The University of the State of New York

The State Education Department
State Review Officer
www.sro.nysed.gov

No. 24-548

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

Appearances:
Liz Vladeck, General Counsel, attorneys for respondent, by Abigail Hoglund-Shen, 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 special education teacher support services (SETSS) for the student related to the 2024-25 school year. The appeal must be sustained in part.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local 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, 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

In this case, the evidence in the hearing record concerning the student's educational history is sparse.

The student has received a diagnosis of cerebral palsy with spastic left hemiplegia (Parent Ex. D at pp. 1, 3).[1] A CSE convened on April 26, 2018, found the student eligible for special education as a student with an other health-impairment, and developed an IEP for the student, recommending a program of integrated co-teaching (ICT) services in Yiddish in the areas of math (10 hours per week), English language arts (ELA) (10 hours per week), social studies (5 hours per

[1] In her appeal papers, the parent indicates that the student also had an autism spectrum disorder (ASD) diagnosis; however, the hearing record does not include any reference to a diagnosis of autism spectrum disorder.

week), and science (5 hours per week); three 30-minute sessions per week of individual occupational therapy (OT) in English; three 30-minute sessions per week of individual physical therapy (PT) in English; and three 30-minute sessions per week of group speech-language therapy in Yiddish (id. at pp. 1, 9-10, 14).[2] Additionally, the CSE recommended individual paraprofessional services for the student's health, mobility, transitions to the bathroom, and supervision in unstructured activities (id. at p. 10).

The parent electronically signed a parent service contract with Lead Remedial Services (Lead Remedial) on June 6, 2024 (see Parent Ex. E).[3] The service contract provided that "LEAD Remedial [] w[ould] make every effort to implement the recommended services mentioned-above with suitable qualified providers for the 12M 2024-25 school year" referring to services listed in the contract which were to the same as those contained in the 2018 IEP, except that instead of the thirty hours per week of ICT services recommended in the 2018 IEP, the service contract identified 10 hours per week of SEIT services (id.). The service contract further stated that "LEAD Remedial [] intend[d] to provide the following services for the 12M 2024-25 school year at the following rates: [] SETSS/SEITS at a rate of $195 per hour" (id. at p. 2).[4] As part of the contract, the parent agreed that she was financially liable to pay Lead Remedial if she was unable to obtain funding from the district (id.). The service contract did not list rates for any services other than SETSS or SEIT services (id. at pp. 1-2).

In a decision dated June 7, 2024, an IHO in a prior matter determined that for the 2023-24 school year, the district denied the student a free appropriate public education (FAPE) because it did not provide an educational program for the student and further found that the parent's provision of 10 hours per week of SETSS at the student's nonpublic school was an appropriate program for the student for the 2023-24 school year (Parent Ex. B). The IHO in that proceeding awarded the parent district funding for 10 hours per week of SETSS for the 12-month 2023-24 school year at a rate of $195 per hour (id. at p. 11).

On July 5, 2024, the parent notified the district of her concerns regarding the student's recommended placement for the 12-month 2023-24 school year (Parent Ex. C at p. 1). The parent indicated her disagreement with the ICT services recommended in the April 2018 IEP as she had been unable "to locate a bilingual Yiddish ICT program within the public school system" (id.). The parent further noted that the CSE had "not convened an IEP meeting in a very long time" and that the district refused to consider 12-month services for the student (id.). The parent notified the district of her intent to place the student at a nonpublic school and locate providers for the student's "special education program and services" (id. at p. 3). The parent also informed the district that

[2] 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]).

[3] Lead Remedial has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

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

she would seek "reimbursement, direct payment, and possibly a bank of compensatory hours" from the district for the special education program and related services (id.).

A. Due Process Complaint Notice

In a due process complaint notice dated July 5, 2024, the parent alleged that the district denied the student a FAPE for the 2024-25 school year (see Parent Ex. A). At the outset of the due process complaint notice, the parent asserted that pendency was based on the unappealed June 2024 IHO decision and that the student's pendency program consisted of 10 hours per week of SETSS on a 12-month basis (Parent Ex. A at p. 2).

As for the presenting problem, the parent asserted that the CSE failed to recommend an appropriate placement for the student (Parent Ex. A at p. 2). According to the parent, the district recommended bilingual ICT services in Yiddish for the student, but she did not receive a school location letter for placement of the student in such a program for the 12-month 2024-25 school year (id.). In addition, the parent stated that the district failed to consider the student's need for a 12-month program (id.). The parent argued that the student required a program of 10 hours per week of SETSS to address the student's "special education needs in a mainstream environment" (id.).

As relief, the parent requested a finding that the district's failure to recommend SETSS and an appropriate placement for the 2024-25 school year was a denial of FAPE (Parent Ex. A at p. 3). The parent also requested funding of the program contained in the June 2024 IHO decision and funding for the related services listed in the April 2018 IEP at the providers' contracted rates (id.). Lastly, the parent stated that if she was unable to locate providers for pendency, then she requested a bank of compensatory education services for those services missed during the 2024-25 school year (id.).

In a due process response, the district generally denied the material allegations contained in the due process complaint notice and stated that the program recommended in the April 2018 IEP was "reasonably calculated to enable the student to obtain meaningful educational benefits" (Due Process Response).

B. Impartial Hearing Officer Decision

An impartial hearing convened before the Office of Administrative Trials and Hearings (OATH) on September 3, 2024 for a hearing on the merits (Tr. pp. 1-86). In a decision dated October 17, 2024, the IHO found that the district denied the student a FAPE for the 2023-24 school year (IHO Decision at pp. 13). Initially, the IHO addressed the parent's request for 12-month services and found that there was no basis for awarding 12-month services because there was no evidence of the student exhibiting regression (id. at pp. 8-10). The IHO then denied the district's requests to dismiss the matter due to either a lack of subject matter jurisdiction or ripeness (id. at pp. 10-11). The IHO found that the district conceded that it failed to provide the student with a FAPE, noting that the district did not implement an IEP or an individualized education services plan (IESP) for the student (id. at p. 13). In terms of the appropriateness of the unilateral services, the IHO found that the parent's witnesses were not credible, and, even if the IHO were to find the witnesses credible, the IHO found that the evidence presented failed to demonstrate that the SETSS

were appropriate for the student (id. at pp. 14-15). As a result, the IHO did not address equitable considerations and denied the parent's requested relief (id. at p. 15).

IV. Appeal for State-Level Review

The parent appeals pro se, alleging that the IHO erred in not making a pendency determination for her son. Additionally, the parent asserts that the SETSS were appropriate to meet the student's needs, that the progress report admitted into evidence detailed the instruction and assessments used with respect to the student, and that the student made progress. As relief, the parent requests pendency and an order directing the district to fund the student's SETSS at the rate of $195 per hour. Lastly, the parent requests related services authorizations (RSAs) for OT and PT.

In an answer, the district generally denies the material allegations contained in the request for review. The district asserts that the parent failed to establish the appropriateness of the unilaterally obtained SETSS. The district also asserts that although the IHO did not make a finding with respect to equitable considerations, if there is a finding that the parent met her burden of proof regarding the appropriateness of the student's SETSS, equitable considerations do not weigh in her favor. Next, the district argues that the parent's request for RSAs for OT and PT should not be considered as the parent did not request this relief at the hearing and the parent testified that the student was receiving these services. Lastly, the district contends that the parent abandoned her pendency request and the IHO's denial of a pendency order should be upheld.

In reply to the answer, the parent asserts that she had an automatic right to pendency that could not be abandoned.

V. Applicable Standards

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress.

After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. 386, 399 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 580 U.S. at 404). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 580 U.S. at 403 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

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

provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).[5]

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

VI. Discussion

A. Pendency

The parent asserts that the student was entitled to pendency in the unappealed IHO decision dated June 7, 2024. In response, the district argues that the parent failed to submit a position on pendency in accordance with the IHO's directive, and therefore, the parent "effectively abandoned the request" for pendency (Answer ¶¶ 23-24).

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]).[6] 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;

[5] 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).

[6] 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).

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

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

Here, the issue of pendency was first raised by the parent in the due process complaint notice in which the parent asserted that pendency was based on the June 7, 2024 decision and that it consisted of 10 hours per week of SETSS (Parent Ex. A at p. 2). Next, pendency was addressed in connection with the parent's attempt to place a prior decision into evidence as the parent asserted that pendency was in that prior decision (Tr. p. 11; see Parent Ex. B). Additionally, the parent asserted that a proposed pendency order was provided to the district in her due process complaint notice but the district "ignored it" (id.). In response, the IHO stated that if one of the parties wanted a pendency hearing she would grant it as long as "the other party [was] on notice" (id.). Further, the IHO stated that "I don't necessarily consider, just because you put it in [a due process complaint notice], someone's on notice because I don't know if something's been signed necessarily or not" (id.). The district took no position on pendency (Tr. p. 12). The IHO set a pendency hearing for the following day, September 4, 2024 (Tr. pp. 12-13, 25, 82).

According to the district in its answer, a pendency hearing was held on September 4, 2024, but during a hearing for another student and the IHO referenced the instant matter seeking the parties' positions on pendency (Answer ¶ 7). In furtherance of its arguments in its answer, the district submits as additional evidence, a transcript dated September 4, 2024 in which pendency for this matter was discussed during the proceedings for another student; and various emails from the IHO and district's counsel (SRO Exs. 1; 2).[7] During the September 4, 2024 hearing regarding another student, the IHO asked the parties if they wanted to submit their pendency positions in writing as the documents relied on by the parent were already in the hearing record or to set a date for a pendency hearing (SRO Ex. 1 at p. 2). Parent's counsel stated that the pendency request was in the due process complaint notice and he was "prepared to rely on my papers if that works" (id.). Parent's counsel agreed to address pendency by email because the pendency hearing date could not be scheduled until the end of September (id. at p. 3). The IHO advised the parties to submit their positions by email on September 9, 2024 (id.).

In an email, dated September 9, 2024, the district represented that the unappealed prior IHO decision and that it consisted of 10 hours of SETSS per week (SRO Ex. 2 at p. 2). According to the IHO, parent's counsel did not submit a position on pendency to the IHO; accordingly, the IHO decided she would "not be issuing a pendency order" and the parties could resolve pendency between themselves (id. at p. 1).[8]

---

[7] Generally, documentary evidence not presented at an impartial hearing is considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]). The factor specific to whether the additional evidence was available or could have been offered at the time of the impartial hearing serves to encourage full development of an adequate hearing record at the first tier to enable the IHO to make a correct and well-supported determination and to prevent the party submitting the additional evidence from withholding relevant evidence during the impartial hearing, thereby shielding the additional evidence from cross-examination and later springing it on the opposing party, effectively distorting the State-level administrative review and transforming it into a trial de novo (see M.B. v. New York City Dep't of Educ., 2015 WL 6472824, at *2-*3 [S.D.N.Y. Oct. 27, 2015]; A.W. v. Bd. of Educ. of the Wallkill Cent. Sch. Dist., 2015 WL 1579186, at *2-*4 [N.D.N.Y. Apr. 9, 2015]). Here, neither document was available to be offered into evidence at the time of the impartial hearing (September 3, 2024). But also, these documents should have been included as part of the hearing record for this student. State regulation provides that the hearing record includes copies of "all briefs, arguments or written requests for an order filed by the parties for consideration by the impartial hearing officer," as well as "all written orders, rulings, or decisions issued in the case" (8 NYCRR 200.5[j][5][vi]; 279.9[a]). Since the transcript page and email contain information pertaining to pendency for this matter, the September 4, 2024 transcript shall be referred and cited to as "SRO Exhibit 1" and paginated with numbers 1-3 and the September 2024 emails shall be referred and cited to as "SRO Exhibit 2" and paginated with numbers 1-2 (see SRO Exs. 1 at pp. 1-3; 2 at pp. 1-2).

[8] The parties to an impartial hearing are obligated to comply with the reasonable directives of the IHO regarding the conduct of the impartial hearing (see Application of a Student with a Disability, Appeal No. 14-090; Application of a Student with a Disability, Appeal No. 09-073; Application of a Child with a Disability, Appeal No. 05-026; Application of a Child with a Disability, Appeal No. 04-103; Application of a Child with a Disability, Appeal No. 04-061). For example, SROs have found that an IHO has properly dismissed a parent's due process complaint notice for his or her failure to comply with an IHO's reasonable directives by not attending an impartial hearing either in person or by an attorney or advocate (see, e.g., Application of a Student with a

Here, the parent did not abandon her pendency claim (see Application of the Bd. of Educ., Appeal No. 17-097; Application of the Dep't of Educ., Appeal No. 09-071 [concluding that the parents had not '"abandoned' their claim for pendency when they did not continue to raise the issue at hearing dates subsequent to the filing of their brief on the issue"]. It is well-settled that a student's entitlement to pendency arises automatically, begins on the date of the filing of the due process complaint notice, and continues until the conclusion of the matter (20 U.S.C. § 1415[j]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; Zvi D., 694 F.2d 904, 906). In any event, he parties do not dispute that pendency lies in the prior, unappealed IHO decision dated June 7, 2024, which found that 10 hours of SETSS provided an appropriate educational program for the student (Req. for Rev. at pp. 2-3; SRO Ex. 2 at p. 2). Accordingly, the district should have been implementing that program from the filing of the due process complaint notice in this matter, as pendency has the effect of an automatic injunction and the district did not contest that the pendency program consisted of 10 hours per week of SETSS (see M.R. v. Ridley Sch. Dist., 744 F. 3d 112, 123 [3d Cir. 2014] [finding "it pointless to insists on a formal demand for interim tuition reimbursement when there is no viable response to that demand"]). Pendency is an automatic injunction, there is no requirement to have the district sign a pendency agreement or any mandate that an IHO hold an evidentiary hearing because the district is already liable under the statute, especially in cases such as this one which failed to identify a genuine dispute. To require a hearing on pendency where the parties agree on the record as to what the program constitutes only adds an unnecessary layer to due process proceedings.

Therefore, I will order that the district fund pendency services, pursuant to the June 7, 2024 decision, from July 5, 2024 until the conclusion of the current proceedings. More specifically, the district was directed to "fund the student's 10 hours per week of SETSS. . . at the rate of $195 per hour" (Parent Ex. B at p. 11).[9]

B. Unilaterally Obtained Services from Lead Remedial

Turning to the substance of the parties' dispute, the district does not cross-appeal from the IHO's finding that it denied the student a FAPE for the 2024-25 school year (IHO Decision at p. 13). Accordingly, the IHO's finding on this issue has become final and binding on the parties and will not be reviewed on appeal (see 34 CFR 300.514[a]; 8 NYCRR200.5[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]).

Disability, Appeal No. 18-111 [finding that it was within the IHO's discretion to schedule the impartial hearing at a district location when the parent did not submit a formal request for a different location and to dismiss the due process complaint notice without prejudice when the parent and her advocates did not appear]; Application of a Student with a Disability, Appeal No. 09-073 [finding that an IHO had a sufficient basis to dismiss a matter with prejudice after the district had rested its case, parent's counsel had been directed by the IHO to produce the parent for questioning by the district at a following hearing date, and neither the parent nor counsel for the parent appeared at the subsequent hearing date]). However, as explained herein, pendency is not discretionary and regardless of the IHO's issuance of an order, the student had an automatic right to pendency and the district was required to implement pendency for the student.

[9] Based on a review of the June 2024 IHO decision, it appears that the student received SETSS from Lead Remedial for the 2023-24 school year (Parent Ex. B at p. 7), the same agency the parent contracted for the delivery of SETSS to the student for the 2024-25 school year and at the same rate (Parent Ex. E).

The crux of the dispute between the parties relates to the appropriateness of the SETSS provided to the student at the student's general education nonpublic school during the 2024-25 school year.[10] Prior to reaching the substance of the parties' arguments, some consideration must be given to the appropriate legal standard to be applied. In this matter, the student has been placed in a general education setting in a nonpublic school and the parent does not seek tuition reimbursement from the district for the cost of the nonpublic school placement, but instead seeks the cost of the student's special education services delivered as individual SETSS. However, the parent did not parentally place the student and seek equitable services under the State's dual enrollment statute for the 2024-25 school year (see Education Law §3602-c).

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 IEP 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 the privately-obtained services must be assessed under this framework. 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]). 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

[10] It appears the IHO determined that the district failed to implement the education program recommended in the April 2018 IEP for the 2023-24 school year (IHO Decision at pp. 11-13). However, it is worth noting that the parent contracted with Lead Remedial on June 6, 2024 for the delivery of SETSS to the student for the 2024-25 school year (Parent Ex. E), and it is not clear from the hearing record that the parent ever notified the district that she was parentally placing the student at a nonpublic school for the 2024-25 school year and wanted an IESP developed for the student so the student could receive district provided special education services at the parental placement. Rather, the hearing record included a letter dated July 5, 2024, in which the parent expressed her belief that the program recommended in the April 2018 IEP was not appropriate and that the district had not convened "in a very long time" (Parent Ex. C). Accordingly, although the parent is not seeking district funding for the costs of the parent's placement of the student at the nonpublic school and is only seeking district funding of the costs of the special education services, the unilateral placement consists of both the general education nonpublic school as well as the special education services.

that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

Turning to a review of the appropriateness of the unilaterally-obtained services, the federal standard for adjudicating these types of disputes is instructive. A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129). Citing the Rowley standard, the Supreme Court has explained that "when a public school system has defaulted on its obligations under the Act, a private school placement is 'proper under the Act' if the education provided by the private school is 'reasonably calculated to enable the child to receive educational benefits'" (Carter, 510 U.S. at 11; see Rowley, 458 U.S. at 203-04; Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see also Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] ["evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (id. at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G., 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). A private placement is appropriate if it provides instruction 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).

Although not in dispute, a brief discussion of the student's needs is necessary to determine the appropriateness of the unilaterally obtained SETSS. Because the April 2018 IEP is six years old it may not be an accurate depiction of the student's needs for the 2024-25 school year and will not be further discussed.

The director of Lead Remedial (director) testified that the student, who was starting fifth grade for the 2024-25 school year, had academic deficits in reading, writing, and math, as well as social deficits (Tr. p. 29; Parent Ex. H ¶ 3; see Parent Ex. G at p. 4). The director also testified that the student struggled with attention and focusing (Tr. p. 29; see Parent Ex. G at p. 4).

Turning to the appropriateness of the unilaterally obtained SETSS, in a progress report dated August 5, 2024, the SETSS provider reported that the student was "reading at a level K according to the Fountas and Pinnell reading levels," which represented an improvement from level J since May (Parent Ex. G at pp. 1, 2).[11] According to the report, the student "read with some level of fluency and accuracy," he could "read words with various phonetic elements including short and long words and some multisyllabic words" (id. at p. 2). The SETSS provider reported that the student needed to improve his ability to apply word attack strategies to read new and unfamiliar words, read sight words in text, recognize when he made errors and self-correct, and learn vocabulary incorporated in higher level questions (id.). During reading instruction, the SETSS provider used new information presented in a multisensory way, multiple exposures, constant and consistent practice to master new skills, exposure to leveled readers with many genres, visual aids, and educational games, the Visualizing and Verbalizing, Story Grammar Marker/Braidy "methodologies," Orton-Gillingham and Wilson Reading programs to teach phonics, and the "Equipped for reading success Program" to teach phonemic awareness methodologies (id.). The progress report included three annual reading goals designed to improve the student's ability to orally summarize a "level L-M text," answer inferential questions about grade level text, and apply word attack strategies to new and unfamiliar multisyllabic words (id. at pp. 2-3).

Regarding writing, the August 2024 SETSS progress report indicated that the student struggled to write clearly, his handwriting was poor, his letters were formed incorrectly, and the spacing of his words was inconsistent (Parent Ex. G at p. 3). According to the report, the student "struggle[d] to spell even simple words," he lacked grammar awareness, did not punctuate his sentences, capitalize letters, or write complete sentences, and the SETSS provider concluded that the student was not able to express himself adequately in writing (id.). The SETSS provider reported using "practice worksheets and writing assignments of a range of discipline-specific tasks and audiences," and encouraging proper positioning of writing instruments to improve the student's handwriting and written expression, and flashcards, worksheets, drills, and word games to improve the student's spelling and grammar skills (id.). The SETSS provider developed four annual writing

[11] According to the director, Fountas and Pinnell level K represented "about" a second-grade reading level (Tr. p. 32).

goals to improve the student's ability to produce complete sentences and correct "inappropriate fragments," spell grade-appropriate words correctly, acquire and accurately use grade appropriate academic words and phrases, and produce clear and coherent writing with appropriate organization (id.).

In the area of math, the SETSS provider reported that the student's skills were at a third-grade level "with support and constant review" (Parent Ex. G at p. 1). Although the student demonstrated skills such as the ability to add double and triple numbers with regrouping, he tended to forget steps and needed teacher or visual prompts (id.). The report indicated that the student had "great trouble solving two step and three step addition and subtraction word problems, identifying key vocabulary to identify math strategies, and completing multiplication problems for a wide range of "fact families" (id.). To address the student's math needs, the SETSS provider reported using "sketching" of math word problems/computation facts, reteaching, manipulatives, visual aids, model instruction, feedback, positive reinforcement, and "clear schedules" to help the student stay focused (id.). Math annual goals included improving the student's ability to multiply facts 1-10, identify key words to solve two- and three-step word problems, and divide single and double-digit numbers (id.).

The director testified that during the 12-month 2024-25 school year the student is receiving 10 hours per week of SETSS from Lead Remedial, and is receiving his related services "elsewhere" and not from Lead Remedial (Tr. p. 38; Parent Ex. H ¶ 11).[12] The parent testified that the student was receiving OT, PT, and speech-language therapy through RSAs funded by the district (Tr. pp. 66-67; Parent Ex. I ¶ 13).[13] The hearing record, however, is devoid of information regarding the related services the student received, including how PT addressed the student's gross motor needs related to his diagnosis of cerebral palsy[14]how OT addressed his handwriting needs as described above, and how speech-language therapy addressed his "significant receptive, expressive, and pragmatic language deficits," as indicated in the August 2024 SETSS progress report (Parent Exs. D at pp. 3-4; G at p. 3).

The foregoing evidence in the hearing record does not support a finding that the parent met her burden under Burlington-Carter to prove that the services she unilaterally obtained for the student constituted specially designed instruction designed to address his unique educational needs. Specially designed instruction is defined as "adapting, as appropriate to the needs of an eligible student . . ., the content, methodology, or delivery of instruction to address the unique needs that result from the student's disability; and to ensure access of the student to the general curriculum, so that he or she can meet the educational standards that apply to all students" (8 NYCRR 200.1[vv]; see 34 CFR 300.39[b][3]). As noted above, the hearing record does not include any evidence of the instruction that the student received while attending the general

[12] There is no evidence in the hearing record as to whether the student receives paraprofessional services at the nonpublic mainstream school (Tr. pp. 1-86; Parent Exs. A-I).

[13] Therefore, the parent's requested relief for an RSA for OT and PT will not be considered.

[14] It should be noted that while the SETSS progress report contains some cursory descriptions of the student's handwriting and language deficits, the only information in the hearing record concerning the student's PT needs is contained in the outdated 2018 IEP and, therefore, is of little evidentiary weight.

education nonpublic school. Thus, it is not possible to ascertain whether the student received any special education support in the classroom to enable him to access the general education curriculum or how the SETSS delivered to him supported his functioning in the classroom, even if provided in a separate location in accordance with the IEP developed for him by the district. Accordingly, the hearing record lacks information concerning the student's general education school in terms of the instruction and curriculum provided, which necessitates assessing the unilaterally obtained services in isolation from the student's general education private placement. Given that, by definition, specially designed instruction is the adaptation of instruction to allow a student to access a general education curriculum so that the student can meet the educational standards that apply to all students, under the totality of the circumstances, the evidence in the hearing record is insufficient to demonstrate that the student's program was appropriate, as the program, as a whole, consisted of enrollment at a general education nonpublic school along with the parent's unilaterally obtained SETSS, and when viewed together, with the idea that the specially designed instruction should be designed to support the student's access to the curriculum, there was insufficient information to support such a finding.

Moreover, as discussed, the hearing record lacks any evidence concerning the PT, OT, and speech-language services the student received despite evidence that the student has demonstrable needs in those areas. Although parents need not show that a unilateral placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65), the program as a whole must still be "reasonably calculated to enable the child to receive educational benefits" (Carter, 510 U.S. at 11, 13-14, quoting Rowley, 458 U.S. at 203-04) when considered under the totality of the circumstances. Further, although there is at least some evidence that the student received some services through the August 5, 2024 progress report, the hearing record concluded on September 3, 2024 and there is no evidence of what services the student has received during the 2024-25 school year following the August 2024 progress report. As the parent's contract with Lead Remedial merely indicates that Lead Remedial "intends to provide" the student with SETSS during the 2024-25 school year, it is not clear that the student continued to receive that service after the conclusion of the hearing or if the student will continue to receive it Parent Ex. E at p. 2).

Here, given the dearth of evidence concerning the student's related services, how the SETSS he receives supports him in his general education classroom, and whether or how much SETSS the student receives during the 2024-25 school year, the totality of the circumstances does not support a reimbursement or funding award for the unilaterally obtained SETSS. Accordingly, the evidence in the hearing record does not support disturbing the IHO's finding that the parent failed to meet her burden and that, therefore, she was not entitled to her requested relief.

The district is reminded that the CSE is obligated by law and regulation to conduct an annual review for the student and there is some evidence that as of the filing of the due process complaint notice in this matter that the CSE had not conducted such review since its April 2018 CSE meeting. Accordingly, while the parent did not seek a reconvene of the CSE as a remedy in this instance, the district nonetheless is required, even absent an order to do so, to fulfill its obligation to convene for the student's annual review in accordance with the aforesaid statutory and regulatory framework.

VII. Conclusion

Having determined that the evidence in the hearing record supports the IHO's determination that the parent failed to demonstrate the appropriateness of the SETSS unilaterally obtained during the 2024-25 school year, the necessary inquiry is at an end and there is no need to reach the issue of whether equitable considerations weigh in favor of the parent's request for relief. However, as explained above, the student is entitled to pendency services, pursuant to the unappealed IHO decision dated June 7, 2024, from July 5, 2024, the date of the due process complaint notice, until the conclusion of these proceedings.

I have considered the parties' remaining contentions and find it is unnecessary to address them in light of my determinations herein.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that for purposes of pendency the district shall directly fund 10 hours per week of SETSS for the student for the 12-month 2024-25 school year at the rate of $195 per hour, from July 5, 2024 until the conclusion of these proceedings; and,

IT IS FURTHER ORDERED that the district is directed to convene the CSE for an annual review for the student, within 30 days of this decision, unless it has already done so in connection with the 2024-25 school year.

Dated: **Albany, New York**
March 27, 2025

STEVEN KROLAK
STATE REVIEW OFFICER