



The University of the State of New York

The State Education Department

State Review Officer

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No. 24-010

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:

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 that respondent (the district) fund the costs of the unilaterally obtained services delivered to her daughter at specified rates for the 2023-24 school year, and which denied her request for compensatory educational services. The appeal must be sustained.

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 § 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). 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

A CSE convened on April 9, 2021 and developed an IESP for the student with an implementation date of April 17, 2021 (Parent Ex. D at pp. 1, 8). At the time of the April 2021 CSE meeting, the student was parentally placed at a nonpublic school (*id.* at p. 3). The April 2021 CSE found the student eligible for special education and related services as a student with an other

health-impairment (id. at p. 1).¹ The April 2021 CSE recommended that the student receive five periods per week of direct, group special education teacher support services (SETSS) in English in a separate location, and two 30-minute sessions per week of individual occupational therapy (OT) in English in a separate location (id. at p. 8).²

By email dated September 2, 2022, the parent provided ten-day written notice to the district with an attached letter also dated September 2, 2022 (Parent Ex. C at p. 1). The body of the September 2, 2022 email stated that the notice "[wa]s in reference to the 2022-23 school year" (id.). In the accompanying letter, the parent wrote to the CSE stating that an April 9, 2021 CSE had recommended SETSS and related services for the student, and that she consented to the district implementing the services (id. at p. 2). The parent also notified the district that she had no way of implementing the recommendations and that she had been unable to locate providers for the SETSS and related services at the district's standard rate (id.). The parent then indicated that she had "no choice but to implement the IESP on [her] own and seek reimbursement or direct payment from the [district]" (id.).

On April 28, 2023, during second grade, the student was evaluated by the district for OT services (Dist. Ex. 3 at p. 1). According to the April 30, 2023 evaluation report, the student was referred by her parents for a school-based OT evaluation to determine if the student would benefit from OT services in the school setting to participate in the curriculum and to develop and retain skills to meet academic goals (id. at pp. 1, 6).

A May 11, 2023 progress report indicated that the student was receiving five hours of SETSS per week from a private agency, "yes i can" (Yes I Can) (Parent Ex. F at pp. 1, 6).

By email dated May 30, 2023, the parent provided the district with a notice of residence with an attached letter also dated May 30, 2023 (Parent Ex. H at p. 1). The accompanying letter indicated that the student was a resident of the district and entitled to services and special education programming from the district (id. at p. 2). The parent requested that the student "receive all services that they require via the [district]" and provided consent for the district to provide "all necessary special education and related services" (id.). Lastly, the letter stated that the student would be parentally placed at a nonpublic school for the 2023-24 school year (id.).

On August 3, 2023, the parent signed an engagement letter/contract with Yes I Can, which was countersigned by a representative of Yes I Can on August 22, 2023 (Parent Ex. E at pp. 1, 3). The engagement letter included a list of professional services, requirements that the parent must follow related to attendance and cooperation with the CSE, and a rate sheet of all available services (id. at pp. 1-3, 5). The engagement letter indicated that the parent was obtaining SETSS but did not state the term of the services or a rate for the specific student (id. at p. 3).

¹ The student's eligibility for special education is not in dispute. The April 2021 CSE found the student eligible as a student with an other health-impairment, and a September 2023 CSE found the student eligible as a student with a learning disability (see 34 CFR 300.8[c][9], [10]; 8 NYCRR 200.1[zz][6], [10]).

² SETSS is not defined in the State continuum of special education services (see 8 NYCRR 200.6). As has been laid out in prior administrative proceedings, the term is not used anywhere other than within this school district and a static and reliable definition of "SETSS" does not exist within the district.

A. Due Process Complaint Notice and Subsequent Events

By due process complaint notice dated September 7, 2023, the parent alleged that the student had been denied a free appropriate public education (FAPE) for the 2023-24 school year (Parent Ex. A at pp. 2, 3). The parent claimed that the student was entitled to pendency based on an unappealed December 2, 2022 IHO decision, which constituted the "last agreed upon program" (*id.* at p. 2). The parent contended that the student's pendency services consisted of five periods per week of direct, group SETSS in English, and two 30-minute sessions per week of individual OT in English (*id.*). The parent next asserted that the district had not convened a CSE for the 2023-24 school year (*id.*). The parent argued that the April 9, 2021 IESP was "outdated and expired" but also sought implementation of the April 9, 2021 IESP (*id.*). The parent further alleged that she was "unable to locate SETSS and related services providers" on her own for the 2023-24 school year, but also "ha[d] located appropriate services providers independently for the 2023-24 school year" (*id.*). The parent argued that the district had failed to implement its own recommendations and that, "[w]ithout supports, the parental mainstream placement [wa]s untenable and the failure to either implement the services or provide a placement [wa]s a denial of a FAPE for the 2023-24 school year" (*id.*). As relief, the parent requested a finding that the district failed to offer a FAPE for the 2023-24 school year because it failed to convene a CSE, recommend placement or services, and implement its own recommendations (*id.* at p. 3). The parent also requested that the district "fund the program outlined in the [unappealed IHO decision] dated [December 2,] 2022 for the 2023-24 school year at reasonable market rate," and that the district fund a bank of compensatory periods of all services to which the student was entitled "under pendency for the entire 2023-24 school year - or the parts of which were not serviced" (*id.*).

The CSE convened on September 19, 2023 to develop an IESP with an implementation date of September 26, 2023 (Dist. Ex. 1 at pp. 1, 6). The September 2023 CSE found the student eligible for special education and related services as a student with a learning disability and recommended that the student receive five periods per week of direct, group SETSS in English in a separate location (*id.* at p. 6).

B. Impartial Hearing Officer Decision

The parties convened for an impartial hearing before the Office of Administrative Trials and Hearings (OATH) on November 22, 2023 (Tr. pp. 1-41). Each of the parties' exhibits were admitted into the hearing record without objection and the IHO did not permit either party to give an opening statement (Tr. p. 5; *see* IHO Decision at p. 4). The parties did give closing statements (Tr. p. 36).

In a decision dated December 6, 2023, the IHO found that the September 2023 IESP was an appropriate program recommendation for the student but that the district failed to implement the IESP for the 2023-24 school year and, as a result, the student was denied a FAPE (IHO Decision at p. 6). The IHO then addressed the appropriateness of the parent's unilaterally obtained services and determined that the parent did not meet her burden (*id.* at pp. 7-8). Specifically, the IHO found that the parent's witnesses did not testify as to what the SETSS provider worked on with the student, that the agency witness had not directly observed any sessions with the student, and the SETSS provider had not been involved with developing the curriculum (*id.* at p. 7). The IHO also noted that the student's progress report was dated May 11, 2023, but did not provide

details about what the student was working on during the 2023-24 school year (id.). Next, the IHO found that the contract with the agency providing the student's SETSS was signed on August 3, 2023, but never stated when services began (id.). The IHO found that the parent's evidence in the hearing record was insufficient to support the appropriateness of the unilaterally obtained SETSS (id.). The IHO noted that it would have been helpful to review the student's schedule, and progress reports that evidenced how the program was tailored to address the student's specific needs (id.). In conclusion, the IHO found that the evidence did not support that the SETSS provider identified the student's needs and then provided services specially designed to address the student's unique needs (id. at p. 8).

Turning to the parent's request for compensatory relief for services which the parent claimed the student was entitled to under pendency, the IHO denied the parent's requests for compensatory SETSS and compensatory OT services (IHO Decision at pp. 8-9). The IHO determined that the student was only receiving SETSS under pendency and did not receive any OT services under pendency (id. at p. 9). However, she found that the district had presented sufficient evidence to support the removal of OT from the student's IESP (id.). The IHO then determined that it was "therefore not necessary that [the s]tudent receive a bank of compensatory hours for special education services that ha[d] been determined to no longer be needed" and denied the parent's request for OT (id.). The IHO also found that, since the student was "receiving pendency for SETSS, [the p]arent's request for a bank of compensatory SETSS hours [wa]s also denied" (id.). The IHO then ordered that, within 30 days of her decision, the district must identify and provide qualified providers to implement five hours per week of SETSS with the student for the remainder of the 10-month 2023-24 school year (id. at p. 10).

IV. Appeal for State-Level Review

The parent appeals and argues that the IHO was biased against her and erred in failing to award her requested relief.³ The parent asserts that she provided sufficient evidence to establish that her unilaterally obtained services were appropriate and that equitable considerations warranted direct funding. The parent further contends that the IHO erred in failing to award compensatory services for OT that was not provided or funded by the district despite agreeing to the student's pendency services. As relief, the parent requests funding for her unilaterally obtained SETSS, funding for OT services for the 2023-24 school year that have not been obtained, and a bank of hours of OT that the district was required to fund as pendency during the proceedings. The parent also appeals from the IHO's award of five hours per week of SETSS to be provided by the district,

³ It is well settled that an IHO must be fair and impartial and must avoid even the appearance of impropriety or prejudice (see, e.g., Application of a Student with a Disability, Appeal No. 12-066). Moreover, an IHO, like a judge, must be patient, dignified, and courteous in dealings with litigants and others with whom the IHO interacts in an official capacity and must perform all duties without bias or prejudice against or in favor of any person, according each party the right to be heard, and shall not, by words or conduct, manifest bias or prejudice (e.g., Application of a Student with a Disability, Appeal No. 12-064). In her request for review, the parent alleges that the IHO had a history of discrimination toward her community, which did not include any specific allegations related to the impartial hearing or the student in this matter. I have conducted an independent review of the hearing record and do not find any evidence of the IHO engaging in any inappropriate conduct, bias, or discrimination.

as she did not request this relief in her due process complaint notice. The parent has attached a document to the request for review for consideration as additional evidence.⁴

In an answer, the district denies the parent's allegations and argues that the IHO's decision should be affirmed. In the event it is determined that the student is entitled to compensatory services, the district does not object to an award of one hour per week of OT for the pendency of the proceedings.

V. Applicable Standards

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

However, under State law, parents of a student with a disability who have privately enrolled their child in a nonpublic school may seek to obtain educational "services" for their child by filing a request for such services in the public school district of location where the nonpublic school is located on or before the first day of June preceding the school year for which the request for services is made (Educ. Law § 3602-c[2]).⁵ "Boards of education of all school districts of the state shall furnish services to students who are residents of this state and who attend nonpublic schools located in such school districts, upon the written request of the parent" (Educ. Law § 3602-c[2][a]). In such circumstances, the district of location's CSE must review the request for services and "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an [IEP]" (Educ. Law § 3602-c[2][b][1]). The CSE must "assure that

⁴ The parent has submitted a progress report from the SETSS provider dated December 14, 2023 and requests that it be considered as additional evidence. The district objects to the parent's submission and argues that while dated December 14, 2023, the information contained in the document was available at the time of the impartial hearing. Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an impartial hearing officer's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of the Dep't of Educ., Appeal No. 08-024; Application of a Student with a Disability, Appeal No. 08-003; Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 06-040; Application of a Child with a Disability, Appeal No. 05-080; Application of a Child with a Disability, Appeal No. 05-068; Application of the Bd. of Educ., Appeal No. 04-068). The December 14, 2023 progress report was not available at the time of the impartial hearing, and I find that it is necessary in order to render a decision. Therefore, I will exercise my discretion and accept the progress report as additional evidence. For purposes of this decision, the December 2023 progress report will be cited as SRO Exhibit A.

⁵ 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]).

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.*).⁶ Thus, under State law an eligible New York State resident student may be voluntarily enrolled by a parent in a nonpublic school, but at the same time the student is also enrolled in the public school district, that is dually enrolled, for the purpose of receiving special education programming under Education Law § 3602-c, dual enrollment services for which a public school district may be held accountable through an impartial hearing.

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

VI. Discussion

A. Unilaterally Obtained Services

The district does not appeal from the IHO's decision that the failure to implement the September 2023 IESP resulted in a denial of a FAPE to the student for the 2023-24 school year (IHO Decision at p. 6). Accordingly, this determination has become final and binding upon the parties (see 34 CFR 300.514[a]; 8 NYCRR200.5[j][5][v]; see *M.Z. v. New York City Dep't of Educ.*, 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]). On appeal, the crux of the dispute between the parties relates to the appropriateness of the SETSS unilaterally obtained by the parent and delivered to the student by Yes I Can during the 2023-24 school year.

Prior to reaching the substance of the parties' arguments, some consideration must be given to the appropriate legal standard to be applied. In this matter, the student has been parentally placed in a nonpublic school and the parent does not seek tuition reimbursement for the cost of the student's attendance there. In her September 7, 2023 due process complaint notice, the parent alleged that the district had not developed an IESP for the 2023-24 school year and as a self-help remedy she unilaterally obtained private services from Yes I Can for the student without the consent of the school district officials, and then commenced due process to obtain remuneration for the costs thereof (Parent Ex. A at p. 2). Accordingly, the issue in this matter is whether the parent is entitled to public funding of the costs of the private SETSS. "Parents who are dissatisfied with their child's education can unilaterally change their child's placement . . . and can, for

⁶ 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.*).

example, pay for private services, including private schooling. They do so, however, at their own financial risk. They can obtain retroactive reimbursement from the school district after the [IESP] dispute is resolved, if they satisfy a three-part test that has come to be known as the Burlington-Carter test" (Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 526 [2d Cir. 2020] [internal quotations and citations omitted]; see Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 14 [1993] [finding that the "Parents' failure to select a program known to be approved by the State in favor of an unapproved option is not itself a bar to reimbursement"]).⁷

The parent's request for privately-obtained services must be assessed under this framework. That is, a board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Carter, 510 U.S. 7; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 252 [2d Cir. 2009]). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

Turning to a review of the appropriateness of the unilaterally obtained services, the federal standard is instructive. A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998]). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (id. at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 207 [1982]). Parents need not show that the placement 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

⁷ State law provides that the parent has the obligation to establish that a unilateral placement is appropriate, which in this case is the special education services that the parent obtained from Yes I Can for the student (Educ. Law § 4404[1][c]).

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, the hearing record includes a May 11, 2023 progress report prepared by the special education teacher during the 2022-23 school year that reflects the student's present level of functioning and goals to improve her reading, math, written language, and social skills (see Parent Ex. F). Specifically with regard to reading, the progress report indicated that administration of a Fountas and Pinnell assessment to the student reflected performance at level "C," which was considered to be "a significant delay of two grades below level," and, although the student had "finally mastered" reading basic words, she continued to struggle with accuracy and fluency (id. at p. 1). To address those needs, the special education teacher used "scaffolding methodologies" to help the student master her reading goals (id.). At that time, the student was working on a reading goal to improve her ability to "blend onset words" by using "various activities as well as visual and tactile materials" (id. at p. 2). To improve the student's reading comprehension skills, the special education teacher used prompts for the student to re-read the text, organizational graphs to help the student "sort out the information in a clear manner," the "highlighting technique" to help her isolate important details, and "illustrations and picture cards" to teach the student to "independently depict key details for retelling" (id. at pp. 2-3). Goals to improve the student's reading comprehension included that she would read grade-level text with purpose and understanding and retell familiar stories with key details (id. at p. 2). To address the student's struggle with focusing during group reading activities, the special education teacher used "think

alouds and role-modeling" to achieve her goal to "[a]ctively engage in reading group activities with purpose and understanding" (id. at p. 3).

Regarding expressive and written language skills, the special education teacher identified that the student exhibited difficulty using basic punctuation and producing structured sentences, and that she had "a poor vocabulary" (Parent Ex. F at p. 5). The special education teacher reported that she used explicit instruction, worksheets, self-monitoring checklists, modeling, sentence starters, and prompts to work on goals including recognizing and naming "end punctuation," and producing and expanding complete sentences in language activities (id.).

In the area of math, the special education teacher reported that the student had difficulty adding and subtracting two digit numbers on paper and counting money (Parent Ex. F at p. 3). To address these needs, the special education teacher used manipulatives, scaffolding, visuals, a number line, prompts and reinforcement, while working on goals to compare two written numbers, understand the relationship between numbers and quantities, and "connect counting to cardinality" (id. at pp. 3-4).

The special education teacher reported that the student was "self-conscious," struggled to request help when unsure what to do, and had difficulty initiating and sustaining attention when conversing with peers (Parent Ex. F at p. 4). To address those needs, the special education teacher used role-modeling, social thinking curriculums, and modeling while working on goals for the student to improve her ability to ask and answer questions for a variety of purposes, and to speak audibly and express thoughts, feelings, and ideas clearly (id. at pp. 4-5).

Regarding the school year at issue, the associate director of educational services of Yes I Can (associate director) provided affidavit testimony that during the 2023-24 school year the student received five hours per week of SETSS from a certified special education teacher who was "trained and experienced to teach literacy and comprehension to school aged" students (Parent Ex. I ¶¶ 4, 11). According to the associate director, the special education teacher also prepared for sessions, created goals for the student for the 2023-24 school year which were reviewed quarterly, wrote progress reports, and met with teachers and parents (id. ¶¶ 12, 13). Services were "typically provided both inside the classroom as push-in sessions and 1:1 in a separate location," and the associate director stated that sessions were "individualized" and included "a great deal of specialized instruction" (id. ¶ 15). The associate director testified that the student's progress was measured through quarterly assessments, meetings with the special education teacher and support staff, observation of the student in the classroom, and daily session notes (id. ¶ 16).

The associate director testified that the student had "already shown signs of progress with her SETSS service provider"; however, the student's "academic and social delays warrant[ed] the need for continued services" (Parent Ex. I ¶ 17; see Parent Ex. F at p. 6). The associate director testified that the May 2023 "progress report entered into evidence [wa]s an accurate representation of what [the special education teacher] has been working on with [the student], including goals, over the course of the 2023-2024 school year" (Parent Ex. I ¶ 14).

Also relevant to the appropriateness of the private SETSS obtained by the parent for the 2023-24 school year is the CSE's recommendation of a similar program for the student for the same time period. The student's special education teacher who delivered the student's SETSS and

completed the May 2023 progress report attended the September 2023 CSE meeting (compare Dist. Ex. 1 at p. 9, with Parent Ex. F at p. 6). According to the IESP, the student's full-scale IQ was in the average range, and her "performance was relatively consistent across all the [p]rimary index [s]cores, suggesting that these abilities [we]re developing evenly" (Dist. Ex. 1 at pp. 1-2). According to results of an undated administration of the Kaufman Test of Educational Achievement-Third Edition included in the September 2023 IESP, the student's performance on measures of her ability to identify letters and read "grade-appropriate words" was at a 4.0 grade level equivalent, and her reading comprehension skills were at a 2.5 grade level equivalent (id. at p. 2). The student's written language skills were at a "K.10 grade equivalent level," and spelling skills were at a second grade level (id.). Her performance on a subtest measuring skills such as number concepts, arithmetic, time, money, and measurement was at the "1.11 grade level equivalent," and her math calculation skills were at a second grade level (id.). The September 2023 IESP reflected information from the student's special education teacher that the student could "read" but could not "decode" on grade level and needed encouragement "when presented with challenges in reading" (id.). Additionally, the IESP indicated that problem solving was difficult for the student because she required tasks to be broken down (id.). The IESP noted that generally the student's reading skills were "within the beginning second grade" level and her math skills were "middle second grade" (id.). Further, the IESP reflected that the student would benefit from visual presentation of lessons, tactile learning experiences, graphic organizers, encouragement, small learning groups, and "'chunking' of math word problems" (id. at p. 3).

The September 2023 IESP indicated that socially, the student played well with other students, and followed "rules and regulations" (Dist. Ex. 1 at pp. 2-3). Physically, the student demonstrated "appropriate gross motor and neuromotor/muscular skills," including that she could "navigate various surfaces at school, move around obstacles," and was independent with most age-appropriate activities of daily living (id. at p. 3).

The September 2023 CSE developed annual goals related to syllabifying words; applying spelling rules; using vocabulary words; applying phonics and word analysis skills to decode and encode words; reading with accuracy and fluency; answering literal and inferential questions about a passage; producing organized essays; translating algebraic expressions into sentences; solving multiplication and division literacy based problems; and using age-appropriate methods to express frustration (Dist. Ex. 1 at pp. 4-5). The CSE recommended five periods per week of direct, group SETSS in a separate location (id. at p. 6).

Given the detailed articulation in the May 2023 progress report of the student's areas of need, goals, and strategies used by the special education teacher from Yes I Can during the 2022-23 school year, combined with the associate director's testimony that May 2023 progress report also reflected what the provider was addressing with the student during the 2023-24 school year, and the September 2023 CSE's recommendation for a similar program of SETSS with annual goals for the 2023-24 school year,⁸ the totality of the evidence in the hearing record supports a finding

⁸ The September 2023 CSE's recommendation was not identical to the privately obtained services in that the CSE recommended group SETSS in a separate location, whereas the special education teacher from Yes I Can delivered the services individually both in and outside of the classroom; however, both consisted of the same type of service at the same frequency and duration (compare Dist. Ex. 1 at p. 6, with Parent Ex. I ¶ 15).

that unilaterally obtained SETSS delivered by a special education teacher from Yes I Can during the 2023-24 school year were appropriate.

Further bolstering this determination, a review of the December 2023 progress report submitted by the parent as additional evidence reflects that the special education teacher continued delivering instruction specially designed to meet the student's needs while updating methodologies, strategies, and goals for the 2023-24 school year (see SRO Ex. A). According to the December 14, 2023 progress report, the student continued to exhibit delays in reading, math and social skills (id.). With regard to reading, the student's performance on an administration of the Fountas and Pinnell assessment was at level "G," which although an improvement from the May 2023 administration, was considered to be "two grades below level" (compare Parent Ex. F at p. 1, with SRO Ex. A at p. 1). The student exhibited difficulty decoding grade level, multisyllabic, and unfamiliar words, and was working on reading goals using the Wilson Reading Program methodologies (SRO Ex. A at pp. 1-2). Regarding reading comprehension, the progress report indicated that the student read simple stories and answered basic questions at her current reading level, but exhibited difficulty with higher order thinking questions, problem solving, and comparing and contrasting (id. at p. 2). To address these needs, the special education teacher used highlighters to help the student find details in texts and encouraged her to focus on unknown words using a "window box" while reading (id.).

To address the student's expressive and written language delays, the special education teacher reported that she repeated instructions, and used a "[w]hole language approach, visuals and worksheets" to improve the student's ability to use follow multi-step instructions, express her thoughts and feelings, use different types of nouns, and spell untaught words phonetically (SRO Ex. A at pp. 4-5). In math, the December 2023 progress report indicated that the student used manipulatives, charts to organize numbers on the paper, targeted practice, objects, drawings, equations, visuals, and breaking down problems into steps to work on goals to improve problem solving skills, addition fluency, and her ability to apply properties of operations (id. at pp. 3-4).

In the area of social skills, the December 2023 progress report indicated that the student was "aware that she c[ould] not keep up in class and that her reading and math skills" were below grade level (SRO Ex. A at p. 1). The special education teacher used a specific "social thinking training" program, modeling, role play, and "tools" for social interaction to improve the student's ability to initiate conversation and join peers during various points in the school day, respond to the others' comments, and self-awareness (id. at p. 4). The special education teacher reported that the student was making progress; however, it was "crucial" for the student to continue to receive five hours of SETSS per week to function in a mainstream classroom, as she continued to present with delays in academic, language, and social skills (id. at p. 5).

Based on the foregoing evidence and my independent review of the hearing record, I find that the IHO erred in concluding that Yes I Can did not provide appropriate unilateral services to the student when viewed under the totality of the circumstances.

B. Equitable Considerations and Relief

Under the federal standard, 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"]).

Reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to their removal of the student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger, 348 F.3d at 523-24; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G., 459 F.3d at 376; Voluntown, 226 F.3d at 68).

Turning to the requirement for ten-day written notice, it appears that, during the impartial hearing, the parties, as well as the IHO, overlooked that the exhibit offered as proof of the parent's ten-day written notice for the 2023-24 school year was from the 2022-23 school year (Parent Ex. C at pp. 1-2; see Parent Ex. J at ¶ 5). For the first time in its answer, the district alleges that the parent failed to provide ten-day written notice. While the evidence of ten-day written notice in the hearing record was from the prior school year, under the very unique circumstances of this case, the lack of a ten-day notice pertaining to the 2023-24 school year should not be a bar to reimbursement. In this matter, the hearing record demonstrates that the district evaluated the student for OT services on April 28, 2023 at the parent's request (Dist. Ex. 3 at p. 1). The CSE failed to convene before the start of the 2023-24 school year and the parent's September 7, 2023 due process complaint notice raised identical claims as those raised for the 2022-23 school year; to wit: implementation of the April 2021 IESP (Parent Exs. A at pp. 2, 3; B at pp. 3, 4, 8; C at pp. 1, 2; J at ¶¶ 3, 4, 11). Given that the purpose of the ten-day written notice is to give the district an

opportunity, before the child is removed, to convene a CSE and in this instance, to develop an IESP, the district had already evaluated the student in April 2023 and failed to convene until after the parent filed the September 7, 2023 due process complaint notice. The hearing record reflects that there was already activity and communication between the parties in spring 2023, the parent's claims were identical and ongoing from the 2022-23 school year, and the district still failed to timely convene a CSE. In this limited circumstance, it cannot be said that the parent's failure to provide ten-day written notice interfered with the district's opportunity to remedy the failure to convene a CSE or implement the student's IESP. Based on the foregoing, there is no equitable basis for reducing or denying the parent's request for direct funding of SETSS.

Having found that the parent's unilaterally obtained services were not appropriate, the IHO did not reach the issue of equitable considerations (IHO Decision at p. 8). However, the IHO did comment on the parent's contract with Yes I Can, observing that the parent signed the contract on August 3, 2023, but that the contract did not indicate when the student began receiving services (id. at p. 7). The Second Circuit has held that some blanks that the parties did not fill in in a written agreement would not render an entire contract void and indicated that in the case before it that "the contract's essential terms—namely, the educational services to be provided and the amount of tuition—were plainly set out in the written agreement, and we cannot agree that the contract, read as a whole, is so vague or indefinite as to make it unenforceable as a matter of law" (E.M., 758 F.3d at 458). In New York, a party may agree to be bound to a contract even where a material term is left open but "there must be sufficient evidence that both parties intended that arrangement" and an objective means for supplying the missing terms (Express Indus. & Terminal Corp. v. N.Y. State Dep't of Transp., 93 N.Y.2d 584, 590 [1999]; 166 Mamaroneck Ave. Corp. v. 151 E. Post Rd. Corp., 78 N.Y.2d 88, 91 [1991]). Here, while the contract does not include a date when services would begin, the duration of a school year, including the first day of school, is information that may be objectively obtained and, overall, review of the hearing record reflects that the parent established that she had financial obligation for the services obtained from Yes I Can (Parent Exs. E at pp. 2, 3; J at ¶¶ 6-9).

Based on the foregoing, the district shall be required to fund the costs of up to five periods per week of SETSS delivered by Yes I Can during the 2023-24 school year. Given this determination, the alternative relief ordered by the IHO—requiring the district to provide the student five hours per week of SETSS for the remainder of the 2023-24 school year—is unnecessary.

C. Compensatory Services

The parent also requests a bank of compensatory OT services for the district's failure to provide pendency services. The district indicates in its answer that, if the parent's allegation that the student did not receive OT pursuant to pendency "is correct," it "does not contest" that the student would be entitled to one hour per week of OT pursuant to pendency.

Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). The purpose of an award of compensatory education is to provide an appropriate remedy for a denial of a FAPE (see E.M., 758 F.3d at 451; P. v. Newington Bd. of Educ., 546 F.3d 111, 123 [2d Cir. 2008] [holding that compensatory education is a remedy designed to "make up for" a denial of a

FAPE]; see also Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 456 [2d Cir. 2015]; Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005] [holding that, in fashioning an appropriate compensatory education remedy, "the inquiry must be fact-specific, and to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"]; Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1497 [9th Cir. 1994]). Accordingly, an award of compensatory education should aim to place the student in the position he or she would have been in had the district complied with its obligations under the IDEA (see Newington, 546 F.3d at 123 [holding that compensatory education awards should be designed so as to "appropriately address[] the problems with the IEP"]; see also Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1289 [11th Cir. 2008] [holding that "[c]ompensatory awards should place children in the position they would have been in but for the violation of the Act"]; Bd. of Educ. of Fayette County v. L.M., 478 F.3d 307, 316 [6th Cir. 2007] [holding that "a flexible approach, rather than a rote hour-by-hour compensation award, is more likely to address [the student's] educational problems successfully"]; Reid, 401 F.3d at 518 [holding that compensatory education is a "replacement of educational services the child should have received in the first place" and that compensatory education awards "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA"]).

In denying the parent's request for compensatory OT, the IHO found that the district's September 2023 IESP was substantively appropriate and correctly removed the recommendation for OT based on the April 2023 OT evaluation (IHO Decision at p. 9). Thus, IHO determined that the student was not entitled to compensatory OT services for missed pendency as the district had demonstrated that the student no longer needed OT to receive a FAPE (id.). This was error.

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, 959 F.3d at 531; 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]). 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 parties in this matter entered into an agreement that the student's pendency was based on an unappealed IHO decision dated December 2, 2022, and consisted of five hours per week of group SETSS and two 30-minute sessions per week of individual OT (IHO Ex. I). The IHO erred in relying on the appropriateness of the September 2023 CSE's recommendations to find that the district was not responsible to deliver OT as part of the student's pendency placement because 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"]). And in this instance, there was no dispute between the parties that the student was entitled to pendency services, including OT.

With respect to implementation of the services, the pendency form did not indicate any provider information (IHO Ex. I). The unappealed IHO decision stated that if the district did not provide pendency, services were to be provided by a provider of the parent's choosing at a market rate to be funded by the district (Parent Ex. B at p. 9). There is no evidence in the hearing record to establish whether or not the district has provided or funded pendency services for the student.

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]). Thus, the student is entitled to a bank of compensatory OT services for missed pendency services beginning on September 7, 2023 through the pendency of the proceedings.

VII. Conclusion

The hearing record demonstrates that the parent met her burden to prove that unilaterally obtained SETSS delivered to the student by Yes I Can were appropriate for the 2023-24 school year and that the parent is entitled to direct funding for the costs of such services for the 2023-24 school year. In addition, the parent is entitled to a bank of hours of compensatory OT to make up for missed pendency services totaling one hour per week beginning September 7, 2023 through the date of this decision.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision, dated December 6, 2023, is modified by reversing those portions which found the parent failed to meet her burden to prove that unilaterally obtained SETSS were appropriate, denied the parents' requested relief, and ordered the district to deliver five hour per week of SETSS to the student for the remainder of the 2023-24 school year;

IT IS FURTHER ORDERED that the district is directed to fund the costs of up to five hours per week of SETSS delivered to the student by Yes I Can during the 2023-24 school year; and

IT IS FURTHER ORDERED that the district is directed to fund a bank of hours for compensatory OT services in the amount of one hour per week for the period from September 7, 2023 through the date of this decision.

Dated: **Albany, New York**
 February 15, 2024

SARAH L. HARRINGTON
STATE REVIEW OFFICER