



The University of the State of New York

The State Education Department

State Review Officer

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No. 23-211

**Application of the NEW YORK CITY DEPARTMENT OF
EDUCATION for review of a determination of a hearing officer
relating to the provision of educational services to a student with
a disability**

Appearances:

Liz Vladeck, General Counsel, attorneys for petitioner, by Brian J. Reimels, Esq.

The Law Office of Elisa Hyman, PC, attorneys for respondent, by Elisa Hyman, 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 district) appeals from a decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondent's (the parent's) son and ordered it to reimburse the parent for his son's tuition costs at the Gesher Early Childhood Center (Gesher) for the 2023-24 school year. The parent cross-appeals from the IHO's determination which denied her request for compensatory pendency services. The appeal must be sustained. The cross-appeal must be dismissed.

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

The parties' familiarity with this matter is presumed and, therefore, the facts and procedural history of the case and the IHO's decision will not be recited here in detail. At the time of the impartial hearing, the student was almost seven years old and had been enrolled by the parent in first grade at Gesher for the 2023-24 school year, which had not yet commenced (Parent Ex. W at

p. 1).¹ According to the hearing record, the CSE convened on September 30, 2022 and after finding the student eligible for special education as a student with autism, developed an IEP for the student for the 2022-23 school year from October 14, 2022 going forward (see generally Dist. Ex. 1).²

In a due process complaint notice, dated June 22, 2023, consisting of 130 enumerated subparagraphs as well as a number of subparagraphs, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2023-24 school year (see Parent Ex. A). The parent further asserted that the CSE had not convened since September 30, 2022 and had failed to develop an IEP for the student for the 2023-24 school year (id. at pp. 8-9). As part of the requested relief, the parent requested reimbursement "for all tuition, transportation and lunch costs" and "any out-of-pocket expenses relating to the Student's special education needs" (id. at p. 14).

The hearing record reflects that a prehearing conference was held on July 27, 2023, at which the district did not appear (Tr. pp. 1-13). The parent's attorney and the IHO reconvened on July 28, 2023 for the impartial hearing (Tr. pp. 14, 23). The district did not appear and, following a discussion, it was determined that the next scheduled hearing date would be utilized for a pendency hearing (Tr. pp. 23, 24, 25, 26). A pendency hearing was held on July 31, 2023, at which the district did not appear (Tr. pp. 31-38). In an interim decision on pendency dated July 31, 2023, the IHO determined that the student's pendency services were based on the unappealed decision he had recently rendered on June 28, 2023, which was a final determination of the parent's claims related to the 2022-23 school year (IHO Ex. III; see Parent Ex. D at pp. 7, 38-39). The parties appeared on August 18, 2023 to continue the proceedings (Tr. pp. 39-42). The parent provided an affidavit in lieu of direct testimony and appeared for cross-examination by the district (Tr. pp. 52-80). On August 24, 2023, the parties reconvened to provide closing statements and the impartial hearing concluded (Tr. pp. 88-107).

In a decision dated September 3, 2023, the IHO determined that the district failed to offer the student a FAPE for the 2023-24 school year and that the 10-month program at Gesher, along with an array of unilateral services obtained by the parent, constituted an appropriate unilateral placement (IHO Decision at pp. 24-30). The IHO further determined that an appropriate program for the student for the 2023-24 school year consisted of 12-month services, which included the 10-month program at Gesher and a list of additional services with differing funding directives (id. at p. 30). More specifically, the IHO ordered the district to reimburse the parent for the 10-month tuition at Gesher and to reimburse transportation to and from Gesher during the 10-month school year; to provide, or "arrange[] for" or authorize the parent to obtain occupational therapy (OT) and individual and group speech-language therapy; to fund "1:1 Special Education Teacher Services" for the 12-month school year; and to fund 1:1 applied behavior analysis (ABA) and ABA supervision for the 12-month school year (id.). The IHO also ordered that services not provided

¹ The Commissioner of Education has not approved Gesher as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

² The student's disability classification of autism is not in dispute (see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

by Gesher or the district were to be funded by the district at the reasonable market rates of the parent's chosen providers (*id.*).

IV. Appeal for State-Level Review

The district appeals and argues that the IHO erred in finding that the parent met his burden of demonstrating the appropriateness of his unilaterally obtained services and unilateral placement of the student at Gesher. The district further argues that the IHO erred in failing to consider whether equitable considerations warranted awarding the parent his requested relief.

In an answer and cross-appeal, the parent asserts that the IHO erred in failing to award the student compensatory pendency services. In an answer to the parent's cross-appeal, the district responds to the parent's request for compensatory pendency services.

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; *see generally* Forest Grove Sch. Dist. v. 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]).³

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 (Florence County Sch. Dist.

³ 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).

Four v. Carter, 510 U.S. 7 [1993]; 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., 554 F.3d at 252). 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, 489 F.3d at 111; Cerra, 427 F.3d at 192). "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).

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. Unilateral Placement and Unilaterally Obtained Services

In its request for review, the district does not appeal from the IHO's determination that it failed to offer the student a FAPE for the 2023-24 school year (IHO Decision at pp. 24, 30). Accordingly, the IHO's determination has become final and binding on the parties (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]). On appeal, the crux of the dispute between the parties relates to the appropriateness of the parent's unilateral placement of the student at Gesher for the 10-month 2023-24 school year and for the parent's unilaterally obtained services to be delivered during the 12-month 2023-24 school year.⁴

During the impartial hearing and in his decision on this matter, the IHO recounted that he had recently concluded an impartial hearing for this student for the 2022-23 school year, wherein the parent's unilateral placement included enrollment at Gesher for the 10-month school year and a combination of unilaterally obtained services delivered during the 12-month 2022-23 school year (Tr. pp. 22, 47-51; IHO Decision at pp. 5, 8, 9, 10; see Parent Ex. D).

In its request for review and during the impartial hearing, the district argued that each school year should be considered separately and that it was not appropriate for the IHO to base his decision on the appropriateness of the parent's program for the 2023-24 school year on evidence offered in support of the appropriateness of the parent's program for the 2022-23 school year (Tr. pp. 47-51). Review of the hearing record supports the district's position that the IHO improperly relied on evidence related to the 2022-23 school year in finding the parent's unilateral placement and unilaterally obtained services for the 2023-24 school year appropriate.

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). 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 (Carter, 510 U.S. at 13-14).

⁴ As a matter of State law, the school year begins on July 1 and ends on June 30 (see Educ. Law § 2[15]).

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 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). 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] ["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).

In addition, the parent's unilaterally obtained services which supplemented the 10-month program at Gesher must also be assessed under this framework. That is, 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]). 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).

1. Student's Needs

Nearly all of the evidence entered into the hearing record in this matter had been submitted as evidence in a prior proceeding concerning the student and the 2022-23 school year, due to the prior matter having recently concluded with a final decision rendered by the same IHO on June 28, 2023 (Tr. p. 17; Parent Ex. D). Although the 12-month, 2023-24 school year had commenced prior to the start of the impartial hearing, there was no evidence entered into the record to indicate whether or not the student received any services during summer 2023. Accordingly, there is a significant amount of evidence regarding the education program and services the student received for the period leading up to during the 2022-23 school year; however, there is a dearth of evidence regarding what happened with the student after the 2022-23 school year.

Generally, in order to assess the appropriateness of the parent's unilateral placement, it is useful to review the student's unique special education needs. Turning to the evidence of the student's needs available in the hearing record, the student underwent a neuropsychological evaluation in January and February 2021, when he was four years old (Parent Ex. I at p. 1). According to the February 2021 neuropsychological evaluation report, the student was initially diagnosed with autism spectrum disorder (ASD) at 22 months of age "by Early Intervention" (id. at pp. 1, 9). The student subsequently qualified for ABA services, as well as speech-language therapy and occupational therapy (OT) (id.). According to the evaluation report, the student's participation in these services fostered significant growth for him between the ages of two and three years (id. at p. 1). However, the student continued to display varied expressions of ASD including poorly modulated eye gaze, echolalic and perseverative communication (e.g. repetition of movie and song lines), and many stereotyped interests (id.). In addition, the student's history included prominent attentional challenges, including distractibility, difficulty maintaining focus, problems following through on tasks, inconsistent engagement and skill representation, and organizational difficulties (id.). The student also displayed "multifaceted expressions" of restless/impulsivity, and difficulty remaining seated, and fidgeting (id. at pp. 1-2). The evaluation report indicated that although the student was not aggressive, he sometimes engaged with others in an impulsive manner, such as knocking down a peer's design as a way to initiate contact (id. at p. 2). The report further indicated that the student periodically engaged in tantrums/meltdowns if a toy was unable to perform a particular function, if a figurine's hand was improperly facing outward, or if a scene did not perfectly correspond to what was in the box (id.). At the time the evaluation was conducted, the student was described as "close to the top of his class," academically (id.).

The February 2021 neuropsychological evaluation report included results of cognitive testing which indicated the student exhibited an uneven intellectual profile characterized by variable proficiency among underlying content areas (Parent Ex. I at p. 9). Review of the student's performance revealed strengths in visual-spatial analysis (within the average range); mild weaknesses in verbal comprehension, fluid (nonverbal) reasoning, and working memory (within the low average range); and more prominent delays in processing speed (within the borderline range) (*id.* at pp. 4-5, 9). Notably, the evaluation report indicated that these findings represented "a decrement in ability" relative to the student's April 2019 and May 2019 evaluations with regard to the high average and low average ranges, respectively (*id.*). Turning to academics, the February 2021 neuropsychological evaluation indicated that the student demonstrated above average letter, sound, and word recognition, solidly intact naming automaticity, and above average reading comprehension skills (*id.* at pp. 5-6, 9). In addition, the student's performance fell solidly within expected levels (average range) in areas of listening comprehension and arithmetic reasoning/problem solving (*id.*).

The February 2021 neuropsychological evaluation report also included an examination of neurocognitive domains that support learning, behavior, and social/emotional functioning which indicated that the student demonstrated strengths in visual-motor precision along with solidly average vocabulary acquisition, receptive language, verbal fluency, visual-motor precision, and social perception (Parent Ex. I at pp. 6-7, 9). However, the evaluation report stated that, notwithstanding those strengths, the student struggled to maintain a still/quiet posture for even a short period of time, and he was markedly vulnerable to external distractions (*id.* at p. 9).

With regard to the student's behavior and social/emotional development, the February 2021 neuropsychological evaluation report indicated that parent ratings on behavior scales highlighted prominent concerns regarding withdrawal and sleep problems along with moderate somatic complaints (Parent Ex. I at p. 9). In addition, the parents' responses also indicated clinically elevated levels of hyperactivity/impulsivity (*id.*). Behavior rating scales completed by the student's special education itinerant teacher (SEIT) and behavioral technician indicated moderate to clinically significant levels of withdrawal, but did not indicate any other behavioral or social/emotional concerns (*id.*). Lastly, the evaluation report indicated that ratings obtained from the student's primary classroom instructors indicated subthreshold expressions of inattention and normative levels of hyperactivity/impulsivity and oppositionality/defiance (*id.*).

According to the February 2021 neuropsychological evaluation report, diagnostically, the student presented with reported and observed weaknesses in social communication and restrictive and repetitive patterns of behavior that comported with a diagnosis of ASD, without accompanying intellectual impairment, without accompanying language impairment, Level 1 (Requiring Support) (Parent Ex. I at pp. 9-10). The evaluation report noted that, while reports from the student's SEIT and behavioral technician did not indicate significant inattention or restlessness/impulsivity, reports from the parents indicated prominent symptom expression corroborated by direct observations of the student's behavior during the evaluation as well as performance on an index of self-regulation and distraction control (*id.* at p. 10). Further, evaluation report stated that reports from the student's primary classroom instructors fell just short of the clinical threshold and thus indicated reasonable symptom expression within the school environment (*id.*). The evaluation report indicated that the totality of available evidence suggested that the student manifested

functionally consequential expressions of inattention and hyperactivity/impulsivity that comported with a diagnosis of attention-deficit/hyperactivity disorder (ADHD), combined presentation (id.).

In conclusion, the February 2021 neuropsychological evaluation report stated that the student was a youngster with many strengths, including well-developed scholastic aptitude, language, visual-motor integration, and social perception (Parent Ex. I at p. 10). However, the evaluation report noted that delays in social communication together with restrictive, repetitive patterns of behavior and self-regulatory challenges had created prominent management difficulties, particularly within the home (id.). The neuropsychological evaluation report indicated that "[a]s attention turn[ed] toward the future, [the student] would invariably benefit from intensive behavioral efforts (continued ABA, parent management training) and ongoing related services" (id.).

The hearing record also included a March 21, 2023 teacher report relevant to the 2022-23 school year, signed by a supervisor from Special Edge, the agency which provided the student with a SEIT at Gesher (see Parent Ex. Q; see also Parent Ex. K at pp. 9-10). At the time of the report, the student was 6.3 years of age and in first grade (Parent Ex. Q at p. 1).⁵ The report noted that the student had been diagnosed with autism and he struggled to answer questions that the teacher asked and appeared to shut out others and ignore their questions (id.). For instance, questions often needed to be repeated several times for the student to answer (id.). It was further noted that the student wanted to play with peers but struggled to do so in a functional manner (id.). According to the teacher report, although the student frequently joined groups of peers who were playing and had begun to interact with them independently, prompting was often necessary to model appropriate conversation (id.). The student was sometimes unsure what to do with peers, but he wanted to be near them, so he would sit close to the peers without engaging in any form of interaction, (and/or) he would sometimes be observed copying exactly what his peers were doing as a way to join play activity (id.). The teacher report indicated that the student generally transitioned to new activities when asked (id.). However, he had limited ability to attend to activities in a small group and when working one on one (id.). According to the teacher report, when an activity was less desirable to the student, he would try to avoid it by making funny noises or by putting his head down on his desk (id.). The student would raise his hand to answer teacher questions when he was able to answer "in a related fashion" (id.). The student was frequently observed engaging in self-stimulation behaviors, and therefore took regular sensory breaks to help him regulate himself and reduce self-stimulation (id.). According to the report, the student received ten hours per week of SEIT services, and two 30-minute sessions per week each of individual speech-language therapy and OT (id.). The student also had a "1:1 ABA para[professional] through his medical insurance when his SEIT [wa]s not in class" (id.). The

⁵ The enrollment agreement for the 2023-24 school year stated that the student was registering for first grade (Parent Ex. W at p.1). The IHO's decision in the prior proceeding (and as incorporated in his decision in this matter) also stated that the student was in first grade for the 2022-23 school year (Parent Ex. D at pp. 13, 17, 30; see IHO Decision at pp. 13, 18, 25). There is no explanation in the hearing record for this discrepancy.

student reportedly required full time 1:1 ABA support, with access to typically developing peers to progress and learn (id.).

The teacher report from Special Edge included specific information about the student's academic performance (Parent Ex. Q at pp. 1-2). With regard to reading, the teacher report indicated that the student presented with language delays and with 1:1 support, the was reading below grade level (id. at p. 1). According to Fountas and Pinnell assessments he was at approximately level A (id.). The teacher report stated that the student could read all learned sight words, was beginning to read blends, but showed limited comprehension of what he read (id.). According to the teacher report, he knew all the short vowels and some long vowels and was able to tap out three letter words (id.). The student used a magnetic board with his SEIT to help him visualize words (id.). The teacher report noted that all reading work with the student was done very slowly compared to his peers (id.). The teacher report noted that the student needed constant reinforcement to stay on task for reading activities as he became disruptive and silly when he felt that the work was difficult (id.). The student had also begun to tantrum when he felt work was too difficult and he was unable to complete the work as well as he would like (id.). The teacher report indicated that due to language delays, the student struggled to follow classroom instruction and multistep directions (id.). At times, the student looked around the room to see what peers were doing, while at other times he appeared to wait for directions to be repeated (id.). The student raised his hand to answer questions but at times questions were answered in a nonrelated fashion (id.). According to the teacher report, the student needed continued 1:1 SEIT support so he could acquire grade level phonemic awareness, decoding and comprehension skills, and continue to progress to master grade level reading goals (id.).

The Special Edge teacher report detailed the student's strengths and weaknesses in writing, noting that writing had been a big challenge for the student and had caused him much frustration in the past (Parent Ex. Q at p. 1). The student had difficulty gauging the space on the page for a written word and wrote very slowly (id.). Still, the teacher report indicated that over the course of the 2022-23 school year, his writing skills had slowly improved (id.). The teacher report noted that the student held his pencil with a finger grasp (id.). His letters were recognizable, but he struggled to form letters correctly (id.). When writing, the student could sound out simple cvc words (id. at p. 2). He had recently learned that an "e" at the end of a word "makes the interior vowel say its name," and he was also beginning to be able to independently write those words (id.).

The Special Edge teacher report indicated math was a major struggle for the student (Parent Ex. Q at p. 2). According to the teacher report the student was able to count from 1 to 15 with 1:1 correspondence, identify numbers 1 to 19, put numbers 1 to 20 in correct order and add two numerals together to get a number up to ten using a spot card or a number line as a visual (id.). The student was also able to subtract numbers ten and less from each other, also using spot cards and number lines (id.). The teacher report indicated that word problems were very difficult for the student, even with teacher support (id.). The student struggled significantly and frequently displayed tantrums to avoid math work (id.). The teacher report indicated that the student needed many motivational rewards as well as reminders that work must be finished in order to go to a more desirable activity with respect to completing his math assignments (id.).

With regard to the student's learning style, the Special Edge teacher report indicated he learned best with visuals, repetition, and manipulatives (Parent Ex. Q at p. 2). The student needed to be exposed to new material several times before he demonstrated understanding (id.). Additionally, he needed instructions to be broken down into simple tasks for him to understand (id.). According to the teacher report, the student shied away from activities that he believed were hard or uninteresting and he needed constant refocusing, as well as positive motivational tools and strong reinforcement to learn new things (id.). The student's interests at the time of the report involved playing pretend cops and robbers, games, Legos, as well as playing with peers (id.).

Socially, the Special Edge teacher report indicated that, although the student was a happy boy who was eager to play with peers, he struggled significantly to interact appropriately with his peers and adults (Parent Ex. Q at p. 2). As per the teacher report, questions frequently needed to be repeated several times for the student to answer (id.). The student wanted to play with peers but struggled to do so in a functional manner, he played most interactively when joining a small group in play with adult modification and prompting and he frequently liked to control play with peers and played the same scenario repeatedly (id.). It was observed that when the student joined larger groups of peers who were playing, he had very limited interaction with peers unless directly given a modeled example of appropriate conversation and would often copy exactly what peers were doing as a way to join play activity (id.). The teacher report noted that the student had been having tantrums more frequently than in the past when frustrated and had tantrums when he found work difficult or when there was a change in his schedule (id.). The student struggled to stop a tantrum and frequently needed to leave the classroom until calm again (id.). According to the teacher report, when the student had tantrums he flopped to the floor, yelled, and covered his ears (id.). The student had a very low frustration tolerance, where he would break down and get upset when he missed work and had to repeat and correct classwork (id. at p. 3). The teacher report noted that the student tended to "get stuck" when things did not go his way (id.). The student also presented with topic-based "obsessions" and would repetitively speak about specific topics (id.). The student's play was centered around those topics and he found it difficult to engage in other forms of imaginative play scenarios (id.). Additionally, the student would often be seen singing the same songs repetitively to himself, to the point that it would be disruptive to the class (id.).

With respect to the student's physical development, the Special Edge teacher report indicated the student held a pencil with a finger grasp (Parent Ex. Q at p. 3). His letters were recognizable but appeared shaky without firm lines (id.). The student colored mostly within the lines but frequently used only one color (id.). He was able to cut on a straight line independently (id.). The student used prompts to cut on curved lines (id.). He struggled with balance, coordination, and stairs (id.). The teacher report noted that the student did not have any health issues (id.).

The Special Edge teacher report detailed the support services that were necessary to address the student's management needs (Parent Ex. Q at p. 3). For the student to access his academic setting, the report concluded that he required a small classroom where he had access to typical peer models, as well as 1:1 instructional support in the form of ABA therapy (id.). ABA therapy was recommended in both the school and home setting, as the teacher report stated that the student

needed 1:1 instruction and ABA 35-40 hours per week, depending on the length of the school day (id.). The Special Edge teacher report recommended that the student receive a formal functional behavioral assessment (FBA) and behavioral intervention plan (BIP) performed by a Board Certified Behavior Analyst or Licensed Behavior Analyst (BCBA/LBA) that included information from both the home and school settings to address the function of his behaviors (id.). It was further recommended that he continue to receive "related services" to address his needs in those areas (id.). The teacher report included goals that targeted the student's ability to expand on his play scenarios and perform challenging work (id.).⁶

A Gesher report card for the first semester of the 2022-23 school year indicated, among other things, that the student had been "growing by leaps and bounds" (Parent Ex. R at pp.1- 2). Teacher comments at that time stated that the student benefitted from assistance completing independent work and when provided with 1:1 support, prompting, and general encouragement, the student produced "beautiful and clear" work (id. at p. 2).

2. Appropriateness of Unilateral Placement and Supplemental Services

As summarized above, the hearing record included information about the student's needs as reported during the 2022-23 school year; however, there is no evidence in the hearing record that demonstrates the student received any services during the 2023-24 school year. The IHO wrote his decision prior to the start of the 10-month program at Gesher and, as previously noted, no evidence of any 12-month services provided to the student during summer 2023 was offered into the hearing record.

With regard to the 2023-24 school year, the hearing record includes an email dated June 19, 2023, which confirmed that the parent had completed a registration packet with Gesher for the 2023-24 school year (Parent Ex. E). The hearing record also includes a 2023-24 registration form indicating the student was enrolling in first grade at Gesher and stated the cost of first grade tuition, which the parent signed on May 21, 2023 (Parent Ex. W at p. 1). However, the IHO decision from the prior proceeding, which the IHO relied on in determining a continuation of the same program would continue to be appropriate, reflects that the student was in first grade during the 2022-23 school year (Parent Ex. D at pp. 13, 17, 30). Additionally, while the registration form demonstrates the parent's financial obligation to Gesher for the 2023-24 school year, there is no evidence that the student attended Gesher during the 2023-24 school year. Further there is no evidence of any special education or related services provided to, or proposed to be provided to, the student during the 2023-24 school year, and as a result, it is not possible to determine whether the student's needs would be met by appropriate specialized instruction at Gesher for that school year. In particular, during the 2022-23 school year, the student attended Gesher and received OT, speech-language therapy, 1:1 SEIT services, and 1:1 ABA services (see Parent Exs. D at pp. 36,38; L at ¶¶40, 42, 46, 51-52, 58; T at p. 1).⁷

⁶ The hearing record includes a May 2022 OT evaluation, a May 2022 speech-language evaluation, and a June 2022 ABA assessment which also detail the student's educational needs (see Parent Exs. T; U; V).

⁷ To the extent that the parent argues that he is not required to present evidence of special education services

While the IHO was correct to note that the evidence from the prior proceeding was useful for establishing the student's needs and it can even be useful for identifying what the contours of an appropriate program would look like for the student; however, it does not follow, as the IHO in effect suggests, that such evidence was sufficient to establish that the parent's unilateral placement for the 2023-24 school year was appropriate given that the evidence in the hearing record did not establish what the student's program was actually going to be for the 2023-24 school year. For example, the admission into evidence of transcripts and affidavits from the prior proceeding (Parent Exs. K, L, M) which demonstrate the special education programming and related services received by the student during the 2022-23 school are relevant to the question of appropriateness of the 2023-24 unilateral placement of the student only if one speculates that the same programming has been or will be provided to the student during the school year currently at issue. The summary of this evidence within the IHO's decision confuses the matter of what the student received or was scheduled to receive during the 2023-24 school year, as the IHO made it appear at times that the evidence described might encompass or refer to the current school year and the student's current educational programming and progress, which upon closer inspection, such evidence only refers to the prior school year, the student's educational programming and progress for the 2022-23 school year (see e.g., IHO Decision at pp. [summarizing the testimony of the student's SEIT contained in Parent Ex. K]).

Rather than rely on evidence from the prior proceeding concerning the prior school year, the parent must come forward with evidence that describes the services and the delivery thereof, here, the hearing record lacks substantive information about any services the student received and does not explain how the services obtained by the parent addressed the student's needs (see L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 491 [S.D.N.Y. 2013] [in reviewing the appropriateness of a unilateral placement, courts prefer objective evidence over anecdotal evidence]; L.Q. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 490 [S.D.N.Y. 2013] [rejecting parents' argument that counseling services met student's social/emotional needs where "[t]here was no evidence . . . presented to establish [the counselor's] qualifications, the focus of her therapy, or the type of services provided" and, further, where "[the counselor] did not testify at the hearing and no records were introduced as to the nature of her services or how those services related to [the student's] unique needs"]; R.S. v. Lakeland Cent. Sch. Dist., 2011 WL 1198458, at *5 [S.D.N.Y. Mar. 30, 2011] [rejecting the parents' argument that speech-language therapy services met student's needs where parents "did not offer any evidence as to the qualifications of the provider of the therapy, the focus of the therapy, or when and how much therapy was provided"], aff'd sub nom., 471 Fed. App'x 77 [2d Cir. June 18, 2012]). As discussed above, the hearing record does not contain testimonial or documentary evidence of the parent's proposed program for the 2023-24 school year or its implementation. Further, there is no evidence to demonstrate how the program would specifically address the student's unique needs or how any unilaterally obtained specialized instruction and related services might have benefitted the student. Consequently, the parent did not meet his

actually being arranged for or delivered to the student during the 2023-24 school year because the parent believes the district was responsible for the student's educational program for the 2023-24 school year pursuant to pendency, as discussed further below, the interim decision on pendency in this matter did not direct the district to provide the student with educational programming, but rather directed the district to fund a majority of the special education services (July 31, 2021 Interim IHO Decision). As the district was required to fund services pursuant to pendency, the parent was still required to present evidence that those services were obtained and delivered to the student and it cannot be assumed that the student received those services or was going to receive those services.

burden of demonstrating the appropriateness of the student's enrollment at Gesher and the unilaterally obtained services he intended to provide to the student for the 2023-24 school year.

B. Compensatory Pendency Services

In his cross-appeal, the parent alleges that the IHO erred in failing to order compensatory education for ABA therapy and other services that should have been provided as pendency for the student during the duration of this proceeding. The parent also argues that to the extent the IHO's pendency decision or final decision could be read to change the district's obligation from provision of ABA therapy and related services to funding for ABA therapy and related services, the IHO erred in the wording of his orders (compare Parent Ex. B, with IHO Decision at p. 30; see also IHO Ex. III at p. 7).

Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). The purpose of an award of compensatory education is to provide an appropriate remedy for a denial of a FAPE (see E.M. v. New York City Dep't of Educ., 758 F.3d 442, 451 [2d Cir. 2014]; Newington, 546 F.3d at 123 [holding that compensatory education is a remedy designed to "make up for" a denial of a FAPE]; see also Doe v. E. Lyme, 790 F.3d 440, 456 [2d Cir. 2015]; Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005] [holding that, in fashioning an appropriate compensatory education remedy, "the inquiry must be fact-specific, and to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"]; Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1497 [9th Cir. 1994]). Accordingly, an award of compensatory education should aim to place the student in the position he or she would have been in had the district complied with its obligations under the IDEA (see Newington, 546 F.3d at 123 [holding that compensatory education awards should be designed so as to "appropriately address[] the problems with the IEP"]; see also Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1289 [11th Cir. 2008] [holding that "[c]ompensatory awards should place children in the position they would have been in but for the violation of the Act"]; Bd. of Educ. of Fayette County v. L.M., 478 F.3d 307, 316 [6th Cir. 2007] [holding that "a flexible approach, rather than a rote hour-by-hour compensation award, is more likely to address [the student's] educational problems successfully"]; Reid, 401 F.3d at 518 [holding that compensatory education is a "replacement of educational services the child should have received in the first place" and that compensatory education awards "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA"]).

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

In this matter the IHO ordered the district to either fund or provide some related services and to fund ABA therapy and ABA supervision. This is not a case in which a district was required to provide all of the student's pendency services and, having failed to have done so, an order of reimbursement for services the parent obtained or for compensatory make-up services from private providers (as opposed to district providers) may have been warranted (see E. Lyme, 790 F.3d at 456-57). If this were a situation in which a district was directly responsible for the actual delivery of services pursuant to pendency and there was a lapse in services, the appropriate relief would be compensatory or make-up services to remediate the deficiency as the Second Circuit indicated (see id.). However, that is not the circumstance presented here.

In a September 20, 2022 final decision by a different IHO, the district was ordered to reimburse the parent for the out-of-pocket expenses he incurred in obtaining private ABA services for the 2022-23, 2023-24, and 2024-25 school years (Parent Ex. B at p. 33). The district was further ordered to provide compensatory ABA therapy and ABA supervision for the 2022-23, 2023-24, and 2024-25 school years (id. at p. 34). However, the September 20, 2022 final decision was not the basis for pendency in this matter.

As noted above, the IHO in this matter also presided over a prior proceeding concerning the 2022-23 school year and rendered his final decision on June 28, 2023, which was not appealed (Parent Ex. D at p. 39). The unappealed June 28, 2023 IHO decision was the pendency-setting event in this proceeding, which will end with the issuance of this decision (Parent Ex. D). The IHO's interim decision on pendency included the language from his unappealed June 28, 2023 decision, which required the district to "unless otherwise noted, direct[ly] fund" the student's 12-month program (IHO Ex. III at p. 8). The IHO's order then explicitly directed the district to reimburse the parent for the 10-month program at Gesher and to reimburse the parent for transportation to and from Gesher (id.). With regard to OT and speech-language therapy, the IHO directed the district to "provide[] and/or arrange[] for OT, speech-language therapy at Gesher "or "via RSA" (id.). The remaining services did not include any qualifying language (*i.e.* "otherwise noted"), therefore the district was ordered to directly fund ten hours per week of "1:1 Special Education Teacher Services," 25 hours per week of 1:1 ABA therapy, and two hours per week of ABA supervision (id.).

Based on the above, the district was never ordered to directly provide the student with 1:1 Special Education Teacher Services, 1:1 ABA therapy, or ABA supervision during the pendency of this proceeding as alleged by the parent. If the parent took issue with the wording of the IHO's June 28, 2023 final decision in the prior proceeding, his remedy was to appeal that decision, which he did not. With regard to the OT and speech-language therapy, there is no evidence of missed pendency services in the hearing record. In fact, the IHO issued his interim decision on pendency on July 31, 2023, approximately one month after the parent filed the due process complaint notice which included a request for pendency; however, the implementation of pendency services did not come up again during the hearing until the parents closing statement (Tr. pp. 99-104). Accordingly, the hearing record establish that the district failed to provide for, arrange for, or fund related services for the student pursuant to pendency.

Considering the above, review of the hearing record establishes that the IHO did not err in denying the parent's request for compensatory ABA therapy and ABA supervision. To the extent the IHO's interim decision on pendency can be read to require the district to "provide" OT and

speech-language therapy services pursuant to pendency, the parent may file another due process complaint notice alleging the district failed to implement pendency services during this proceeding and seek compensatory education for missed pendency services (see Mackey Bd. of Educ. of the Arlington Cent. Sch. Dist., 386 F.3d 158, 160-61 [2d Cir. 2004][the student's right to pendency is evaluated separately from the substantive claims alleged in the due process complaint notice], Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]; Bd. of Educ. of Poughkeepsie City Sch. Dist. v. O'Shea, 353 F. Supp. 2d 449, 459 [S.D.N.Y. 2005]).

VII. Conclusion

Based on the foregoing, the IHO erred in finding the parent's unilateral placement and unilaterally obtained services for the student appropriate and erred in awarding reimbursement, direct funding, and provision of specified services by the district. Having found that the parent did not sustain his burden of demonstrating the appropriateness of his unilateral placement and unilaterally obtained services, there is no need to reach the issue of whether equitable considerations support the parent's request for relief (see M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]). The IHO correctly determined that the parent was not entitled to compensatory pendency services.

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's decision dated September 3, 2023, is modified by reversing those portions which found the parent's unilateral placement at Gesher and additional unilaterally obtained services for the 2023-24 school year were appropriate, and which ordered the district to reimburse the parent for the costs of the student's attendance at and transportation to and from Gesher, and to provide or fund 1:1 Special Education Teacher Services, OT, speech-language therapy, ABA therapy and ABA supervision during the 2023-24 school year.

Dated: **Albany, New York**
 January 4, 2024

STEVEN KROLAK
STATE REVIEW OFFICER