation award, is more likely to address [the student's] educational problems successfully"]; Reid, 401 F.3d at 518 [holding that compensatory education is a "replacement of educational services the child should have received in the first place" and that compensatory education awards "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA"]). The hearing record does not indicate that the parent sought OT services from Future Plus or that Future Plus was unable to provide those services. The parent did not clarify this issue as neither affidavit indicated whether the parent sought OT or whether Future Plus was unable to provide the service (see Parent Exs. J; K). The parent's attorney did not request compensatory OT services during the parent's closing statement (Tr. p. 12). Accordingly, the IHO's award of compensatory OT services was in error as the parent has not sought OT services.

D. 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]).¹⁴ 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).

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

¹⁴ 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).

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 right to pendency is automatic; therefore, the district is incorrect that the parent had to further argue pendency at the impartial hearing. The parent asserted pendency in her due process complaint notice pursuant to what she asserts was the last agreed upon placement, the May 2019 IEP. The district has not disputed that assertion or attempted to rebut it. The district simply asserts the parent should not get pendency because the issue was not specifically raised at the impartial hearing. That is not sufficient or a valid legal argument.

Here, the student is entitled to pendency pursuant to the May 2019 IEP from the date of the due process complaint notice, July 9, 2024, through the date of this decision. As stated above, pendency is an automatic right and, in this case, the district has not challenged what constitutes the student's educational program during the pendency of the proceeding and ensuing appeal. Since, the district has not disputed the parent's assertion that the May 2019 IEP was the last agreed upon placement, the student is entitled to the services recommended in the May 2019 IEP during the pendency of this proceeding and the district is ordered to fund the provision of the educational program recommended in the May 2019 IEP of seven hours of SETSS¹⁵ per week, two 30-minute sessions of speech-language therapy per week and two 30-minute sessions of OT per week (see Parent Ex. B at p. 18).

VII. Conclusion

The IHO properly found that the district denied the student a FAPE for the 2024-25 school year. However, the IHO erred in not awarding summer services and by limiting the awarded unilaterally-obtained services to three hours per week of SETSS, instead of the seven hours per week delivered during the summer. The parent is entitled to funding for seven hours of SETSS

¹⁵ It is noted that the IEP recommended SEIT services; however 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]). The student has aged out of preschool services and SEIT services are not an available special education service for the student under State law; accordingly, as requested by the parent, in this instance SETSS will be treated as the service that constitutes the student's pendency services.

and two 30-minute sessions of speech-language therapy per week at the contracted rates with Future Plus for the services actually delivered during the summer, upon submission of proof of delivery. However, the IHO erred by ordering compensatory OT services.

In addition, as discussed above, the parent is entitled to pendency services consisting of seven hours of SETSS, two 30-minute sessions of speech-language therapy and two 30-minute sessions of OT from the date of the due process complaint notice through the date of this decision. Such services are to be implemented by the district, unless the parties otherwise agree.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the September 23, 2024 IHO decision is modified to find that the parent is entitled to funding for seven hours of SETSS per week at the rate of \$195 per hour and two 30-minute sessions per week of speech-language therapy at the rate of \$300 per hour for the services provided during July and August 2024, upon proof of delivery; and

IT IS FURTHER ORDERED that the IHO's order for 36 hours of compensatory OT services is vacated; and

IT IS FURTHER ORDERED that the parent is entitled to pendency services pursuant to the May 2019 IEP; and

IT IS FURTHER ORDERED that, unless the parties otherwise agree, the district is ordered to provide compensatory services for any services missed during the pendency of this proceeding which the student was entitled to under pendency pursuant to the recommendations made in the May 2019 IEP, consisting of seven hours of SETSS per week, two 30-minute sessions of speech-language therapy per week, and two 30-minute sessions of OT per week.

Dated: **Albany, New York**
 January 9, 2025

CAROL H. HAUGE
STATE REVIEW OFFICER