



The University of the State of New York

The State Education Department

State Review Officer

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No. 24-008

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

Appearances:

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

Liz Vladeck, General Counsel, attorneys for respondent, by Thomas W. MacLeod, 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 the decision of an impartial hearing officer (IHO) which denied her request to be reimbursed for the costs of her daughter's special education teacher support services (SETSS) for the 2023-24 school year. Respondent (the district) cross-appeals from the IHO's order directing the district to fund a bank of compensatory educational services for the student. The appeal must be sustained. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

When a student who resides in New York is eligible for special education services and attends a nonpublic school, Article 73 of the New York State Education Law allows for the creation of an individualized education services program (IESP) under the State's so-called "dual enrollment" statute (see Educ. Law §3602-c). The task of creating an IESP is assigned to the same committee that designs educational programming for students with disabilities under the IDEA (20 U.S.C. §§ 1400-1482), namely a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law §§ 3602-c; 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 related to IESPs, State law provides that "[r]eview of the recommendation of the committee on special education may be obtained by the parent or person in parental relation of the pupil pursuant to the provisions of [Education Law § 4404]," which effectuates the due process provisions called for by the IDEA (Educ. Law § 3602-c[2][b][1]). Incorporated among the procedural protections of the IDEA and the analogous State law provisions 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[a]). 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

Given the limited issues to be resolved in this appeal, a full recitation of the student's educational history is not necessary.

In a letter to the district dated May 24, 2023, the parent notified the district that the student had been parentally placed in a nonpublic school and, as a student entitled to a special education program, the parent was requesting that the district provide those services to the student (see Parent Ex. D at p. 2).

On July 13, 2023, the parent executed a contract with "Stepfwd, LLC," to provide the student with the following services for the 2023-24 school year: five periods per week of SETSS in a group setting and two 30-minute sessions per week of individual occupational therapy (OT) services (Parent Ex. E at pp. 1-2).¹ According to the contract, the agency charged \$220.00 per hour for SETSS; however, the contract did not specify a rate charged for the OT services (id. at p. 2).²

In a letter dated September 1, 2023, the parent notified the district of her intention to unilaterally obtain the SETSS and related services recommended in the student's IESP, dated April 7, 2022 (April 2022 IESP) (see Parent Ex. C at p. 2). The parent indicated that she consented to "all services on this IESP being implemented by the [district]" (id.). The parent indicated that she had been unable to locate providers to deliver these services at the district's standard rates, and therefore, she had "no choice but to implement the IESP on [her] own and seek reimbursement or direct payment" of these services by the district (id.).

A. Due Process Complaint Notice

By due process complaint notice dated September 7, 2023, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2023-24 school year because the district had failed to develop an IESP for the 2023-24 school year (see Parent Ex. A at pp. 1-2).³ As part of the due process complaint notice, the parent sought pendency services for the student consistent with the special education program recommended in the April 2022 IESP, which constituted the last-agreed upon IESP: five periods per week of SETSS

¹ The educational director (director) of the agency referred to it as the "Step Forward LLC" agency (Parent Ex. I ¶ 5).

² The parent testified that she contacted Stepfwd after submitting her 10-day notice letter, dated September 1, 2023, to the district, which notified the district of her intention to "implement the program" set forth in the student's April 2022 IESP (Parent Ex. H ¶¶ 6-7).

³ In a pendency program form, which the parent's attorney completed and executed on the parent's behalf on September 7, 2023, it was noted that the student's April 2022 IESP formed the basis for the student's pendency services (see Supp. Ex. 5 at p. 1). Within the form, the student's pendency services were described as five periods per week of SETSS in a group setting and two 30-minute sessions per week of individual OT services, but the form did not include any information concerning providers or an agency delivering services, or the rates to be paid for such services (id. at pp. 1-2). A district representative countersigned the pendency program form on November 15, 2023, and noted that pendency was "uncontested" (id. at p. 2).

delivered in a group setting and two 30-minute sessions per week of individual OT services (*id.* at p. 2). In addition, the parent noted that she had been unable to locate any providers to implement the "recommendations for the 2023-24 school year," and since the student's "parental mainstream placement [wa]s untenable" without such services, the parent had located "appropriate services providers independently for the 2023-24 school year" (*id.*).

As relief for the alleged violations and as relevant to this appeal, the parent initially reserved her right to seek compensatory educational services in the form of SETSS and related services "for any periods not provided during the 2023-24 school year" (Parent Ex. A at p. 2). The parent also sought an order directing the district to fund the following: the special education program set forth in the April 2022 IESP for the 2023-24 school year "at a reasonable market rate" and a bank of compensatory educational services "for all services" the student was entitled to receive under pendency "for the entire 2023-24 school year—or the parts of which were not serviced" (*id.* at p. 3).⁴

B. Impartial Hearing Officer Decision

On November 22, 2023, the parties completed the impartial hearing held before an IHO with the Office of Administrative Trials and Hearings (OATH) (*see* Tr. pp. 1-19).^{5,6} In a decision dated December 6, 2023, the IHO found that the district failed to implement the student's IESP for the 2023-24 school year and similarly failed to "identify and provide qualified providers for the special education services it recommended" (IHO Decision at p. 6). As a result, the IHO concluded that the district failed to offer the student a FAPE (*id.*).⁷

⁴ In a response to the parent's due process complaint notice dated October 30, 2023, the district indicated that a CSE met on March 15, 2023, and recommended "SETSS, R[elated] S[ervices] A[uthorizations] (RSAs) (OT)" for the student (Supp. Ex. 2 at pp. 1-3).

⁵ As noted in the IHO's decision, the IHO conducted a "settlement" conference on October 19, 2023, and two additional "status" conferences respectively held on November 3 and November 16, 2023 (IHO Decision at p. 3). However, the hearing record does not include a transcript or a written summary of these proceedings, contrary to State regulations (*see* 8 NYCRR 200.5[j][3][xi] [requiring that a "transcript or a written summary of the prehearing conference shall be entered into the record by the [IHO]").

⁶ At the impartial hearing, the district submitted an IESP into the hearing record as evidence, which reflected a CSE meeting date of March 15, 2023 (*see* Dist. Ex. 1 at pp. 1, 10). However, based on the attendance page of the IESP, it does not appear that the parent attended the CSE meeting (*id.* at pp. 10-11). Within the March 2023 IESP, it was noted that "[r]epeated attempts to reach [the] parent were unsuccessful" and that the CSE had not received a "SETSS report" at that time (*id.* at pp. 2-3). However, the hearing record is devoid of evidence describing any attempts the district made to include the parent's attendance at the March 2023 CSE meeting or to obtain a SETSS report; moreover, the hearing record is devoid of evidence describing the development of the March 2023 IESP (*see generally* Tr. pp. 1-19; Parent Exs. A-I; Dist. Ex. 1).

⁷ The IHO did not address the March 2023 IESP that the district submitted into evidence within the decision, but rather, appeared to formulate her conclusion that the district failed to offer the student a FAPE for the 2023-24 school year based on the district's failure to implement the student's April 2022 IESP (*see* IHO Decision at pp. 4-6).

Turning to the parent's unilaterally obtained services, the IHO found that the parent failed to provide sufficient evidence concerning the "specific goals" developed for the student and for the "areas of need" addressed by the agency (IHO Decision at p. 7). In particular, the IHO concluded that the parent failed to provide any "progress reports" or a schedule of services or "details about the SETSS curriculum" for the student (*id.*). According to the IHO, the parent's testimony was "vague and nondescriptive about the SETSS" provided to the student, and the hearing record did not contain evidence of when the student began receiving SETSS "even though the contract was signed on July 13, 2023" (*id.*). In addition, the IHO found that the hearing record lacked evidence of the student's progress with SETSS, and she noted that "[i]t would have been helpful to hear directly from the SETSS instructor, and to review [the s]tudent's schedule, and progress reports that evidence how the program was tailored" to address the student's needs (*id.*). Consequently, the IHO concluded that the evidence failed to establish that the SETSS provider identified the student's needs and provided "services specially designed" to address her unique needs, and therefore, the parent failed to establish that the unilaterally obtained services were appropriate (*id.*).

As a final point, the IHO noted that although the parent had requested a bank of compensatory educational services for any and all pendency services not delivered to the student, the evidence in the hearing record reflected that the student was receiving SETSS—but not OT services—from the Stepfwd agency (*see* IHO Decision at pp. 7-8). Thus, based on a "36-week, 10-month school schedule," the IHO calculated that the student was entitled to 18 hours of OT services "from the beginning of the school year through 30 days from the date of this decision, at the established [d]istrict rate" (*id.* at pp. 8-9). In addition, the IHO found that the compensatory educational services providers "should be paid at the established [d]istrict rate" (*id.* at p. 9 [emphasis in the original]).

In light of her findings, the IHO ordered the district to "identify and provide qualified providers" to deliver the student's SETSS (five hours per week in a group) and OT services (two 30-minute sessions per week) for the "entirety" of the 10-month, 2023-24 school year (IHO Decision at p. 9). The IHO also ordered the district to "fund a compensatory bank of 18 hours" of individual OT services (with such services to expire if not used within two years from the date of the decision) (*id.*). Additionally, the IHO ordered the district to directly pay the SETSS and OT providers upon receipt of the student's "2023-2024 class schedule, receipts and/or invoices detailing the exact dates of services and number of minutes/hours the services were provided, and session notes" (*id.*).

IV. Appeal for State-Level Review

The parent appeals, arguing that the IHO ignored and thus, failed to consider, the student's progress report—which had been entered into the hearing record as evidence at the impartial hearing—when analyzing whether the SETSS provided to the student by the Stepfwd agency was appropriate.⁸ The parent also argues that the IHO erred by failing to award sufficient

⁸ With the "Statement of Facts" in the parent's request for review, the parent noted that she had filed a due process complaint notice in December 2022 related to the student's special education program for the 2022-23 school year (Req. for Rev. at p. 2). The parent further noted that the December 2022 due process complaint notice alleged a denial of FAPE for the 2022-23 school year based on the district's failure to implement the student's IESP (*id.*).

compensatory educational services for OT, as the district "failed to implement any services under the pendency agreement." As relief, the parent seeks an order directing the district to fund the student's SETSS at the contracted rate of \$220.00 per hour and to award 40 hours of compensatory educational services for OT not delivered to the student under pendency. Alternatively, the parent asserts that the matter should be remanded to the IHO to consider the relevant progress report and any other relevant evidence concerning the delivered services.

In an answer and cross-appeal, the district initially responds to the parent's allegations and generally argues to uphold the IHO's finding that the SETSS delivered to the student was not appropriate. The district cross-appeals from the IHO's decision awarding compensatory educational services for OT. In addition, the district argues that equitable considerations do not weigh in favor of the parent's requested relief because the SETSS rate was excessive and unwarranted and because the student inappropriately received individual SETSS rather than in a group.

In a reply to the district's answer, the parent responds to the district's allegations in its cross-appeal, the district's arguments in support of upholding the IHO's finding that the SETSS was not appropriate, and with respect to the equitable considerations raised by the district.

V. Applicable Standards

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

However, under State law, parents of a student with a disability who have privately enrolled their child in a nonpublic school may seek to obtain educational "services" for their child by filing a request for such services in the district of location where the nonpublic school is located on or before the first day of June preceding the school year for which the request for services is made (Educ. Law § 3602-c[2]).⁹ "Boards of education of all school districts of the state shall furnish services to students who are residents of this state and who attend nonpublic schools located in such school districts, upon the written request of the parent" (Educ. Law § 3602-c[2][a]). In such circumstances, the district of location's CSE must review the request for services and "develop an

According to the parent, this previous case was "withdrawn as a result of a resolution agreement" between the parties, dated June 2, 2023, which required the district to "fund the mandated services" delivered by the parent's selected providers (id.).

⁹ State law provides that "services" includes "education for students with disabilities," which means "special educational programs designed to serve persons who meet the definition of children with disabilities set forth in [Education Law § 4401(1)]" (Educ. Law § 3602-c[1][a], [d]).

[IESP] for the student based on the student's individual needs in the same manner and with the same contents as an [IEP]" (Educ. Law § 3602-c[2][b][1]). The CSE must "assure that special education programs and services are made available to students with disabilities attending nonpublic schools located within the school district on an equitable basis, as compared to special education programs and services provided to other students with disabilities attending public or nonpublic schools located within the school district" (*id.*).¹⁰

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

VI. Discussion

A. Preliminary Matters—Scope of Review

Before turning to the merits of the parent's appeal and the district's cross-appeal, it must be noted that neither party has appealed or challenged the IHO's order directing the district to "identify and provide qualified providers" to deliver the student's SETSS and OT services consistent with the recommendations in her IESP as part of the relief in this case (compare Req. for Rev., and Answer & Cr. App., and Reply, with IHO Decision at p. 9). Therefore, absent an appeal of this order, it has become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see *M.Z. v. New York City Dep't of Educ.*, 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

B. Unilaterally Obtained SETSS Services

Turning first to the parent's appeal, a review of the evidence in the hearing record supports the parent's argument that the IHO erred by ignoring, or failing to consider, the progress report in evidence when assessing the appropriateness of the unilaterally obtained SETSS. As a result and as explained below, the IHO's finding must be reversed.

Consistent with the parent's contentions, the hearing record included a progress report, dated November 7, 2023 (November 2023 progress report), which had been prepared by one of the certified special education teachers (SETSS providers) who delivered the student's SETSS during the 2023-24 school year (compare Parent Ex. F at p. 1, with Parent Ex. I ¶ 16). Generally, the progress report indicated that the student, who was in fifth grade, exhibited "deficiencies in

¹⁰ State guidance explains that providing services on an "equitable basis" means that "special education services are provided to parentally placed nonpublic school students with disabilities in the same manner as compared to other students with disabilities attending public or nonpublic schools located within the school district" ("Chapter 378 of the Laws of 2007—Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the Individuals with Disabilities Education Act (IDEA) 2004 and New York State (NYS) Education Law Section 3602-c," Attachment 1 at p. 11, VESID Mem. [Sept. 2007], available at <http://www.p12.nysed.gov/specialed/publications/policy/nonpublic907.pdf>). The guidance document further provides that "parentally placed nonpublic students must be provided services based on need and the same range of services provided by the district of location to its public school students must be made available to nonpublic students, taking into account the student's placement in the nonpublic school program" (*id.*).

reading, fluency, comprehension, accuracy, spelling, and organization" (Parent Ex. F at p. 1).¹¹ Specific to reading skills, the SETSS provider reported that the student's "advanced" decoding and fluency skills were "weak," she occasionally omitted words, struggled "with both deciphering foreign words and accurately articulating them," and benefitted "from assistance to improve her fluency" (*id.*). Although the student had the "capacity to comprehend texts that [we]re somewhat below the standard grade level," when reading a novel, she struggled to respond to grade level open-ended comprehension questions and also with questions involving inferencing and higher-order thinking skills (*id.*). According to the progress report, the SETSS provider "educated and guided" the student in the "process of analyzing the question, following (sic) stressing the need to locate and retrieve the answer from the book" (*id.*). The student's goals noted within the progress report included the ability to decode a paragraph with 90 percent accuracy, summarize a paragraph in her own words and correctly answer four out of five comprehension questions, and read a paragraph at 90 words per minute, all at a fifth grade level (*id.*).

Next, the November 2023 progress report indicated that the student's writing skills were below grade level and, although she could "construct a sentence without assistance," the student "require[d] guidance in order to compose a whole paragraph" (Parent Ex. F at p. 1). With assistance from the SETSS provider, the student demonstrated the ability to compose an essay; however, she "tend[ed] to make errors in spelling and grammar" and the SETSS provider reported that the student's "spelling proficiency" was "two years behind the expected level for her grade" (*id.*). Although the student "excel[led] in organizing," she struggled to meet grade-level writing standards, and her grammar and spelling errors "result[ed] in an inability to effectively convey her thoughts" (*id.* at pp. 1-2). Additionally, the SETSS provider reported that the student's vocabulary was limited, she failed to use vocabulary words that were "suitable for her age," she composed "elementary, concise sentences," and she struggled to incorporate specific information into her writing (*id.* at p. 2). The SETSS provider reported that she used "prompting, underlining, and a plot diagram" with the student, and she developed goals for the student to improve her ability to compose a paragraph without help using a graphic organizer and to independently edit a paragraph that she wrote for punctuation and spelling (*id.*).

The SETSS provider indicated in the November 2023 progress report that the student's math skills were below grade level, she struggled to organize her knowledge, and she became overwhelmed when presented "with a large amount of information at once" (Parent Ex. F at p. 2). According to the SETSS provider, the student's use of visual aids and whiteboards was "quite effective," and the student's goal was to "score 90 [percent] or higher on a grade level exam" (*id.*).

Regarding the student's performance in the classroom, the November 2023 progress report reflected that the student became "immersed in her own internal realm," she found it "difficult to participate," she "hardly ever raise[d] her hand," and that she was "unable to keep up with what [wa]s going on and w[ould] miss deadlines if she d[id] not have support" (Parent Ex. F at pp. 1-2). The SETSS provider reported that the student needed "assistance in order to learn and become proficient in the topic because she c[ould] not do so on her own" (*id.* at p. 2). Socially, the progress

¹¹ Results of academic achievement testing conducted in March 2022 reflected in the student's April 2022 IESP indicated that the student exhibited deficits in reading comprehension and math problem solving skills, and her scores in word reading, spelling, and numerical operation skills fell within the low average range (*see* Parent Ex. B at p. 1).

report described the student as "reserved," and indicated that "[g]etting along with new individuals [wa]s difficult for her" (*id.*). Further, the progress report indicated that the student did not communicate her thoughts or emotions, she did not "show much emotion" and she was "very hard to read" (*id.*). One of the student's goals was to improve her ability to express her feelings and explain her actions to an adult (*id.*).

The SETSS provider also reported that the student needed five hours of support to "stay on track with the lesson and retain her current level" of reading and writing skills, and so that material could be reviewed in an "accessible manner" due to her difficulty with concepts and need for visual aids (Parent Ex. F at p. 3).

At the impartial hearing, the director provided testimony by affidavit that, during the 2023-24 school year, the SETSS providers delivered five hours per week of SETSS to the student in a "1:1 setting" that was "typically" outside of the classroom (Parent Ex. I ¶¶ 5, 14-15, 21). The director testified that the sessions were "individualized" and included a "great deal of specialized instruction" (*id.* ¶ 21). According to the director, in addition to providing the student's SETSS, the SETSS providers developed goals for the student, which were reviewed quarterly, and the student's progress was measured through quarterly assessments, meetings with the SETSS providers and support staff, observation of the student in the classroom, and daily session notes (*id.* ¶ 22). She further testified that the progress report in evidence was "an accurate representation" of what the SETSS providers had been working on with the student during the 2023-24 school year (*id.* ¶¶ 19-20). The director indicated that the student had "already shown signs of progress"; however, due to her academic and social delays, the student required the continuation of five periods per week of SETSS for the 2023-24 school year (*id.* ¶¶ 23-24).

Based on the foregoing—and contrary to the IHO's findings—the November 2023 progress report, together with testimonial evidence, reflects the student's needs, as well as the goals and progress the student made, during the 2023-24 school year related to the SETSS delivered to the student. Thus, the IHO's finding that the parent failed to sustain her burden to establish the appropriateness of the unilaterally obtained SETSS must be reversed and the district must reimburse or directly fund the costs of the SETSS delivered to the student from September 7, 2023 through the date of this decision. Thereafter, the district must—consistent with the IHO's order, which neither party has appealed—identify and provide a qualified SETSS provider to deliver the student's services for the remainder of the 2023-24 school year.

C. OT Services

The parent argues that the IHO erred by failing to award sufficient compensatory educational services for OT under pendency. The parent contends that the student has not received any OT services during the 2023-24 school year—or pursuant to the pendency agreement—and thus, the student is entitled to receive 40 hours of compensatory OT services.

The district, as a cross-appeal, contends that the IHO erred by awarding compensatory OT services. The district argues that the student is not entitled to any award of OT services because the hearing record fails to contain any evidence that the student did not make progress without the services. Therefore, any compensatory educational services, which, as relief, aims to put the student in the same position she would have been in but for the failure to offer a FAPE, would be

inappropriate. Similarly, the district asserts that any award of compensatory educational services for OT would exceed appropriate compensation because the school year at issue is nearly half over. The district also argues that the student is not entitled to additional OT services for missed pendency services because the parent engaged private providers to deliver such services and once obligated to do so, the district cannot be held liable for any such services not delivered to the student.

Initially, the student may be entitled to an award of compensatory educational services under two different rationales: first, as relief for the district's failure to offer the student a FAPE by failing to implement the OT services pursuant to the recommendation in her IESP; or second, as a remedy for missed pendency OT services.

With regard to any missed pendency OT services, the student's entitlement to pendency services began with the filing of the parent's due process complaint notice, dated September 7, 2023. Under the IDEA and the New York State Education Law, the student was then required to 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. of the 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]).¹² 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]). The pendency provision does not require that a student remain in a particular site or location (T.M., 752 F.3d at 170-71; Concerned Parents and 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).

¹² 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).

The Second Circuit has held that where a district fails to implement a student's pendency placement, students should receive the pendency services to which they were entitled as a compensatory remedy (Doe v. E. Lyme, 790 F.3d 440, 456 [2d Cir. 2015] [directing full reimbursement for unimplemented pendency services awarded because less than complete reimbursement for missed pendency services "would undermine the stay-put provision by giving the agency an incentive to ignore the stay-put obligation"]; see Student X, 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]).

Generally, if a district was required to provide pendency services to the student 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 be warranted (see E. Lyme, 790 F.3d at 456-57). Or, if 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 (id.).

In contrast, evidence, at times, demonstrates that the parent obtained the student's pendency services through private providers. In that instance, having arranged for and agreed to the delivery of the services by the private provider, the parent elected to carry the responsibility for ensuring the delivery of the stay-put services, with the district remaining responsible only for funding the services so delivered. As such, the parent assumes the risk that unforeseen events would cause the terms of the pendency agreement to be undesirable. Thus, for example, a parent's difficulty in locating a private provider is a risk that the parent assumes.

Here, neither party disputes that the student was entitled to receive two 30-minute sessions per week of individual OT services as a part of the student's pendency placement. Instead, the dispute focuses on which party bore the responsibility to implement the student's OT pendency services, and whether any delay therein must be remedied. On this point, the evidence in the hearing record is equivocal and does not clearly point to whether the district or the parent was responsible for implementing the student's OT pendency services. For example, the parent's contract with Stepfwd, executed in July 2023 prior to the start of the 10-month school year, included the delivery of two 30-minute sessions per week of individual OT (see Parent Ex. E at p. 1). According to the contract, however, the parties agreed that Stepfwd would "make every effort to implement the recommended services" set forth in the contract, but the contract did not include a rate for the OT services to be delivered (id. at pp. 1-2). Although the contract between the parent and Stepfwd included the delivery of OT services, the parent testified that she had not been able to locate an OT provider in order to provide the student with the OT services mandated in her "most recent IESP," and requested a bank of 40 hours of OT as a remedy (Parent Exs. E at pp. 1-2; H ¶¶ 12-13). And while the IHO appears to have ordered the district to fund 18 hours of OT services as compensatory educational services because the student was not receiving OT services pursuant to pendency, the IHO did not indicate whether it was the district or the parent who was obligated to provide the student with OT services that were not delivered (see IHO Decision at pp. 8-9).

To further confuse the issue, the district, in its statement of material facts in the answer and cross-appeal, appears to admit that it had "agreed to implement the services in the 2022 IESP pursuant to pendency" (Answer & Cr. App. ¶ 7). Then, as a part of its cross-appeal, the district argues to the contrary—that once the parent contracted with Stepfwd to provide OT and SETSS to the student, it was the parent's obligation to provide OT services and the district could not be liable for any failure to do so (*id.* ¶ 14).

Therefore, based on the foregoing, it is altogether unclear from the evidence and the arguments now on appeal, whether the parent or the district was responsible for implementing the student's OT pendency services. As a result, the undeveloped hearing record cannot form the basis to make this determination at this juncture.

Nevertheless, the evidence in the hearing record firmly establishes that, as relief for the district's failure to offer the student a FAPE, the student was entitled to compensatory educational OT services for the 2023-24 school year from September 7, 2023 through the date of this decision, consisting of two 30-minute sessions per week of individual OT (or one hour per week), which shall be calculated based on a 10-month school year (or 36 weeks). Thereafter, the district must—consistent with the IHO's order, which neither party has appealed—identify and provide a qualified OT provider to deliver the student's services for the remainder of the 2023-24 school year.

VII. Equitable Considerations

As a final argument, the district contends that the cost of the parent's unilaterally obtained SETSS was excessive especially since Stepfwd delivered the services individually, rather than in a group setting; thus, the district asserts that equitable considerations warrant a complete denial of funding for SETSS. In response, the parent argues that the alleged excessiveness of the SETSS rate was not raised at the impartial hearing and the hearing record is devoid of evidence to suggest that the SETSS rate was excessive.

The final criterion for a reimbursement award is that the parent's claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (*Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 374 [1985]; *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. v. Scarsdale Union Free Sch. Dist.*, 744 F.3d 826, 840 [2d Cir. 2014] [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]). The 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"]).

Generally, an excessive cost argument focuses on whether the rate charged for service was reasonable and requires, at a minimum, evidence of not only the rate charged by the unilateral placement, but evidence of reasonable market rates for the same or similar services. Here, the district's assertion is baseless, as it is not supported by any evidence in the hearing record because no such evidence was introduced or entered into the hearing record regarding the cost of the SETSS (see generally Tr. pp. 1-19; Parent Exs. A-I; Dist. Ex. 1). As a result, the district's argument is dismissed.

VIII. Conclusion

Having determined that the evidence in the hearing record does not support the IHO's finding that the parent's unilaterally obtained SETSS were not appropriate and having found that the student is entitled to one hour per week of individual, compensatory OT services from September 7, 2023 through the date of this decision, the necessary inquiry is at an end.

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's decision, dated December 6, 2023, is modified by reversing the IHO's determination that the parent's unilaterally obtained SETSS were not appropriate to meet the student's needs; and,

IT IS FURTHER ORDERED that the district shall reimburse or directly fund the costs of the unilaterally obtained SETSS delivered to the student during the 2023-24 school year at a rate consistent with the contract, to wit, \$220.00 per hour, from September 7, 2023, through the date of this decision; and,

IT IS FURTHER ORDERED that the district shall fund a bank of compensatory OT services for its failure to offer the student a FAPE for the 2023-24 school year, from September 7, 2023, through the date of this decision, consistent with the recommendation for two 30-minute individual OT sessions per week; and,

IT IS FURTHER ORDERED that the district shall identify and provide a qualified SETSS provider and a qualified OT provider to deliver the student's SETSS and OT services from the date of this decision through the remainder of the 2023-24 school year unless the parties otherwise agree.

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

CAROL H. HAUGE
STATE REVIEW OFFICER