The University of the State of New York

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

No. 23-207

**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 Gail Eckstein, 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 requests that respondent (the district) fund the costs of privately obtained services delivered to her son during the 2022-23 school year and provide compensatory educational services. The 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 programing 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, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and

initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

## III. Facts and Procedural History

The student began receiving special education itinerant teacher (SEIT) services in February 2021 during preschool and, thereafter, speech-language therapy and occupational therapy (OT) services were added to his programming (Parent Ex. B at p. 2). A Committee on Preschool Special Education (CPSE) convened on November 17, 2021, and developed an individualized education program (IEP), which was subsequently amended on December 3, 2021, that recommended a 12-month school year program to be delivered in an early childhood program selected by the parent, consisting of the following services on a weekly basis: 7.5 hours of individual SEIT services, one

30-minute session of individual and one 30-minute session of group speech-language therapy, and two 30-minute sessions of individual OT (id. at pp. 1, 15-16).

In preparation for the student's transition to school-age programming, the district conducted a classroom observation and a social history update in May 2022 (Dist. Exs. 4-5).[1] According to the social history, the parent had enrolled the student at a religious nonpublic school (Dist. Ex. 4 at p. 2).

On May 17, 2022, a CSE convened, found the student eligible for special education as a student with a speech or language impairment, and, because the student was parentally placed in a nonpublic school, developed an IESP for the 2022-23 school year with a projected implementation date of September 6, 2022 (Parent Ex. C; see Dist. Ex. 3). The CSE recommended related services for the student on a weekly basis as follows: two 30-minute sessions of individual and one 30-minute session of group speech-language therapy and two 30-minute sessions of individual OT (Parent Ex. C at pp. 6-7).

According to the parent, in August 2022, she sent the district a letter via facsimile to state her disagreement with the May 2022 IESP and her intent to "use the services [of] a private agency at enhanced rate" to deliver the student's services and seek district funding for the costs thereof (Parent Ex. G ¶ 8).[2]

On October 3, 2022, the parent entered an agreement with Benchmark Student Services (Benchmark) for the provision of "Special Education Teacher services" during the 2022-23 school year that would be "consistent with [the student's] most-current agreed-upon IEP or IESP (Parent

[1] As part of the hearing record on appeal, the district filed the entirety of its evidentiary disclosure, which included District Exhibits 1 through 6. However, the hearing record shows that, during the impartial hearing, documents marked as District Exhibits 1, 2, and 6 were withdrawn (July 18, 2023 Tr. pp. 5-7). The remaining exhibits (marked as District Exhibits 3 through 5) were entered into evidence by the IHO as District Exhibits 1 through 3, but the exhibits were not re-marked by either the district or the IHO (July 18, 2023 Tr. pp. 8-9). Further confusing the matter, the exhibit list appended to the IHO's decision lists four district exhibits including one of the initially omitted exhibits and numbers the exhibits entered into evidence as District Exhibits 2 through 4. In a clarification, the IHO indicates that the exhibit numbers identified on the list appended to the decision were "correct irrespective of the bate stamped." Notwithstanding the exhibit designations identified on the record when the documents were entered or the alternative exhibit designations identified on the IHO's exhibit list, for ease of reference, the exhibits entered into evidence will be cited as marked (Dist. Exs. 3-5). Notably, in their pleadings, both parties also cite to the exhibits in this manner (see Req. for Rev.; Answer). The documents that were omitted or withdrawn from evidence have not been considered in this appeal. In the future, the IHO is encouraged to ensure greater clarity with exhibit identification. For example, in this instance, the IHO could have either had the district re-label its exhibits after documents had been omitted and withdrawn or, perhaps, more efficiently, the IHO could have entered the exhibits as marked and created a corresponding list of exhibits to attach to the decision.

[2] The hearing record does not include a copy of the August 2022 letter.

Ex. F).[3] In early October 2022, a special education teacher from Benchmark began providing the student with 7.5 hours per week of SETSS (Parent Exs. E at p. 1; H ¶ 3; I ¶¶ 13-14).[4]

According to the parent, she had previously filed a due process complaint notice, dated October 6, 2022, to challenge the May 2022 IESP but that prior proceeding was dismissed without prejudice on March 2, 2023 (see Parent Ex. A at p. 4; see also Tr. p. 5).

**A. Due Process Complaint Notices**

In a due process complaint notice, dated March 20, 2023, the parent, through a lay advocacy service, alleged that the district denied the student a free appropriate public education (FAPE) for the 2022-23 school year (see Parent Ex. A). The parent alleged that the district failed to conduct sufficient evaluations of the student; committed procedural violations relating to, among other things, required notices and CSE composition; predetermined and denied the parent the opportunity to participate in the development of the student's educational program; and developed an inappropriate IESP that consisted only of related services despite the student's need for special education support in the classroom and inappropriately failed to include 12-month services (id. at pp. 1-4). In addition, the parent contended that the district failed to "implement the student's agreed upon services" to which the student was entitled pursuant to pendency as a result of a prior matter that had been pending from October 6, 2022 through March 2, 2023 (id. at pp. 2, 4).

As for a remedy, the parent sought findings that the district "should have provided the student" with specific programming consisting of SEIT and related services for the 2022-23 school year "at enhanced market rate" and an order for such services as relief, as well as "a bank of services to makeup any of the awarded services not provided to the student during the 2022-2023 school year as a result of this Due Process proceedings" (Parent Ex. A at p. 3). The parent also invoked pendency, asserting that the student's pendency placement lay in the November 2021 IEP (id. at p. 5).

In a second due process complaint notice, dated May 31, 2023, the parent, through an attorney, alleged that the district "denied the student a [FAPE] or equitable education" for the 2022-23 school year (May 2023 Due Process Compl. Not. at p. 1). In particular, the parent asserted that the district had failed to locate and assign or fund a provider to deliver the services mandated

[3] Throughout the hearing record, the terms SEIT services, special education teacher support services (SETSS), and special education teacher services are used interchangeably. For ease of reference in this decision, the services of a special education teacher for the student during the 2022-23 school year will be referred to as SETSS.

[4] According to a June 2023 progress report completed by the student's special education teacher, the student also received speech-language therapy and OT (Parent Ex. E at p. 1); however, the hearing record is not developed regarding the delivery of these services. The parent believed that she had contracted for OT and speech-language therapy services but she could not recall the name of the agency or agencies and no contracts were offered into evidence (Tr. pp. 55, 58, 61-62). The parent testified that the student received speech-language therapy in school starting "towards the middle" of the school year (Tr. pp. 49, 50-51). The parent further indicated that the student started receiving OT services around the "[b]eginning of October" and that those services were "just horrible" as they were not consistently delivered and the providers kept changing (Tr. pp. 49-50, 51, 56).

in the student's IESP (id.). For relief, the parent requested that the district fund the student's IESP services "at market rate," as well as compensatory education "at market rate" (id. at pp. 1-2).

### B. Impartial Hearing Officer Decision

An impartial hearing convened before the Office of Administrative Trials and Hearings (OATH) on May 1, 2023 and concluded on July 18, 2023 after four days of proceedings inclusive of prehearing and status conferences (May 1, 2023 Tr. pp. 1-8; May 10, 2023 Tr. pp. 1-7; June 22, 2023 Tr. pp. 1-27; July 18, 2023 Tr. pp. 1-123).[5] In an interim decision dated June 26, 2023, the IHO consolidated the matters arising from the March 2023 and May 2023 due process complaint notices (Interim IHO Decision). The lay advocate continued to represent the parent during the evidentiary phase of the of the impartial hearing process.

In a final decision dated August 24, 2023, the IHO determined that the district failed to meet its burden to prove that it offered or provided the student a FAPE for the 2022-23 school year (IHO Decision at pp. 2, 3). Regarding the parent's unilaterally obtained services from Benchmark, the IHO found that the parent failed to show that the private special education teacher support services (SETSS) offered specially designed instruction to meet the student's needs, noting that the evidence did not include a description of the programming offered or a description of how the services provided were tailored to support the student (id. at pp. 4, 5). In addition, the IHO found that the parent did not demonstrate the appropriateness of private OT services, noting that the hearing record did not include progress reports, a program description, a contract for services, attendance reports, evidence of the number of hours of OT delivered, the name of the agency providing the OT, or the qualifications of the providers, and that the parent testified to her dissatisfaction with the OT services (id. at pp. 4-5). The IHO also noted that, during the impartial hearing, the parent withdrew any request for compensatory speech-language therapy services (id. at p. 2). Based on the foregoing, the IHO denied the parent's requested relief (id. at p. 5).

## IV. Appeal for State-Level Review

The parent appeals through her advocate, alleging that the IHO erred in denying relief. In particular, the parent argues that the IHO erred in finding that she did not meet her burden to prove that the unilaterally obtained services were appropriate. The parent asserts that the student needed support from a special education teacher to benefit from instruction and that this need was evidenced by the November 2021 CPSE's recommendations just six months prior to the May 2022 CSE meeting. The parent further alleges that the private provider worked on the goals in the CPSE IEP and documented the actions taken during sessions, as well as the student's progress, which demonstrated that the provider worked on all areas of concern, including attention, focus, problem-solving, and social/emotional development, and that the instruction was specially designed to meet the student's needs. As to the IHO's finding that the hearing record lacked a program description, the parent asserts that the preschool IEP set forth the program. The parent notes that the provider worked with the student previously and held the necessary credentials. Finally, the parent asserts that the student made progress, as demonstrated by a comparison of the student's present levels of

[5] The transcripts of the proceedings were not consecutively paginated with each other. Therefore, for purposes of this decision, the transcript cites will be preceded by the hearing date.

performance set forth in the November 2021 IEP and the provider's progress report for the 2022-23 school year.

The parent also argues that the IHO erred in neglecting to address the district's failure to implement the student's pendency services while the originally filed due process complaint notice was pending from October 6, 2022, through March 2, 2023, and then after the parent filed the March 20, 2023, due process complaint notice underlying the present matter. "At the very least," the parent asserts that, if the IHO found the unilaterally obtained services to be inappropriate, she should have ordered compensatory education to make-up for the district's failure to implement pendency.

In an answer, the district responds to the parent's material allegations and argues that the IHO's decision should be upheld in its entirety. In addition, as an alternative ground to support the IHO's denial of the parent's requested relief, the district argues that the parent failed to demonstrate a legal obligation to pay the costs of the SETSS delivered by Benchmark. The parent submits a reply to the district's answer.

## 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]).[6] "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

[6] 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.).[7] 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**

In this matter, the student has been parentally placed in a nonpublic school and the parent does not seek tuition reimbursement for the cost of the student's attendance there. The parent alleged that the district offered an inappropriate IESP for the 2022-23 school year and did not implement the student's mandated public services under the State's dual enrollment statute. As a self-help remedy the parent unilaterally obtained private services from Benchmark as well as another unidentified agency 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 who 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

[7] 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.

program known to be approved by the State in favor of an unapproved option is not itself a bar to reimbursement."]).

As the IHO found, 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 obtained for a student by his or her parents 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]).[8] 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).

Neither party appeals the IHO's determinations that the district failed to meet its burden to prove that it offered or provided the student appropriate services for the 2022-23 school year (see IHO Decision at pp. 2, 3). Accordingly, this determination 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]). The next issue to be considered is the appropriateness of the student's private services from Benchmark.

**A. Unilaterally-Obtained Services**

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 or, as in this case, private services must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school or services offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998]). 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). 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. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 207 [1982]). Parents need not show that the placement

[8] 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 Benchmark and the related services provider(s) for the student (Educ. Law § 4404[1][c]).

provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether a unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether the placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [finding that "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 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).

**1. Student's Needs**

Here, the student's needs are described in the May 2022 IESP developed by the CSE (see Parent Ex. C). According to the May 2022 IESP, the student's "pre-academic skills [we]re on or on or above grade level," the student knew colors, letters, and shapes, and could read many sight words and some simple phrases, "rote count to over 25+, recognize numerals 1-100[,] and . . . demonstrate numbers 1-10 with his fingers" (id. at pp. 1-2). The student could "complete sequence and sorting activities," understood "directional concepts with moderate cues," and, with visual cues, could identify opposites, things that go together, and things that did not belong (id. at p. 1). In writing, the student could independently write his own name and the names of some of his classmates (id.).

In the area of speech and language, the May 2022 IESP indicated that the student's skills had "markedly improved" from limited noises and utterances to use of language that "often included full sentences" and the ability "to advocate for himself using language" (Parent Ex. C at

p. 1). The IESP noted improvement in the student's expressive and receptive language skills and in his use of vocabulary, noting his ability to "spontaneously name pictured objects (nouns), letters, the sounds they make, colors, shapes and provide[] personal information" (id.). The student "require[d] assistance" or was challenged by the use of self-pronouns, sequencing a three-picture story, engaging in a conversation, pointing to or arranging objects in a before/after or above/below order based on verbal cues, or naming the main idea of a story (id.).

With respect to the student's social development, the May 2022 IESP noted the student's "significant progress," indicating that he interacted more with peers and initiated conversations (Parent Ex. C at p. 2). However, the IESP reported that the student sometimes needed prompting on redirection to follow rules (id.). The student's preschool teacher completed the Gilliam Autism Rating Scale—Third Edition (GARS-3), which yielded an autism index score of 69, while fell in the "Probable" range for autism spectrum disorder, "Severity Level 1 (requiring minimal support)" (id.).

The physical development portion of the May 2022 IESP noted the student's ability to copy horizontal and vertical lines, "draw with some detail . . . with minimal cues," stack blocks and place puzzle pieces, and hold writing and drawing instruments "when copying numbers, letters, and shapes with decreasing reminders" (Parent Ex. C at p. 3). According to the IESP, the student continued to work on cutting and gluing skills (id.). With respect to gross motor skills, the IESP indicated that the student functioned "approximately at a 4.0-4.3 age range," could peddle a tricycle, throw a ball, and run or walk quickly, remained seated upright during sessions with the occasional need for reminders, but exhibited a need with respect to standing on tiptoes for more than 10 seconds or maintaining balance on a moveable platform (id.).

The IESP noted that, to enable the student to sustain attention, he benefited from "routine and structure including visual aids for learning new information and clear behavior expectations" as well as verbal prompts (Parent Ex. C at p. 1). As supports for the student's management needs, the IESP further indicated that the student benefited from positive peer models, positive reinforcement, and redirection to task (id. at p. 3).

The March 2022 IESP emphasized many of the student's strengths, and, as noted above, did not include a recommendation for support from a special education teacher (see Parent Ex. C at pp. 6-7). However, other sources of information in the hearing record highlighted the student's continued struggles with attention and social interactions (see, e.g., July 18, 2023 Tr. pp. 43, 46-47, 104; Parent Exs. B at p. 3; E at pp. 1-4; I ¶¶ 6-9). When the November 2021 CPSE recommended SEIT services for the student, it described that the student benefited "from assistance including repetition of questions, models and instructions with visuals," support during group learning activities, assistance to settle into an activity with improved attention and ability to carry out a task, modeling to support the student's "desire to role play," as well as attention to help him calm down and return to a task when he would yell and cry (Parent Ex. B at p. 3).

The parent testified that the student was easily distracted, easily frustrated, and did not like to interact with peers (Tr. pp. 43, 46-47, 65-66). She testified that the student needed SETSS to provide reminders to help him focus (Tr. p. 65).

The special education teacher who delivered the student's services from February 2021 through the 2021-22 school year and again during the 2022-23 school year described the student's attentional and social/emotional needs (Parent Exs. E at p. 1; I ¶¶ 2-3, 6-9, 13). In particular, in describing the student's needs during the 2022-23 school year, the teacher indicated that the student demonstrated "limited attention span during group lessons, inability to maintain emotional equilibrium when face[d] with disappointment or changes to his routine, and [an] inability to independently initiate play interactions with peers and even adults around him" (Parent Ex. I ¶ 6). The teacher described that the student became "easily frustrated and disoriented when faced with disappointment or unexpected changes in his routine" and needed support to calm down (id. ¶ 8). In addition, the teacher noted that, when the student did not receive support in group activities and his attentional and social/emotional delays interfered with his functioning, he experienced "heightened anxiety and frustration" which could "sometimes spiral into episodes of crying or yelling," requiring him to be removed from a group setting (id. ¶ 9).

**2. Services from Benchmark**

For the 2022-23 school year, the student's nonpublic school classroom consisted of approximately 17 students, a teacher, and an assistant teacher (Parent Ex. E at p. 1). In early October 2022, the special education teacher from Benchmark began providing the student with 7.5 hours per week of individual SETSS in the nonpublic school (July 18, 2023 Tr. p. 77; Parent Exs. E at p. 1; H ¶ 3; I ¶¶ 13-14). The special education teacher held certification in early childhood education and education of students with disabilities from birth through second grade and, prior to the 2022-23 school year, had worked with the student beginning in February 2021 and through the 2021-22 school year (July 18, 2023 Tr. pp. 86-87; Parent Exs. D; H ¶ 4; I ¶¶ 1-3).

The special education teacher indicated that he delivered services to the student on Monday afternoons, and Tuesday, Wednesday, and Thursday mornings, with a varying scheduled intended to "ensure that [the student wa]s benefitting from [the] services during his most vulnerable times of day" (Parent Ex. I ¶ 13). Services were delivered for approximately "an hour-and-a-half" each day (Tr. p. 89). The special education teacher testified that he collaborated with the student's classroom teacher and the special education coordinators at the student's nonpublic school who agreed that the student required services from a special education teacher (Parent Ex. I ¶ 17). In addition, the parent indicated that the special education teacher was in touch with her and that she was happy with his services (July 18, 2023 Tr. p. 48). The parent indicated that the student received the SETSS as "a one-on-one support" both in the classroom and on the playground to support the student in peer interactions (July 18, 2023 Tr. p. 48). The hearing record further shows that, in the event sessions were missed, the special education teacher attempted to deliver make-ups when possible (July 18, 2023 Tr. pp. 54-55, 90, 92).

The special education teacher described that the student required support during academic instruction and peer activities, including "refocusing, prompting, prior reminders of what to expect, and visual aids" (Parent Ex. I ¶ 7). Within a June 2023 progress report, the special education teacher described that the student benefited from "[r]eminders of the daily routine and routine activity sequence," as well as redirection and modeling when attempting to communicate with others, and repetition, demonstration, and explanation of directives (Parent Ex. E at pp. 1, 4). The teacher described the student's need for "frequent reminders, approximately every few minutes, to redirect his attention" (id. at pp. 1, 4). In addition, the teacher indicated that the student's attention

improved with visual aids, videos, and repetitive techniques, as well as prompting and redirection (id. at p. 3).

The special education teacher stated his view that the student required the 7.5 hours of SETSS "for the extended 2022-2023 year," without which "he would not have made gains towards his academic and social expectations" (Parent Ex. I ¶ 16). Within the June 2023 progress report, the special education teacher indicated that, with SETSS support, the student had improved in his communication, social engagement, and participation in activities, while noting that the student tended to engage in parallel play during large group activities (Parent Ex. E at p. 1). The progress report noted that the student "f[ound] comfort in his interactions with the provider and exhibit[ed] communication through moderate eye contact, gestures, repetition of words, and phrases for both commenting and requesting purposes" (id.).

It is well settled that a finding of progress is not required for a determination that a student's unilateral placement is adequate (Scarsdale Union Free Sch. Dist. v. R.C., 2013 WL 563377, at *9-*10 [S.D.N.Y. Feb. 4, 2013] [noting that evidence of academic progress is not dispositive in determining whether a unilateral placement is appropriate]; see M.B. v. Minisink Valley Cent. Sch. Dist., 523 Fed. App'x 76, 78 [2d Cir. Mar. 29, 2013]; D.D-S. v. Southold Union Free Sch. Dist., 506 Fed. App'x 80, 81 [2d Cir. Dec. 26, 2012]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 486-87 [S.D.N.Y. 2013]; C.L. v. Scarsdale Union Free Sch. Dist., 913 F. Supp. 2d 26, 34, 39 [S.D.N.Y. 2012]; G.R. v. New York City Dep't of Educ., 2009 WL 2432369, at *3 [S.D.N.Y. Aug. 7, 2009]; Omidian v. Bd. of Educ. of New Hartford Cent. Sch. Dist., 2009 WL 904077, at *22-*23 [N.D.N.Y. Mar. 31, 2009]; see also Frank G., 459 F.3d at 364). However, while not dispositive, a finding of progress is, nevertheless, a relevant factor to be considered in determining whether a unilateral placement is appropriate (Gagliardo, 489 F.3d at 115, citing Berger, 348 F.3d at 522 and Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]).

Based on all of the foregoing, I find that, while the evidence admitted at the hearing cannot be described as robust concerning the implementation of the privately obtained services and the student's progress, there is sufficient evidence to show that the student received SETSS and it further shows that the provider identified the student's specific needs and delivered instruction specially designed to meet those needs during the 2022-23 school year. In finding that the parent did not meet her burden to prove that the SETSS delivered by Benchmark were appropriate, the IHO found that the parent "did not provide a program description of what the SETSS services entail[ed] and how the service was uniquely tailored to support the Student's needs" (IHO Decision at p. 4); however, unilaterally obtained services need not be delivered pursuant to a formal IEP or program description (Carter, 510 U.S. at 13-14) and, further, the hearing record in its entirety describes the SETSS delivered to the student during the 2022-23 school year and shows that they were specially designed to meet his needs. Although the IHO correctly noted that the parent did not present evidence regarding the OT services and, in fact, testified to her dissatisfaction with the services (IHO Decision at p. 4, citing Tr. pp. 49-50), generally, 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). Thus, notwithstanding that the hearing record is not developed

regarding the unilaterally-obtained OT services, the totality of the evidence shows that the parent met her burden to prove that the unilaterally-obtained programming, overall, was appropriate.[9]

**B. Parents' Financial Obligation**

Next the district argues that the parents should be denied funding for the costs of the privately-obtained services based on an insufficient showing of the parent's financial obligation to Benchmark, noting the lack of terms in the contract regarding the hourly rate for the services. The Second Circuit has held that some blanks that the parties did not fill in in a written agreement would not render an entire contract void and indicated that in the case before it that "the contract's essential terms—namely, the educational services to be provided and the amount of tuition—were plainly set out in the written agreement, and we cannot agree that the contract, read as a whole, is so vague or indefinite as to make it unenforceable as a matter of law" (E.M. v. New York City Dep't of Educ., 758 F.3d 442, 458 [2d Cir. 2014]). In New York, a party may agree to be bound to a contract even where a material term is left open but "there must be sufficient evidence that both parties intended that arrangement" and an objective means for supplying the missing terms (Express Indus. & Terminal Corp. v. N.Y. State Dep't of Transp., 93 N.Y.2d 584, 590 [1999]; 166 Mamaroneck Ave. Corp. v. 151 E. Post Rd. Corp., 78 N.Y.2d 88, 91 [1991]).

As noted above, the contract between the parents and Benchmark indicated that Benchmark would provide special education teacher services during the 2022-23 school year "consistent with [the student's] most-current agreed-upon IEP or IESP" (Parent Ex. F at p. 1). The agreement further stated that "Benchmark provide[d] Special Education Teacher services at enhanced market rates" and indicated that, "[i]f the Parent cho[se] not to seek funding from the [district], the Parent [would be] responsible to the Agency for the cost of services at the rate charged by Benchmark for these services" and that "[t]he Parent w[ould] be billed on a monthly basis" (id. at p. 2). Alternatively, the agreement provided that, if the parents pursued an impartial hearing, Benchmark could agree to "delay invoicing" provided that the parents would "remain[] responsible for the full payment amount that [wa]s not funded by the [district]" (id.).

Thus, the contract itself referenced the most recent agreed-upon IESP or IEP as the objective source for supplying the term about the frequency of the contracted for services (Parent Ex. F at p. 1). In her testimony, the parent acknowledged that she signed the contract assuming responsibility for the costs of the student's services if she did not prevail at the impartial hearing and stated the hourly rate for the SETSS (July 18, 2023 Tr. pp. 52-53; Parent Ex. G ¶¶ 10-11). In

[9] With that said, there is no legal support for the parent's contention in the reply that the SETSS and OT were "not the same unilateral placement" such that the inappropriateness of the OT services "would not affect the appropriateness of the SETSS service placement" (Reply ¶ 3). While a parent may structure a unilateral placement in this manner, for example, by obtaining outside services for a student from more than one source (i.e., from an agency on top of a private school placement or, as here, from different agencies) (see C.L., 744 F.3d at 838-39 [finding the unilateral placement appropriate because, among other reasons, parents need not show that a "'private placement furnishes every special service necessary'" and the parents had privately secured the required related services that the unilateral placement did not provide], quoting Frank G., 459 F.3d at 365), it is the parents burden to prove that the unilateral placement as a whole is appropriate. While in this instance, the lack of evidence about the OT does not prevent the parent from obtaining relief, under different facts, where a related service is paramount to meeting a student's needs, for example, the lack of evidence could result in a finding that, as a whole, the parent did not show that the unilateral placement was appropriate.

addition, the Benchmark administrator testified to the parties' obligations under the contract and the hourly rate for the services (Parent Ex. H ¶¶ 5-6). She indicated that the agency charged different rates for different students depending on factors such as how difficult it was to find a provider, if a lot of supervision was required, and if a lot of materials were necessary (July 18, 2023 Tr. p. 74). However, she testified that the rate for the student in the present matter was "the lowest rate" the agency charged (id.). The administrator indicated that the rate was "within the range of market rates" (Parent Ex. H ¶ 6).

Based on the foregoing, there is no evidence in the hearing record to support the district's argument that the parents did not incur a contractual liability for the services provided by Benchmark.

**C. Compensatory Pendency Services**

Turning to the parent's request for compensatory education to makeup for lapses in the district's delivery of the student's pendency placement, the Second Circuit has held that where a district fails to implement a student's pendency placement, students should receive the pendency services to which they were entitled as a compensatory remedy (Doe v. E. Lyme, 790 F.3d 440, 456 [2d Cir. 2015] [directing full reimbursement for unimplemented pendency services awarded because less than complete reimbursement for missed pendency services "would undermine the stay-put provision by giving the agency an incentive to ignore the stay-put obligation"]; see Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *25, *26 [E.D.N.Y. Oct. 30, 2008] [ordering services that the district failed to implement under pendency awarded as compensatory education services where district "disregarded the 'automatic injunction' and 'absolute rule in favor of the status quo' mandated by the [IDEA] and wrongfully terminated [the student's] at-home services"] [internal citations omitted]).

However, here the district was not required to implement pendency. Recently, the Second Circuit has explained that a parent may not unilaterally move a student to a preferred nonpublic school and still receive pendency funding, since it is the district that is authorized to decide how (and where) a student's pendency services are to be provided as per the text and structure of the IDEA and given that the district is the party responsible for funding the pendency services (Ventura de Paulino, 959 F.3d at 532-35). The Court observed that:

> If a parent disagrees with a school district's decision on how to provide a child's educational program, the parent has at least three options under the IDEA: (1) The parent can argue that the school district's decision unilaterally modifies the student's pendency placement and the parent could invoke the stay-put provision to prevent the school district from doing so; (2) The parent can determine that the agreed-upon educational program would be better provided somewhere else and thus seek to persuade the school district to pay for the program's new services on a pendency basis; or (3) The parent can determine that the program would be better provided somewhere else, enroll the child in a new school, and then seek retroactive reimbursement from the school district after the IEP dispute is resolved

(Ventura de Paulino, 959 F.3d at 534). Here, the parent elected the third option when she rejected the May 2022 IESP and unilaterally obtained private services for the student at her own financial risk. Thus, any gaps in the delivery of the privately obtained services are not attributable to the district, and the student is not entitled to compensatory pendency services.

## VII. Conclusion

Based on the foregoing, the parent sustained her burden to demonstrate the appropriateness of the unilateral services she obtained for the student. Accordingly, the district shall be required to fund the services delivered by Benchmark during the 2022-23 school year.

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

**IT IS ORDERED** that the IHO's decision, dated August 24, 2023, is modified by reversing those portions which denied the parents' request for district funding for the costs of the SETSS delivered by Benchmark during the 2022-23; and

**IT IS FURTHER ORDERED** that the district shall directly fund the costs of up to 7.5 hours of SETSS per week delivered to the student by Benchmark during the 2022-23 school year upon submission of provider affidavits as to services rendered.

**Dated:** **Albany, New York**
**February 16, 2024**

**JUSTYN P. BATES**
**STATE REVIEW OFFICER**