The University of the State of New York

The State Education Department
State Review Officer
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No. 23-316

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:
The Law Office of Elisa Hyman, PC, attorneys for petitioner, by Lauren Druyan, Esq., and Erin O'Connor, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Brian J. Reimels, 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 an interim decision of an impartial hearing officer (IHO) determining her son's pendency placement during a due process proceeding, as well as from a final decision of an IHO which denied her request that respondent (the district) fund the costs of her son's private services delivered during the 2022-23 school year and her request for a declaratory finding regarding an appropriate educational program for the student. The district cross-appeals from that portion of the IHO's decision which found that the CSE must reconvene and recommend specific services ordered by the IHO. The appeal must be sustained in part. The cross-appeal must be sustained in part.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local 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 in detail here. During the 2021-22 school year the student attended kindergarten at the Hellenic Classical Charter School (Hellenic) and the CSE convened on November 17, 2021 to "consider comparable services for [the student] at his placement" as the parent indicated that she was "not seeking a community school placement"

at that time (see Dist. Ex. 6).[1] Finding the student eligible for special education as a student with a speech or language impairment, the CSE developed an IEP with a projected implementation date of December 3, 2021, which recommended that the student receive three periods per week of special education teacher support services (SETSS) in English-language arts (ELA) and two periods per week of SETSS in math (id. at pp. 1, 21). For the student's related services, the CSE recommended two 30-minute sessions per week of individual occupational therapy (OT), two 30-minute sessions per week of individual speech-language therapy, and individual school nursing services as needed (id. at pp. 21-22).[2] The November 2021 CSE noted that integrated co-teaching (ICT) services had previously been recommended during the student's "[t]urning 5 reevaluation" but that an ICT "setting" was not available at Hellenic and the parent was not seeking a community school placement at that time (id. at p. 28).

Over four dates in April and May 2022, evaluators conducted a private neuropsychological evaluation of the student (see Dist. Ex. 14). The student received diagnoses of a language disorder and attention deficit hyperactivity disorder (ADHD) (id. at p. 7). The evaluators recommended the continuation of SETSS and OT at the frequency and duration currently mandated, and, in addition, recommended that the student received group speech-language therapy (id.). A private speech-language evaluation of the student was conducted on May 10, 2022 (see Parent Ex. R; see also Dist. Ex. 16). The private speech-language pathologist recommended that the student receive two 30-minute sessions per week of individual speech-language therapy and one 30-minute session per week of speech-language therapy in a group of no more than three students (Parent Ex. R at p. 17). On October 17, 2022 a private OT evaluation of the student was conducted (see Parent Ex. S; see also Dist. Ex. 15). The occupational therapist recommended that the student receive OT services on a 12-month basis, with one session provided individually and one session pushed in during writing or math activities (Parent Ex. S at p. 10).

A CSE convened on December 13, 2022 (see Dist. Ex. 18).[3] The resultant IEP indicated that the student was in first grade at Hellenic and reflected results of the private neuropsychological evaluation as well as other evaluative information from fall 2022 (id. at pp. 1-2). The CSE recommended three periods per week of SETSS in ELA in a separate location, two periods per week of SETSS in math in a separate location, two 30-minute sessions of individual OT per week, two 30-minute sessions of individual speech-language therapy per week, and individual school nursing services as needed (id. at pp. 17-18). The program was to be implemented beginning December 28, 2022 and the student was not recommended for 12-month services (id. at pp. 17-19). The IEP noted that the parent requested that the student receive 1:1 SETSS at home (id. at p. 24).

[1] During the 2020-21 school year the student received special education and related services through the Committee on Preschool Special Education (CPSE) (Dist. Ex. 3 at p. 1).

[2] The CSE recommended that one of the student's OT sessions take place within the general education classroom, and the other in a separate location (Dist. Ex. 6 at p. 21).

[3] A CSE also convened on November 21, 2022 and recommended the same program as the December 2022 IEP (compare Dist. Ex. 19 at pp. 16-17, with Dist Ex. 18 at pp. 17-18).

A. Due Process Complaint Notice

In a due process complaint notice dated March 13, 2023, the parent 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's claims included but were not limited to that the district: failed to conduct timely and appropriate evaluations; failed to create a "substantially and procedurally appropriate" IEP; predetermined the outcome of the CSE meetings; did not follow the procedural requirements of the IDEA; and failed to implement the student's IEPs (id. at pp. 2, 7-10).[4] More specifically, the parent argued the district failed to conduct any of its own evaluations and the CSE "ignored the input" from the parentally obtained evaluations and providers (id. at pp. 6-7). The parent asserted that the CSE also ignored her request for the student to "maintain 1:1 special education teacher services," instead recommending a general education program with SETSS (id. at p. 6). The parent contended that the CSE failed to recommend group speech services and failed to consider or recommend Orton Gillingham and/or after school tutoring services for the 2022-23 school year (id.).[5]

The parent requested pendency consisting of six hours per week of special education itinerant teacher (SEIT) services, two 30-minute sessions of individual OT per week, and three 30-minute sessions of individual speech-language therapy per week (Parent Ex. A at p. 12). As relief, the parent requested compensatory education services to restore the student to the position he would have been if not for the denial of FAPE, for any missed IEP services, and/or for lapses in the delivery of the student's pendency services (id.). Lastly, the parent requested independent educational evaluations (IEEs) at district expense and reimbursement for any out-of-pocket costs relating to the student's special education needs, including but not limited to, Orton-Gillingham tutoring services, transportation, and evaluations (id.).

B. Impartial Hearing Officer Decision

An impartial hearing convened on April 28, 2023 and concluded on October 25, 2023 after seven days of proceedings inclusive of prehearing and status conferences (see Tr. pp. 1-154). In an interim decision, dated June 19, 2023, the IHO denied the parent's request for pendency (see Interim IHO Decision). Specifically, the IHO declined to find that a pendency agreement entered during a prior impartial hearing involving the student's 2019-20 through 2021-22 school years (prior matter) was the operative placement (id. at p. 5).

In a final decision dated November 18, 2023, the IHO found that the district failed to meet its burden to prove that it provided the student with a FAPE for the 2022-23 school year (IHO Decision at pp. 9, 12). In particular, the IHO noted that the December 2022 IEP mandated speech-language services and OT, but the district failed to provide all of those services (id. at p. 9).

The IHO then found that the student was "entitled to compensatory services to attempt to place the [s]tudent in the position he should have been in, if he had received the supports and

[4] The parent also made claims that the district violated Section 504 of the Rehabilitation Act of 1973 (section 504), 29 U.S.C. § 794(a) (Parent Ex. A at pp. 1, 2).

[5] According to the parent, the student was privately receiving services using Orton Gillingham (Parent Ex. A at p. 6).

services as indicated in the December 13, 2022 IEP" (IHO Decision at p. 11). The IHO determined that the district failed to recommend the student receive group speech-language therapy for the 2022-23 and, therefore, the student was also entitled to such services as relief (id.). With regard to the parent's request that 1:1 SEIT services be placed on the student's IEP, the IHO noted that SEIT services were preschool services and, as the student was not in preschool, he did not qualify for such services (id.). The IHO denied the parent's request for reimbursement for Orton-Gillingham services that were privately obtained during the 2022-23 school year, finding that there was no "evidence introduced to support the notion that the Student require[d] evidence based direct multisensory instruction for reading" (id. at pp. 11-12). Therefore, as relief, the IHO ordered the district to fund a bank of hours of speech-language therapy and OT in amounts to be determined by the district (id. at pp. 12-13). The IHO ordered that the compensatory education be delivered by a provider of the parent's choosing at a reasonable market rate with no expiration (id.). In addition, the IHO ordered the district to reconvene a CSE within 30 days to amend the IEP to include group speech-language therapy and determine whether the student requires additional SETSS (id. at p. 13).

IV. Appeal for State-Level Review

The parent appeals, alleging that the IHO erred in denying the parent's requests for pendency, declaratory relief, and reimbursement for privately obtained services.

Relating to pendency, the parent asserts that the IHO erred in finding that there was no pendency program.[6] The parent contends that the pendency agreement from the prior matter was the last implemented program and that the final March 2023 IHO decision from the prior matter had no impact on the issue of pendency.[7] The parent asserts that the IHO's failure to grant pendency forced her to use the bank of compensatory education services awarded in the prior matter so that the student continued to receive services. The parent requests compensatory pendency services equal to the services the student was mandated to receive from the date of the due process complaint notice through the conclusion of this matter. Finally, the parent argues that the student is entitled to SEIT services are part of pendency and that comparable services, such as SETSS, should not be substituted.

Turning to relief related to the district's failed to offer or provide the student a FAPE, the parent argues that the IHO erroneously denied the parent reimbursement for the costs of Orton-Gillingham services delivered to the student. Next, the parent contends that the IHO erred by failing to rule on her request for a declaratory finding regarding what constituted an appropriate program for the student. In particular, the parent seeks a finding that the student's educational program should include a 1:1 special education teacher and Orton-Gillingham services.[8]

[6] The parent contends that the IHO failed to include exhibits entered into evidence during the hearing date devoted to pendency on the exhibit list attached to the final decision. The parent includes the exhibits with her request for review.

[7] In the alternative, the parent contends that, if there was no agreed upon pendency, the services delivered during the pendency of the prior matter constituted the operative placement.

[8] The parent also argues that the IHO failed to address the parent's 504 claims; however, an SRO lacks jurisdiction

In an answer with cross-appeal, the district responds to the parent's allegations.[9] Initially, the district concedes that the student is entitled to pendency services consisting of six hours per week of SEIT services, three 30-minute sessions of individual speech-language therapy, and two 30-minute sessions of OT per week. However, the district asserts that, to the extent the parent obtained SEIT services during the pendency of the proceeding, the SRO should order the district to reimburse or fund those services already obtained. The district contends that this would negate a need for a bank of compensatory services. Regarding related services, the district requests that the SRO either order the district to "fund whatever services the Parent might have obtained during the pendency" of this proceeding or, in the alternative, "award a bank of compensatory services for any missed periods of" related services that the student should have received during the pendency of this proceeding.

Next, the district asserts that the IHO properly denied the parent's request for reimbursement for the costs of Orton-Gillingham services. In addition, to the extent the IHO denied the parent's request for reimbursement on other grounds, the district cross-appeals the IHO's rationale and argues that the tutoring services were aimed to maximize the student's abilities and generalize them at home and were otherwise duplicative of other teaching the student was receiving. Lastly, the district argues that the IHO properly declined to find that an appropriate program for the student included SEIT and Orton-Gillingham services but erred by ordering the CSE to reconvene and recommend group speech-language therapy.

In an answer to the district's cross-appeal, the parent responds to the district's allegations. The parent contends that, in light of the district's concession regarding pendency, the student is entitled to a bank of 90 hours of SEIT services because the student did not receive any SEIT pendency services, and that the student is entitled compensatory bank equal to the amount of speech-language therapy and OT services that were not provided. In regard to the Orton-Gillingham services, the parent argues that the district is wrong that such services would "maximize" the student's potential and the IHO erred in finding such services are only for students with dyslexia. Regarding the IHO's order for the CSE to reconvene, the parent contends that the IHO had the authority to direct the CSE to recommend group speech-language therapy services. As a final matter, the parent argues that, although the IHO ordered compensatory education for the

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to consider a party's challenge to an IHO's finding or failure or refusal to rule on section 504, as an SRO's jurisdiction is limited by State law to matters arising under the IDEA and Article 89 of the Education Law (Educ. Law § 4404[2] [providing that SROs review IHO determinations "relating to the determination of the nature of a child's handicapping condition, selection of an appropriate special education program or service and the failure to provide such program"]). Courts have also recognized that the Education Law makes no provision for State-level administrative review of IHO decisions with regard to section 504 (see A.M. v. New York City Dep't of Educ., 840 F. Supp. 2d 660, 672 & n.17 [E.D.N.Y. 2012] [noting that "[u]nder New York State education law, the SRO's jurisdiction is limited to matters arising under the IDEA or its state counterpart"], aff'd, 513 Fed. App'x 95 [2d Cir. 2013]; see also F.C. v. New York City Dep't of Educ., 2016 WL 8716232, at *11 [S.D.N.Y. Aug. 5, 2016]). Therefore, an SRO does not have jurisdiction to review any portion of the IHO's decision or the parent's claims as they relate to section 504, and accordingly such claims will not be further addressed.

[9] As neither party has appealed from the IHO's determination that the district failed to offer the student a FAPE for the 2022-23 school year (IHO Decision at p. 9), that finding is final and binding on the parties and will not be further discussed (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]). Accordingly, the remaining issues to be addressed relate to relief sought by the parents.

district's failure to implement the IEPs, she left the amount of compensatory education to the district's discretion. The parent contends that the SRO should now calculate the amount of services due or remand the issue back to the IHO for a determination.

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]).[10]

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. 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).

[10] 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).

VI. Discussion

A. Pendency

The IDEA and the New York State Education Law require that a student remain in his or her then current educational placement, unless the student's parents and the board of education otherwise agree, during the pendency of any proceedings relating to the identification, evaluation or placement of the student (20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; see Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 531 [2d Cir. 2020]; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 170-71 [2d Cir. 2014]; Mackey v. Bd. of Educ. for Arlington Cent. Sch. Dist., 386 F.3d 158, 163 [2d Cir. 2004], citing Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]; M.G. v. New York City Dep't of Educ., 982 F. Supp. 2d 240, 246-47 [S.D.N.Y. 2013]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *20 [E.D.N.Y. Oct. 30, 2008]; Bd. of Educ. of Poughkeepsie City Sch. Dist. v. O'Shea, 353 F. Supp. 2d 449, 455-56 [S.D.N.Y. 2005]).[11] Pendency has the effect of an automatic injunction, and the party requesting it need not meet the requirements for injunctive relief such as irreparable harm, likelihood of success on the merits, and a balancing of the hardships (Zvi D., 694 F.2d at 906; see Wagner v. Bd. of Educ. of Montgomery County, 335 F.3d 297, 301 [4th Cir. 2003]; Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 [3d Cir. 1996]). The purpose of the pendency provision is to provide stability and consistency in the education of a student with a disability and "strip schools of the unilateral authority they had traditionally employed to exclude disabled students . . . from school" (Honig v. Doe, 484 U.S. 305, 323 [1987] [emphasis in original]; Evans v. Bd. of Educ. of Rhinebeck Cent. Sch. Dist., 921 F. Supp. 1184, 1187 [S.D.N.Y. 1996], citing Bd. of Educ. of City of New York v. Ambach, 612 F. Supp. 230, 233 [E.D.N.Y. 1985]). A student's placement pursuant to the pendency provision of the IDEA is evaluated independently from the appropriateness of the program offered the student by the CSE (Mackey, 386 F.3d at 160-61; Zvi D., 694 F.2d at 906; O'Shea, 353 F. Supp. 2d at 459 [noting that "pendency placement and appropriate placement are separate and distinct concepts"]). The pendency provision does not require that a student remain in a particular site or location (Ventura de Paulino, 959 F.3d at 532; T.M., 752 F.3d at 170-71; Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 753, 756 [2d Cir. 1980]; see Child's Status During Proceedings, 71 Fed. Reg. 46709 [Aug. 14, 2006] [noting that the "current placement is generally not considered to be location-specific"]), or at a particular grade level (Application of a Child with a Disability, Appeal No. 03-032; Application of a Child with a Disability, Appeal No. 95-16).

Under the IDEA, the pendency inquiry focuses on identifying the student's then-current educational placement (Ventura de Paulino, 959 F.3d at 532; Mackey, 386 F.3d at 163, citing Zvi D., 694 F.2d at 906). Although not defined by statute, the phrase "then current placement" has been found to mean either: (1) the placement described in the student's most recently implemented IEP; (2) the operative placement actually functioning at the time when the due process proceeding was commenced; or (3) the placement at the time of the previously implemented IEP (Dervishi v. Stamford Bd. of Educ., 653 Fed. App'x 55, 57-58 [2d Cir. June 27, 2016], quoting Mackey, 386 F.3d at 163; T.M., 752 F.3d at 170-71 [holding that the pendency provision "requires a school

[11] In Ventura de Paulino, the Court concluded that parents may not transfer a student from one nonpublic school to another nonpublic school and simultaneously transfer a district's obligation to fund that pendency placement based upon a substantial similarity analysis (see Ventura de Paulino, 959 F.3d at 532-36).

district to continue funding whatever educational placement was last agreed upon for the child"]; see Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 452 [2d Cir. 2015] [holding that a student's entitlement to stay-put arises when a due process complaint notice is filed]; Susquenita Sch. Dist. v. Raelee, 96 F.3d 78, 83 [3d Cir. 1996]; Letter to Baugh, 211 IDELR 481 [OSEP 1987]). Furthermore, the Second Circuit has stated that educational placement means "the general type of educational program in which the child is placed" (Concerned Parents, 629 F.2d at 753, 756), and that "the pendency provision does not guarantee a disabled child the right to remain in the exact same school with the exact same service providers" (T.M., 752 F.3d at 171). However, if there is an agreement between the parties on the student's educational placement during the due process proceedings, it need not be reduced to a new IEP, and the agreement can supersede the prior unchallenged IEP as the student's then-current educational placement (see Bd. of Educ. of Pawling Cent. Sch. Dist. v. Schutz, 290 F.3d 476, 483-84 [2d Cir. 2002]; Evans, 921 F. Supp. at 1189 n.3; Murphy v. Arlington Central School District Board of Education, 86 F. Supp. 2d 354, 366 [S.D.N.Y. 2000], aff'd, 297 F.3d 195 [2d Cir. 2002]; see also Letter to Hampden, 49 IDELR 197 [OSEP 2007]). Moreover, a prior unappealed IHO decision may establish a student's current educational placement for purposes of pendency (Student X, 2008 WL 4890440, at *23; Letter to Hampden, 49 IDELR 197).

Here, given the district's position set forth in the answer, the parties are now in agreement that the student's pendency placement consists of six hours per week of SEIT services, three 30-minute sessions of individual speech-language therapy per week, and two 30-minute sessions of individual OT services per week (see Req. for Rev. ¶ 1; Answer & Cr.-Appeal ¶ 8). Moreover, there is evidence of a prior pendency agreement which was signed by the district in October 2021, which stated that these services were pendency for the 12-month school year (SRO Ex. A at pp. 1-2). The parties agreed that the SEIT services were to be provided by Special Edge (id. at p. 1). The district also does not dispute that it did not deliver or fund pendency services to which the student was entitled (see Answer & Cr.-Appeal ¶¶ 9-10).

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]).

As there is no dispute that the student was entitled to pendency and that the district failed to provide the student's pendency services, the district will be required to fund or provide compensatory pendency services for the missed services from the date of the due process complaint notice, March 13, 2023, through the date of this decision. For the 1:1 SEIT services, consistent with the parties' agreement, the district will be required to fund services provided by Special Edge unless Special Edge is unavailable, in which case the district must provide the services unless the parties otherwise agree. The district should provide the compensatory pendency speech-language therapy and OT unless the parties otherwise agree.

B. Reimbursement for Unilaterally Obtained Services

After describing Orton-Gillingham as a "specialized reading technique," the IHO denied the parent's request for reimbursement of the Orton-Gillingham services privately provided to the student during the 2022-23 school year, finding that the student had not received a diagnosis of "dyslexia nor ha[d] there been any evidence introduced to support the notion that the [s]tudent require[d] evidence based direct multisensory instruction for reading" (IHO Decision at pp. 11-12). On appeal, the parent asserts that the IHO erred by denying reimbursement for the one 45-minute session per week of privately obtained Orton-Gillingham services for the student.

Here, there is no question that the parent is seeking reimbursement or funding from the district for private services that she already obtained. The parent's request for privately obtained Orton-Gillingham services must be assessed under the Burlington/Carter framework. That is, although the student attended Hellenic, a public charter school, the parent alleged that the district did not provide enough special education support for the student during the 2022-23 school year, and, as a self-help remedy, she unilaterally obtained private Orton-Gillingham services for the student without the consent of the school district officials, and then commenced due process to obtain remuneration for the costs thereof. 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, 959 F.3d at 526 [internal quotations and citations omitted]; see Carter, 510 U.S. at 14 [finding that the "Parents' failure to select a program known to be approved by the State in favor of an unapproved option is not itself a bar to reimbursement."]).

1. Appropriateness of Orton-Gillingham Services

Under the Burlington/Carter test, a private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129). Citing the Rowley standard, the Supreme Court has explained that "when a public school system has defaulted on its obligations under the Act, a private school placement is 'proper under the Act' if the education provided by the private school is 'reasonably calculated to enable the child to receive educational benefits'" (Carter, 510 U.S. at 11; see Rowley, 458 U.S. at 203-04). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (id. 510 U.S. at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G. 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).

Here, during the impartial hearing, the owner of Wishes of Literacy Center testified that she operated "an Orton-Gillingham tutoring center for children with dyslexia and reading disabilities" (Tr. pp. 143, 150). She testified that she was familiar with the student as he had been receiving services from Wishes of Literacy since September 2022 (Tr. pp. 144, 148-49). She indicated that the student received one 45-minute session per week of services (Tr. pp. 149-50). According to the owner, a special education teacher conducted an "initial assessment" of the student, which indicated that he had "very low phonemic awareness skills" and although he "look[ed] like someone who was a halfway decent reader," he did not know what he was reading (Tr. pp. 144, 147-48).[12] The owner testified that although the student "was able to manipulate sounds enough to decode" he struggled when sounds changed and was a "memorized reader" (Tr. p. 148). The student's reading fluency "was not horrendous" but was "on the lower side" and he did not exhibit knowledge of syllabication and grammar rules (id.). The owner stated that in September 2022, the student was performing "[b]elow grade level" but had made progress with

[12] The student's initial Wishes of Literacy assessment was not included in the hearing record (see Parent Exs. A-S, U; Dist. Exs. 1-24).

the services provided (Tr. pp. 149-51). The owner indicated that, generally, during sessions, the student worked on decoding skills, fluency, the rules of English language, comprehension, and spelling (Tr. p. 150).

Based on the foregoing, there is little information in the hearing record regarding the privately obtained Orton-Gillingham services. The provider who delivered the services did not testify at the impartial hearing and the hearing record does not include any documentary evidence regarding the services, such as a progress report or service records (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]). Thus, based on the totality of the circumstances, there is insufficient evidence in the hearing record to support a finding that the unilaterally obtained Orton-Gillingham services offered specially designed instruction to meet the student's unique needs.

2. Equitable Considerations

Even if the evidence was sufficient to support a finding that the unilaterally obtained Orton Gillingham services were specially designed to meet the student's needs, equitable considerations do not support an award of reimbursement for the costs thereof.

The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]; L.K. v. New York City Dep't of Educ., 674 Fed. App'x 100, 101 [2d Cir. Jan. 19, 2017]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014] [identifying factors relevant to equitable considerations, including whether the withdrawal of the student from public school was justified, whether the parent provided adequate notice, whether the amount of the private school tuition was reasonable, possible scholarships or other financial aid from the private school, and any fraud or collusion on the part of the parent or private school]; C.L., 744 F.3d at 840 [noting that "[i]mportant to the equitable consideration is whether the parents obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA"]).

Among the factors that may warrant a reduction in tuition under equitable considerations is whether the frequency of the services or the rate for the services were excessive (see E.M., 758 F.3d at 461 [noting that whether the amount of the private school tuition was reasonable is one factor relevant to equitable considerations]). An IHO may consider evidence regarding whether the rate charged by the private agency was unreasonable or regarding any segregable costs charged by the private agency that exceed the level that the student required to receive a FAPE (see L.K. v. New York City Dep't of Educ., 2016 WL 899321, at *7 [S.D.N.Y. Mar. 1, 2016], aff'd in part, 674 Fed. App'x 100). More specifically, while parents are entitled to reimbursement for the cost of an appropriate private placement when a district has failed to offer their child a FAPE, it does not follow that they may take advantage of deficiencies in the district's offered placement to obtain all those services they might wish to provide for their child at the expense of the public fisc, as such results do not achieve the purpose of the IDEA. To the contrary, "[r]eimbursement 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 [emphasis added]; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148). Accordingly, while a parent should not be denied reimbursement for an appropriate program due to the fact that the program provides benefits in addition to those required for the student to receive educational benefits, a reduction from full reimbursement may be considered where a unilateral placement provides services beyond those required to address a student's educational needs (L.K., 674 Fed. App'x at 101; see C.B. v. Garden Grove Unified Sch. Dist., 635 F. 3d 1155, 1160 [9th Cir. 2011] [indicating that "[e]quity surely would permit a reduction from full reimbursement if [a unilateral private placement] provides too much (services beyond required educational needs), or if it provides some things that do not meet educational needs at all (such as purely recreational options), or if it is overpriced"]; Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ., 790 F.2d 1153, 1161 [5th Cir. 1986] ["The Burlington rule is not so narrow as to permit reimbursement only when the [unilateral] placement chosen by the parent is found to be the exact proper placement required under the Act. Conversely, when [the student] was at the [unilateral placement], he may have received more 'benefit' than the EAHCA [the predecessor statute to the IDEA] requires"]).

Although the owner testified that the student's skills were not at grade level, results of formal academic achievement testing of the student conducted as part of the May 2022 private neuropsychological evaluation indicated that his word reading and comprehension abilities were "solidly within the average range" (Dist. Ex. 14 at pp. 6, 10). The December 2022 IEP indicated at that time, the student was reading at a Fountas and Pinnell Assessment level "E," which corresponded to "a beginning of [first] grade level" (Dist. Ex. 18 at p. 2). According to the IEP, the student did "very well decoding unknown words in text using previously learned phonics rules when sounding out," he retold stories at his independent reading level, and he exhibited good reading stamina during independent reading time (id.). The student could work on monitoring for meaning, reading words with suffixes and multisyllabic words, and his reading fluency (id.).

Thus, review of the evidence hearing record leads me to the conclusion that the IHO appropriately denied reimbursement for the privately obtained Orton-Gillingham services. While the student may have received some benefit, the evidence shows that he exhibited reading skills within the average range prior to the initiation of such services, and therefore did not require the services provided by Wishes of Literacy as remedial relief for deficits that went unaddressed by the CSE. In other words, "[r]eimbursement 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), but the district was not required to provide services in excess of what was required.

C. Prospective/Declaratory Relief

The IHO noted that, in May 2022, private evaluators recommended that the student receive group speech-language therapy (IHO Decision at p. 7; see Dist. Ex. 14 at p. 7). The IHO then determined that the student was "entitled to compensatory services for the group speech and language therapy the [d]istrict failed to provide him with but should have received during the 2022-23 school year" and ordered the CSE to reconvene to amend the student's IEP to include group speech-language therapy (IHO Decision at pp. 11, 12). In its cross-appeal, the district challenges the IHO's order requiring the CSE to reconvene and amend the student's IEP to include group speech-language therapy. In addition, the parent alleges that the IHO should have found that an appropriate program for the student going forward should include 1:1 special education teacher services and Orton-Gillingham tutoring services.

Generally, a parent's request to prospectively place students in a particular type of program and placement through IEP amendments can, under certain circumstances, have the effect of circumventing the statutory process, pursuant to which the CSE is tasked with reviewing information about the student's progress under current educational programming and periodically assessing the student's needs (see Adams v. Dist. of Columbia, 285 F. Supp. 3d 381, 393, 396-97 [D.D.C. 2018] [noting with approval the hearing officer's finding "that the directives of IDEA would be best effectuated by ordering an IEP review and revision, rather than prospective placement in a private school"]; see also Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *16 [E.D.N.Y. Oct. 30, 2008] [noting that "services found to be appropriate for a student during one school year are not necessarily appropriate for the student during a subsequent school year"]). This is particularly so when the school year at issue is over and, in accordance with its obligation to review a student's IEP at least annually, a CSE should have already produced an IEP for the following school year, which has not been the subject of a due process proceeding (see also Eley v. Dist. of Columbia, 2012 WL 3656471, at *11 [D.D.C. Aug. 24, 2012] [noting that prospective placement is not an appropriate remedy until the IEP for the current school year has been completed and the parent challenges the IEP for the current year]).

Thus, with respect to the district's cross-appeal, I agree that the IHO's order for the CSE to reconvene and recommend group speech-language therapy on a going-forward basis was not specifically tailored to remediate and provide the student with the service that he should have been receiving during the 2022-23 school year; the IHO's award of compensatory education to remedy the district's failure in this regard is discussed further below. In addition, as discussed above, the evidence in the hearing record does not support the parent's contention that the student required Orton-Gillingham tutoring during the 2022-23 school year and, as such, the evidence in the hearing record also does not support a declaratory or prospective award requiring such services as part of the student's programming on a going forward basis.

As for 1:1 home-based special education teacher services, as noted above, I will award compensatory SEIT services to remedy the district's failure to provide the student's pendency services. However, a student's placement pursuant to the pendency provision of the IDEA is evaluated independently from the appropriateness of the program offered the student by the CSE (Mackey v. Bd. of Educ. for Arlington Cent. Sch. Dist., 386 F.3d 158, 160-61 [2d Cir. 2004]; 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] [noting that "pendency placement and appropriate placement are separate and distinct concepts"]). As for the appropriateness of the services going forward, the hearing record does not support the parent's contention that the student requires home-based 1:1 special education teacher services. Several courts have held that the IDEA does not require school districts, as a matter of course, to design educational programs to address a student's difficulties in generalizing skills to other settings outside of the school environment, particularly where it is determined that the student is otherwise likely to make progress, at least in the classroom setting (see, e.g., F.L. v. New York City Dep't of Educ., 2016 WL 3211969, at *11 [S.D.N.Y. June 8, 2016]; L.K. v. New York City Dep't of Educ., 2016 WL 899321, at *8-*10 [S.D.N.Y. Mar. 1, 2016], aff'd in part, 674 Fed. App'x 100 [2d Cir. Jan. 19, 2017]; P.S. v. New York City Dep't of Educ., 2014 WL 3673603, at *13-*14 [S.D.N.Y. Jul. 24, 2014]; M.L. v. New York City Dep't of Educ., 2014 WL 1301957, at *11 [S.D.N.Y. Mar. 31, 2014]; K.L. v. New York City Dep't of Educ., 2012 WL 4017822, at *14 [S.D.N.Y. Aug. 23, 2012], aff'd, 530 Fed. App'x 81 [2d Cir. July 24, 2013]; Student X, 2008 WL 4890440, at *17; A.D. v. New York City Dep't of Educ., 2008 WL 8993558, at *7 [S.D.N.Y. Apr. 21, 2008]; see also Thompson R2-J Sch. Dist. v. Luke P., 540 F.3d 1143, 1152-53 [10th Cir. 2008]; Gonzalez v. Puerto Rico Dep't of Educ., 254 F.3d 350, 353 [1st Cir. 2001]; Devine v. Indian River County Sch. Bd., 249 F.3d 1289, 1293 [11th Cir. 2001]; JSK v. Hendry County Sch. Bd., 941 F.2d 1563, 1573 [11th Cir 1991]).

Review of the May 2022 private neuropsychological evaluation shows that the student's cognitive functioning as measured by the Wechsler Preschool and Primary Scale of Intelligence—Fourth Edition, was in the very superior (fluid reasoning), superior (visual spatial), high average (processing speed), average (verbal comprehension), and low average (working memory) ranges, with a full scale IQ in the high average range (Dist. Ex. 14 at p. 9). Academically, the student achieved the following subtest standard scores (percentile ranks) on an administration of the Kaufman Test of Educational Achievement, Third Edition: letter & word recognition 101 (53), reading comprehension 99 (47), math concepts & applications 92 (30), math computation 122 (93), written expression 96 (39), and spelling 105 (63) (id.). Furthermore, the student's teacher did not report clinically significant behaviors on an administration of the Behavior Assessment System for Children—Third Edition (id. at p. 12). It is unclear, based on the student's performance on standardized measures, how the private evaluators reached the conclusion that despite the provision of five hours per week of group special education teacher services to the student in-school, he "undoubtedly require[d] 1:1 special education teacher support afterschool, to assist with his social, language and learning profile" (id. at p. 7; see Tr. p. 110).[13]

As of November 2022, during the student's first grade year, the student's estimated reading, writing, and math skills were at a "beginning [first] grade level" and the CSE reported that he was "functioning on a [first] grade level academically and ha[d] shown progress this year" (Dist. Ex. 18 at pp. 1-2). At that time, the in-school SETSS provider reported that the student was meeting benchmarks in math and "performing the same as his peers" (id. at p. 4).

[13] While the private neuropsychological evaluation revealed the student's language delays, those deficits were addressed through the recommended speech-language therapy services (see Dist. Ex. 14 at pp. 7, 11) and as described below, further speech-language therapy services are ordered herein as relief.

Therefore, despite recommendation of the private evaluators, the evidence in the hearing record does not lead to the conclusion that the student requires a program going forward that includes home-based 1:1 special education teacher services. Thus, there is insufficient basis to reverse the IHO's determination that the student did not require home-based 1:1 special education services in order to receive educational benefit (see Y.D. v. New York City Dep't of Educ., 2017 WL 1051129, at *8 [S.D.N.Y. Mar. 20, 2017] [finding out-of-school services were unnecessary to ensure the student made progress in the classroom and would, instead, be aimed at managing behaviors outside the school day]; R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at *15 [S.D.N.Y. Sept. 27, 2013] ["While the record indicates that [the student] may have benefited from home-based services, it contains no indication that such services were necessary"], aff'd, 589 Fed. App'x 572 [2d Cir. Oct. 29, 2014]). While I understand the parent's desire to see additional improvements in the student's experiences in the home, the district is not required to provide "every special service necessary to maximize the student's potential" (Mr. P v. W. Hartford Bd. of Educ., 885 F.3d 735, 756 [2d Cir. 2018], cert. denied sub nom., 139 S. Ct. 322 [2018]).

Instead, when the CSE next convenes it will be required, as the IHO ordered, to consider the parent's request of whether the student requires additional SETSS or home-based 1:1 special education teacher services on a going-forward basis, but based on the evidence in this proceeding, it would only be necessary to do so if new or additional information were available to the CSE that warranted such a recommendation.

D. Compensatory Education

As noted above, the IHO erred in ordering the CSE to recommend speech-language therapy on a going-forward basis. However, the IHO also determined that the district should provide the student with compensatory group speech-language therapy services but left the calculations of such an award to the district, which was an impermissible delegation of the IHO's duty (IHO Decision at pp. 11, 12). It is the IHO's role to fashion appropriate relief, not the district's (see Sch. Comm. of Burlington v. Dep't of Educ. of the Commonwealth of Mass., 471 U.S. 359, 369 [1985] [noting that, while the IDEA "confers broad discretion on . . . court[s]" and administrative agencies to fashion "appropriate" relief, an agency or court may not delegate this responsibility to a school district]; see e.g., Application of a Student with a Disability, Appeal No. 20-149). As I am reversing the IHO's prospective programming changes, I find that further discussion is warranted regarding an appropriate award of compensatory group speech-language therapy.[14]

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

[14] The IHO also ordered the district to determine an appropriate award of compensatory individual speech-language therapy and OT to remedy the district's failure to implement those services mandated on the IEP during the 2022-23 school year. In the request for review, the parent did not directly appeal the IHO's order for the district to determine the compensatory award but raised it as an issue for the first time in her answer to the district's cross-appeal. As it is not before me, I decline to disturb the IHO's order relating to compensatory individual speech-language therapy and OT; however, as the calculation should be an hour-for-hour remedy for the failure to implement the services (minus those services ordered herein that pertain to the student's pendency placement which overlap with the 2022-23 school year), the district should conduct an audit of the services already delivered versus the services still owed, and beyond conducting the calculation based upon the student's records, there should no room for the district to exercise further discretion over the final amount of compensatory education.

of a FAPE (see E.M., 758 F.3d at 451 [holding that compensatory education is a remedy designed to "make up for" a denial of a FAPE]; Newington, 546 F.3d at 123 [stating that "[t]he IDEA allows a hearing officer to fashion an appropriate remedy, and . . . compensatory education is an available option under the Act to make up for denial of a [FAPE]"]; see also E. Lyme, 790 F.3d at 456; 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 evidence shows that over multiple dates in April and May 2022, two clinical psychologists conducted a private neuropsychological evaluation of the student (Dist. Ex. 14 at pp. 1, 8). Assessments of the student revealed "variable abilities on tasks of complex language expression and processing" and his parent and occupational therapist reported the student exhibited difficulties with "social withdrawal" (id. at pp. 4, 6). The evaluators concluded that the student demonstrated areas of relative weakness in complex language and social pragmatics and recommended that he receive group speech-language therapy "to address his challenges with social pragmatics and inferential communication" (id. at p. 6). Recommendations for the student included a continuation of individual speech-language therapy, and speech-language therapy "in a group format to address his challenges with social pragmatics and inferential communication" (id. at p. 7).

In May 2022, a speech-language pathologist conducted a private evaluation of the student (Parent Ex. R). Results of the evaluation indicated that the student presented with "severe dysfluent speech production, moderate delays in expressive and receptive vocabulary, expressive language in the area of grammar and syntax, and literacy skills in the area of conventions" (id. at p. 16). Additionally, the speech-language pathologist reported that the student exhibited "severe delays in articulation skills and oral motor skills" (id.). According to the speech-language pathologist, articulation skills were important for being understood by others and forming peer relationships, and that a fluency disorder affected social skills, confidence, and overall intelligibility (id. at p. 17). In addition to individual speech-language therapy sessions, the speech-language pathologist recommended that the student receive one session per week of speech-language therapy in a group of no more than three students, which would allow him "the opportunity to improve his social skills" (id.).

The parent testified that she provided the private evaluation reports to the district (Tr. p. 117). The student's IEPs did not address the deficits mentioned by the private evaluators for group speech-language therapy, nor does the prior written notice provide an explanation as to why (see Dist. Exs. 18 at pp. 3-4; 19 at pp. 2-3; 24). In this case there was a clear consensus of the need for group speech language services before the November 2022 CSE in light of his pragmatic language skills (A.M. v. New York City Dep't of Educ., 845 F.3d 523, 543 [2d Cir. 2017]), but district failed to provide an explanation as to why the November 2022 CSE declined to recommend group speech-language therapy despite the reasoning and recommendations from multiple evaluators before it (see Parent Exs. R at p. 17; Dist. Exs. 14 at p. 7; 18 at pp. 17-18; 19 at pp. 16-17).

Given the recommendations in the private evaluations, the evidence in the hearing record supports equitable relief in the form of one 30-minute session per week of group speech-language therapy services during the 2022-23 school year after the November 21, 2022 CSE, due to the district's failure to provide it on the student's IEP. Thus, based on a 10-month school year,[15] from November 21, 2022 through end of the school year, I find an award of 14 hours of group speech-language therapy per week appropriate.[16]

In addition, while the IHO erred in requiring the CSE to amend the student's IEP to include group speech-language therapy, the order for the CSE to reconvene within 30 days remains. Thus, when the CSE reconvenes, it should reconsider how it will address the student's pragmatic language skills going forward.

VII. Conclusion

In summary, given the parties' agreement with respect to the student's pendency placement, the student is entitled to compensatory education to remedy the lapse in pendency equal to six hours of 1:1 SEIT services, three 30-minutes sessions of speech-language therapy, and two 30-minute sessions of OT services for each week from the date of the due process complaint notice through the date of this decision. With regard to relief to address the district's failure to offer the student a FAPE, the parent is not entitled to reimbursement for Orton-Gillingham services or a finding that the student's programming must include Orton-Gillingham services or home-based 1:1 special education teacher services going forward. With regard to compensatory education, in addition to the IHO's award of individual speech-language therapy and OT, the student is entitled to a bank of 14 hours of group speech-language therapy services.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

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[15] A 10-month school year consists of approximately 36 weeks (180 school days divided by 5 days per week) (see Educ. Law § 3604[7]; 8 NYCRR 175.5[a], [c]).

[16] Prior to November 21, 2022, the student's program was based on the prior IEP dated November 17, 2021 (see Dist. Ex. 5). The November 2021 CSE did not have the private evaluations before it, so the recommendations of the private evaluators could not be relied upon to retrospectively assess the November 2021 CSE's recommendations (C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013] [finding that "a substantively appropriate IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE about subsequent events . . . that seek to alter the information available to the CSE"], citing R.E., 694 F.3d at 186–87).

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's interim decision, dated June 19, 2023, is vacated and, based on the parties' agreement, the student's pendency placement consists of six hours of 1:1 SEIT services per week, three 30-minute sessions of speech-language therapy per week, and two 30-minute sessions of OT per week;

IT IS FURTHER ORDERED that the IHO's final decision, dated November 18, 2023, is modified by reversing those portions which ordered the CSE, upon reconvening, to recommend group speech-language therapy for the student on his IEP and which ordered the district to determine an appropriate compensatory award of group speech-language therapy;

IT IS FURTHER ORDERED that the district shall fund compensatory pendency services totaling six hours per week of 1:1 SEIT for each week from the date of the due process complaint notice, March 13, 2023, through the date of this decision; provided however, if Special Edge is unavailable to deliver the services, then the district shall be required to provide the services;

IT IS FURTHER ORDERED that the district shall provide compensatory pendency services totaling three 30-minute sessions of individual speech-language therapy and two 30-minute sessions of individual OT per week for each week from the date of the due process complaint notice, March 13, 2023, through the date of this decision; and

IT IS FURTHER ORDERED that the district is ordered to provide a bank of 14 hours of compensatory education in the form of group speech-language therapy.

Dated: **Albany, New York**
June 3, 2024

JUSTYN P. BATES
STATE REVIEW OFFICER