



The University of the State of New York

The State Education Department

State Review Officer

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No. 24-067

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 Ezra Zonana, 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 2022-23 school year. Respondent 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 dismissed. The cross-appeal must be sustained in part.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; *see* 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

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

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

III. Facts and Procedural History

The parties' familiarity with this matter is presumed and, therefore, the detailed facts and procedural history of the case and the IHO's decision will not be recited here. The student was the subject of a previous due process proceeding and State-level review (Application of a Student with a Disability, Appeal No. 23-167). Therein it was noted that the student received a diagnosis of bilateral profound sensorineural hearing loss as an infant and received speech-language therapy and later center-based services through the Early Intervention Program (EIP) and that at approximately age three, the student was fitted for cochlear implants, supported by hearing aids (id.) During her preschool years, the student attended a center-based auditory/oral program for five days a week, and although the student aged out of committee for preschool special education (CPSE) services, the student remained in the preschool center-based program for approximately

two additional years at the parent's expense (id.). The student then transitioned to an in-district auditory/oral program in a 12:1+1 special class in a specialized school for the following three years in first and second grade (repeating second grade) (id.). In January 2020, a CSE convened and recommended that the student attend a 12:1+1 special class that used an auditory/oral teaching methodology for five periods a week for activities of daily living (ADLs), fifteen periods per week for English language arts (ELA), five periods per week for math, three periods per week for social studies, three periods per week for science, one period per week for visual arts, one 30-minute session per week of individual occupational therapy (OT), five 30-minute sessions per week of individual speech-language therapy, 12-month services, assistive technology, and supports for school personnel on behalf of the student (id.). The parent was dissatisfied with the January 2020 IEP and unilaterally placed the student in Pathway Elementary School (Pathway) beginning in September 2020 for the 2020-21 school year (id.). The parent challenged the January 2020 IEP and sought tuition reimbursement for Pathway for the 2020-21 school year and prevailed during the State-level review portion of the administrative proceedings (id.).

As relevant to the instant proceeding, the CSE convened on November 23, 2021 to develop the student's IEP, finding her eligible for special education services as a student with deafness (see generally Parent Ex. M).¹ The CSE recommended a 12:1+1 special class for math, ELA, social studies and science with related services of four 30-minute sessions of individual hearing education services, one 30-minute session of individual OT, and five 30-minute sessions of individual speech-language therapy (id. at p. 25). The CSE also recommended full time individual hearing assistive technology (id. at p. 26).

On July 13, 2022, the district sent the parent a prior written notice of the November 2021 CSE's recommendations, and a school location letter dated the same day (Dist. Exs. 2 at pp. 1-2; 3 at p. 1).

On July 27, 2022, the CSE reconvened to amend the student's IEP for the 2022-23 school year to include 12-month services (Parent Ex. B at p. 33; compare Parent Ex. M at pp. 26, 34, with Parent Ex. B at pp. 26, 31).²

Although the precise timing is unclear, it appears that the student had continued to attend Pathway through the end of the 2021-22 school year or for a short time into the beginning of fall 2022 (Parent Ex. B at p. 3; see Tr. p. 244). In mid-September 2022, the student began attending a private school in a general education classroom for the 2022-23 school year (Parent Ex. L ¶ 7; see Tr. pp. 244-45; Request for Review ¶ 6).

The parent disagreed with the recommendations contained in the July 2022 IEP for the 2022-23 school year and, as a result, notified the district on October 9, 2022 of her intent to contract with a private agency to provide special education teacher support services (SETSS), speech services and oral transliteration services and seek reimbursement from the district for the cost of

¹ The student's eligibility for special education as a student with deafness is not in dispute (see 34 CFR 300.8[c][3]; 8 NYCRR 200.1[zz][2]).

² Both parties submitted copies of the student's July 2022 IEP (compare Dist. Ex. 4, with Parent Ex. B). For purposes of this decision, only the parent's exhibit will be cited.

such services (see Parent Ex. K). In November 2022, the student began receiving services from Benchmark Student Services (Benchmark) (see Parent Exs. L at ¶9; H).

A. Due Process Complaint Notice

In a due process complaint notice, dated March 5, 2023, the parent through a lay advocate alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2022-23 school year (see Parent Ex. A). The parent alleged that the district failed to convene an annual review CSE meeting for the 2022-23 school year; "collect updated evaluations" of the student; consider the full continuum of services for the student; and provide the parent with prior written notice in accordance with State and federal laws (*id.* at p. 1). Additionally, the parent alleged that the district failed to offer any individualized instruction to the student and that a "dominant focus of a one-to-one setting was necessary" (*id.* at p. 3). The parent asserted that on a 12-month basis the student should receive services that consisted of ten hours per week of SETSS, five 30-minute sessions per week of individual speech-language therapy, one 30-minute session per week of individual OT, four 30-minute sessions per week of individual hearing education services, a daily full-time oral transliteration paraprofessional, and hearing assistive technology to be used daily (*id.*). As relief, the parent sought: an order directing the district to directly fund the student's SETSS and speech-language therapy that the parent privately contracted for during the 2022-23 school year at an "enhanced market rate"; "a bank of compensatory services to make up for any of the listed services not provided [to the student] during the [20]22-2023 [s]chool [y]ear"; and public funding for an independent neuropsychological evaluation of the student by a provider of the parent's choosing (*id.* at p. 5).

B. Events Post Dating the Due Process Complaint Notice

On April 25, 2023, the CSE convened to create an individualized education services plan (IESP) for the student with an implementation date of May 9, 2023 (see Parent Ex. J).³ The April 2023 CSE recommended eight hours per week of SETSS, three 30-minute sessions per week of individual speech-language therapy, two 30-minute sessions per week of group speech-language therapy and five 30-minute sessions per week of individual hearing education services (*id.* at pp. 14-15). The April 2023 CSE also recommended full time individual hearing assistive technology and a full time individual oral interpreter (*id.* at p. 15).

C. Impartial Hearing and Decision

An impartial hearing convened on April 26, 2023 and concluded on December 7, 2023, after 10-days of proceedings inclusive of two status conferences (Tr. pp. 1-506).⁴ In May 2023, the IHO issued an interim decision denying consolidation of this proceeding and the impartial hearing underlying Application of a Student with a Disability, Appeal No. 23-167, noting that the parent was represented by a different lay advocate in each proceeding, the other proceeding had nearly concluded, and that the district was represented by a different attorney in each proceeding

³ Both parties submitted copies of the student's April 2023 IESP (compare Dist. Ex. 7, with Parent Ex. J). For purposes of this decision, only the parent's exhibit will be cited.

⁴ A representative for the district did not appear for the April 26, 2023 status conference (see Tr. pp. 1-13).

(IHO Interim Decision dated May 1, 2023). During the June 12, 2023 impartial hearing, the representative from the district indicated that the district was not going to defend against the parent's allegation it failed to offer the student a FAPE for the 2022-23 school year, but reserved the right to challenge the appropriateness of the student's unilaterally obtained services (Tr. p. 30). The parent initially introduced twelve documents into the hearing record during the June 12, 2023 impartial hearing which were received into evidence (Tr. p. 88.).

Prior to the June 20, 2023 impartial hearing, the district sought a subpoena duces tecum to obtain the student's records from Benchmark for the 2022-23 school year and also sought to subpoena the individuals from Benchmark who provided SETSS and speech-language therapy to the student during the 2022-23 school year; the IHO modified and issued the subpoena duces tecum on October 30, 2023 (see IHO Exs. I-III). During the June 20, 2023 impartial hearing, the district offered eight exhibits to be admitted into evidence (Tr. pp. 61-62). The IHO marked the district's exhibits for identification purposes, but did not admit the documents into the hearing record at that time (Tr. p. 62). In November 2023, the IHO denied the parent's request to consolidate this proceeding with another due process proceeding filed with respect to the 2023-24 school year, noting among other things, that the parties were represented by different individuals (IHO Interim Decision dated Nov. 16, 2023). On December 7, 2023, the parent resubmitted all of her evidence to the IHO with the addition of another document for a total of thirteen documents (Tr. pp. 346-52). The IHO admitted all thirteen documents into the hearing record (*id.*). During the December 7, 2023 impartial hearing, the district sought to introduce four documents received in response to its June 20, 2023 subpoena duces tecum into the hearing record in addition to the eight documents previously marked for identification (Tr. pp. 434-36). The IHO admitted all of the district's evidence into the hearing record over the parent's objection (Tr. pp. 437-45).

In a final decision dated January 16, 2024, the IHO determined that the district failed to offer the student a FAPE for the 2022-23 school year, that the unilaterally-obtained SETSS and speech-language therapy provided by Benchmark were not appropriate, and that equitable considerations did not weigh in favor of the parent's request for direct payment for such services (IHO Decision at pp. 17- 22). However, the IHO awarded the student the related services delineated in her July 2022 IEP as compensatory relief for the district's denial of a FAPE for the 2022-23 school year; the IHO awarded 70 hours of hearing education services, 20 hours of OT, 40 hours of speech-language therapy and full-time hearing assistive technology (*id.* at pp. 21-23). The IHO noted that such calculations were based on the time period from September 1, 2022 until April 25, 2023, the date the CSE convened to create the student's IESP (*id.*). The IHO ordered the district to provide the student with the compensatory education as a bank to be available for a period of three school years (*id.*).

IV. Appeal for State-Level Review

The parent appeals through her advocate alleging that the IHO erred in denying the funding of the costs of Benchmark. In particular, the parent alleges the evidence in the hearing record proves that the SETSS and speech-language therapy were "reasonably calculated to provide specially designed instruction" to the student; that the student made progress through those services; and that the services were provided by competent providers. Additionally, the parent alleges that the recommendation for eight sessions of SETSS in the April 2023 IESP further supports that SETSS was an appropriate program for the student and that the student was on track to meet age-appropriate goals and thus the IHO erred by not ordering direct funding.

More specifically, the parent argues that the IHO's reasoning in denying relief was deficient for three main reasons. First, the parent argues she has a right to place her child in a private school and have the district provide special education support under State law and the IHO erred in her determination that it was inappropriate to place the student in a general education program at a nonpublic school. Second, the parent argues the IHO erred in her determination that the student needed the full-time program recommended by the CSE and argues that the IHO improperly faulted the parent for not being able to implement a full-time program and that she lacked the same resources that were available to the district. Third, the parent argues that the IHO erred in relying on the 27 sessions of SETSS called for in the July 2022 IEP to conclude that the student required programming with more support and failed to consider the April 2023 CSE's conclusion that 8 sessions of SETSS per week was appropriate for the student, which was two periods less than what the parent privately obtained from Benchmark. Overall, the parent argues that although a full-time special education program may have indeed offered more benefits to the student, a unilateral placement does not need to provide every service that could maximize the student's potential.

The parent also alleges that the IHO erred in finding that the equitable considerations did not weigh in favor of the parent's requested relief due to an invalid contract and excessive costs of the Benchmark services. For relief, the parent requests direct payment for the unilaterally-obtained SETSS and speech-language therapy provided by Benchmark for the 2022-23 school year as per the parent's contract with Benchmark.

In an answer and cross-appeal, the district responds to the parent's material allegations and argues that the IHO's decision that the services provided by Benchmark during the 2022-23 school year were not appropriate and that the equities did not weigh in favor of the parent should be upheld in its entirety. In its cross-appeal, the district seeks modification of the IHO's award of compensatory services to reflect the services recommended in the April 2023 IESP rather than the July 2022 IEP, and that the award should be calculated from April 25, 2023 until the end of the school year. As relief, the district seeks to dismiss with prejudice the parent's request for review. The parent submits an answer to the district's answer with cross-appeal and seeks an upward modification of the compensatory education services awarded by the IHO.

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would

in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. 386, 399 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 580 U.S. at 404). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 580 U.S. at 403 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR

300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).⁵

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85).

VI. Discussion

Initially, as neither party has appealed the IHO's determination that the district failed to meet its burden to prove that it provided the student a FAPE for the 2022-23 school year, that finding has become final and binding on the parties and will not be further discussed (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

A. Unilaterally Obtained Services

Turning to a review of the appropriateness of the unilaterally obtained services, the federal standard for adjudicating these types of disputes is instructive. A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129). Citing the Rowley standard, the Supreme Court has explained that "when a public school system has defaulted on its obligations under the Act, a private school placement is 'proper under the Act' if the education provided by the private school is 'reasonably calculated to enable the child to receive educational benefits'" (Carter, 510 U.S. at 11). 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

⁵ The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Andrew F., 580 U.S. at 402).

need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether a unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether the placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] ["evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

The Second Circuit has set forth the standard for determining whether parents have carried their burden of demonstrating the appropriateness of their unilateral placement.

No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

(Gagliardo, 489 F.3d at 112, quoting Frank G., 459 F.3d at 364-65).

1. Student's Needs

The hearing record provides evidence regarding the student's needs. The July 2022 IEP included information from a prior IEP, which was described as a December 23, 2021 IEP in the

district's prior written notice dated July 13, 2022 (Parent Ex. B at p. 1; Dist. Ex. 2 at p. 2).⁶ The July 2022 IEP noted that the student had previously participated in the district's 12:1+1 "Auditory/Oral" special classroom in a specialized school and received speech-language therapy and OT (Parent Ex. B at p. 1). According to the July 2022 IEP, the student was then-currently in fourth grade and her teacher from Pathway provided information to the CSE (*id.* at p. 3). The Pathway teacher indicated that the student had poor intelligibility which made it difficult for her to have a conversation with peers, but she "join[ed] in with peers by copying them" (*id.*). The July 2022 IEP indicated that the student sometimes "prefer[red] to play a game rather than have a conversation or play by herself" because she was difficult to understand (*id.*).

According to the Pathway teacher, the student demonstrated math skills at the first-grade level, with the ability to add and subtract (Parent Ex. B at p. 3). The July 2022 IEP indicated the student was "able to write basic sentences," but required assistance with grammar and organization (*id.*). The Pathway teacher also indicated the student had difficulty responding to more than basic "wh-" questions, such as those involving "her schedule or days of the week" (*id.*). The July 2022 IEP also drew information from a June 2021 report from Pathway, indicating that the student had demonstrated progress "in developing comprehension strategies" with "moderate" demonstration of "sequencing, retelling information, and following multi-step directions" (Parent Ex. B at p. 4; *see* Dist. Ex. 1 at p. 2). The July 2022 IEP indicated that the student "struggled to apply information in both expressive and receptive language tasks and apply appropriate critical thinking skills" (*id.*).

The July 2022 IEP indicated that the student's instruction within the classroom included "a myriad of approaches such as interactive group activities and hands-on learning" (Parent Ex. B at p. 3; *see* Dist. Ex. 1 at p. 2). In addition, the July 2022 IEP indicated that the student benefitted from "[c]lassroom experiences that enrich[ed] language development" as well as "explicit and systematic instruction" (*id.*). According to the July 2022 IEP, the student's classroom provided "multiple modalities of instruction and ample opportunities for experiential learning, which better met [the student's] learning style needs" (Parent Ex. B at p. 4; *see* Dist. Ex. 1 at p. 2).

The July 2022 IEP indicated that the student was able to write letters and some sight words (Parent Ex. B at p. 4). The student benefitted from "guided and independent practice" as well as "individual supplementary lessons to master dictation exercises" (*id.*; *see* Dist. Ex. 1 at p. 3). According to the July 2022 IEP, the student "acquired all letter sounds" including "short vowel sounds" (Parent Ex. B at p. 3 *see* Dist. Ex. 1 at p. 1). The July 2022 IEP indicated that the student required support to "apply correct vowel sounds when reading [consonant-vowel-consonant (CVC)] words that change in vowel pattern" (*id.*).

Socially, the July 2022 IEP indicated that the student was "well-liked," and "willing to self-correct and apply learned strategies when speaking with others" (Parent Ex. B at p. 5; *see* Dist. Ex. 1 at p. 4). The July 2022 IEP indicated that the student demonstrated improved confidence when communicating with others, but that "social development and maturation [] remain[ed] an area of weakness" (*id.*). The July 2022 IEP indicated that "oral instruction and following more complex

⁶ Some of the information appears to be taken from the student's January 2020 IEP, during which school year the student had been described as "repeating second grade" and, during the 2020-21 school year, it was clear that the student attended an ungraded class at Pathway (Application of a Student with a Disability, Appeal No. 23-167).

activities often interfere[d] with [the student] fully meeting classroom expectations and interaction with same-age peers" (id.).

The July 2022 IEP's physical development section indicated the student received OT to address visual-motor and visual-perceptual skills (Parent Ex. B at p. 6). The July 2022 IEP indicated the student had demonstrated progress in these areas and that "[e]xcept for her hearing impairment, [the student]" demonstrated appropriate sensory integration skills (id.). The July 2022 IEP indicated the student maintained appropriate posture, transitioned to therapy "without difficulty," and was "an active" participant (id.).

The July 2022 IEP contained a variety of management needs including hearing assistive technology; "[d]irections and concepts repeated, simplified and/or clarified as needed while maintaining appropriate eye contact between [the student] and the speaker;" preview unfamiliar vocabulary; visual aids; flexible preferential seating with "full visual access to speaker's face and lips;" breaks to prevent auditory fatigue; supports for note-taking, prompting, or clarification; a divider to reduce visual distractions; focusing prompts; checklists that include explicit instructions for tasks; and use of multi-modal teaching methods "including kinesthetic/tactile materials and visuals" (Parent Ex. B at p. 7). The July 2022 IEP indicated that the student's needs included "direct instruction in such areas as community safety, self-advocacy, and activities of daily living in relation to her hearing loss" as well as "small group instruction where she can have support in the areas of auditory, expressive, and receptive language skills" (id.).

Several annual goals were included in the July 2022 IEP to address the student's needs including reading accuracy and comprehension; decoding skills; reading and writing new sight words; answering "wh-" questions; retelling a story; writing a complete sentence; "us[ing] a combination of drawing, dictating, and writing to narrate a single event;" spelling skills; solving math problems; using pronouns; producing specific sounds in words and phrases; increasing inferencing skills; following multi-step directions presented orally; multiplication skills; identifying key words in math problems; focusing on "teacher's lips, face[,] and gestures for speech reading cues;" informing the teacher if she cannot hear something; and utilizing an FM unit throughout the day (Parent Ex. B at pp. 9-24).

The July 2022 IEP recommended that the student participate in a 12-month program within a 12:1+1 special class for math, ELA, social studies, and science (Parent Ex. B at pp. 25-26). In addition, the July 2022 IEP recommended four 30-minute sessions per week of hearing education services, one 30-minute session per week of individual OT, and five 30-minute sessions per week of individual speech-language therapy (id. at p. 25). The July 2022 IEP also recommended full time use of individual hearing assistive technology (id. at p. 26). The July 2022 IEP recommended the student receive the following testing accommodations: extended time, separate location, use of hearing assistive technology, and tests read (id. at p. 28).

2. Services from Benchmark

In finding that the unilaterally-obtained services were inappropriate, the IHO concluded that the student's educational program as a whole, including the parent's decision to place the student in a general education program, was not appropriate because the student's private school provided none of the kind of intensive special education services called for in the student's IEP such as a 12:1+1 special class, hearing education services, OT, speech language services, or

hearing assistive technology (IHO Decision at p. 18). The IHO, who believed that the parent was in essence seeking a modification of the student's IEP, determined that "related services cannot be excised from the operative IEP" (*id.*). The language in the IHO's decision was vague insofar as the IHO stated that "the educational program component cannot be divorced from the related services component, as the 7/27/2022 IEP did not provide for SETSS or a full-time oral transliteration paraprofessional" (*id.* at p. 18). However, the hearing record does clarify matters to a degree in that the parent indicated in her ten-day notice of unilateral placement that she believed the district's programming was flawed because it lacked oral transliteration services for the student, and in her due process complaint notices she specifically set forth her view that appropriate programming for the student required the same related services identified by the IHO in her decision as well as a full time paraprofessional to provide oral transliteration services (Parent Exs. A at p. 3; K).

Turning to the evidence put forth by the parent regarding the unilaterally-obtained services for the student, the parent's contractual agreement with Benchmark indicated that Benchmark would provide the student with "SETSS and [speech-language therapy] services...during the [20]22-23 [s]chool [y]ear, starting on or about [September 9, 2022,] and continuing until on or about [June 30, 2023]" (Parent Ex. H at p. 1). Further, the agreement with Benchmark indicated that the agency would "endeavor to provide 10 periods per week of SETSS services" and "[two 30-minute sessions] per week of Speech-Language Therapy services...in the [student]'s school on an ongoing basis" (*id.*). The administrator from Benchmark testified that the agency provided the student with SETSS and speech language services during the 2022-23 school year with both services beginning "sometime" in November 2022 (Tr. pp. 173, 175-76). According to a log of services provided by Benchmark, the student received speech-language therapy from October 19, 2022 until December 29, 2022, but did not resume services after such date (Dist. Ex. 11).

The Benchmark supervisor testified that one teacher focused on reading and the other focused on math (Tr. p. 117).⁷ This testimony is consistent with the information contained within the weekly session notes (*see generally* Dist. Ex. 12). A SETSS progress report dated May 3, 2023 for the 2022-23 school year was completed by one of the student's SETSS providers (*see* Parent Ex. F). In math, the SETSS provider indicated the student "add[ed] up to [four] digits and subtract[ed] with borrowing" but had difficulty "understanding patterns in numbers and greater than and less than with three digits" (Parent Ex. F at p. 1). The student "seem[ed] to understand multiplication" but "struggle[d] with concepts of division" (*id.*). The SETSS teacher indicated the student was "unable to solve word problems and often d[id] not comprehend the question," and "ha[d] difficulty identifying operations" (*id.*). The IHO expressed concern that the SETSS providers did not address the student's math needs; however, that particular finding was inaccurate because review of the weekly session notes indicated that one of the SETSS providers worked on

⁷ The IHO also determined that SETSS provided by Benchmark was not appropriate because one of the providers was not "certified to provide SETSS" and neither was certified to provide supportive services to a student with a profound deafness disability; however, as set forth above, a private school need not employ certified special education teachers (*Carter*, 510 U.S. at 13-14; IHO Decision at p. 19; *see* Parent Exs. C, D). SETSS is not on the State's continuum of alternative placements, and it is not an area of State certification; however, the IHO's concern that neither teacher had adequate experience with deaf or hard of hearing students bears out as further described below.

math skills in nearly all sessions, and the other SETSS provider addressed math during two weeks in November 2022 (see IHO Decision at p. 18; Parent Ex. F at p. 1; Dist. Ex. 12 at pp. 5, 14-29).

In addition, the IHO expressed concern about the Benchmark supervisor directing the SETSS providers to cover their mouths preventing reliance on lip-reading as it was "at odds with" a strategy identified in the management needs of the July 2022 IEP (IHO Decision at p. 18). The July 2022 IEP indicated the student required "[f]lexible preferential seating" with "full visual access to speaker's face and lips (teachers and peers) to pick up cues like facial expressions and body language" (Parent Ex. B at p. 7). The Benchmark supervisor testified that she recommended the providers cover their mouths to teach sounds so that the student concentrated on the sound rather than lip-reading (Tr. p. 114). The evidence in both this hearing record and in the prior dispute between the parties (in both the district programs and at Pathway) indicates that the student heavily relies on visual supports to communicate and engage in learning activities (see Application of a Student with a Disability, Appeal No. 23-167) and even the parent was seeking a visual communication support in the form of a full-time oral transliterator. Furthermore, there is no evidence in the hearing record regarding the Benchmark supervisor's qualifications or experience in working with students who are deaf or hard-of-hearing, and directing the teachers to cover their mouths was not supported by the evidence of the student's needs. Although the teachers were not required to be State-certified in order find the unilateral placement appropriate, that does not mean that just any private teacher or school can provide the student with appropriate special education, and I am not convinced that the student's teachers at Benchmark had adequate experience or qualifications in working with students who are deaf or have profound hearing loss in order to appropriately address the student's areas of need. Based upon the evidence before her, the IHO did not err in finding the strategy directed by the Benchmark supervisor to be at odds with the student's needs.

According to a SETSS provider's May 2023 progress report, the student "require[d] a lot of effort to decode multisyllabic words" and it took her "a very long time to learn each phonetic sound" (Parent Ex. F at pp. 1, 3). The student was "impulsive when reading" and her "rate and fluency [was] drastically below her peers" (id.). According to the SETSS provider, the student had difficulty with reading comprehension, "summarizing [] the main idea of a story," and making inferences (id.). The SETSS provider indicated that the student had "very poor" reading comprehension skills and that her "higher level thinking skills [were] very weak as well" (id.).

According to the SETSS provider, the student "struggle[d] with auditory processing and c[ould] not understand basic directions or concepts in the classroom" (Parent Ex. F at p. 1). The student required "constant repetition and clarification," extra "time to process" information, and assistance "with multi-step assignments" (id.). The SETSS provider indicated that the student was "unable to express herself appropriately or articulate her needs" (id.). In addition, the student required "a long time to process what [was] being asked before she c[ould] respond" (id.).

In writing, the SETSS provider indicated the student had difficulty organizing her thoughts and with punctuation and grammar (Parent Ex. F at p. 1). The SETSS provider indicated that the student was "missing a lot of language skills" and had difficulty "express[ing] her thoughts clearly in writing" (id.).

In the May 2023 progress report, the SETSS provider indicated the student "learn[ed] best through visual and tactile modalities," and benefitted from "modeling and hands-on practice"

(Parent Ex. F at p. 2). The SETSS provider indicated that the student demonstrated a strength in organization skills and "a well[-]developed imagination" (id.). According to the May 2023 progress report, the student learned best through visual and tactile modalities and was provided supports such as "manipulatives, group work, partner work, differentiated classwork, repeated directions, and preferential seating" (id.). The student had difficulty initially focusing on a task (id.).

Regarding the student's social skills, the SETSS provider indicated that the student had a difficult time "following a conversation, communicating[,] and expressing her feelings" (Parent Ex. F at p. 2). While the student "enjoy[ed] interacting with her friends and teachers," she was "socially immature and lack[ed] some social skills" (id.). According to the SETSS provider, the student's "self-esteem [was] affected by her inability to express her thoughts completely" (id.).

Regarding physical development, the SETSS provider indicated in the May 2023 progress report that the student "ha[d] poor posture and d[id] not walk with a proper gait" (Parent Ex. F at p. 2). She further indicated that the student had "neat" handwriting but wrote "extremely slowly" (id.).

The May 2023 SETSS progress report included six goals for the student to work on that would address writing, comprehension, and math needs (Parent Ex. F at p. 2). The SETSS provider recommended the student receive ten hours of SETSS per week, five sessions per week of speech-language therapy, and "the support of a full time oral transliterator, [h]earing [e]ducation [s]ervices[,] and [an] [a]ssistive [t]echnology device" (id.).

The student's speech-language therapist between October 19, 2022 and December 29, 2022 provided a June 6, 2023 speech-language therapy progress report which indicated the student had "severe delays in the areas of articulation, and expressive and receptive language, secondary to a bilateral hearing loss" (Parent Ex. G at p. 1). The speech-language therapist indicated the student was "friendly" and "engaging" but that her difficulties impacted her functioning "in and out of the classroom when learning, and when conversing with peers" (id.). The speech-language therapist indicated that the student "struggle[d] with the basic language skills needed to function in a classroom" including difficulty with articulation and "functional listening skills such as following classroom directions" (id.). According to the speech-language therapy progress report, the student continued to have difficulty defining root words, and she demonstrated "disorganized" grammar and sentence structure (id.). The speech-language therapist indicated the student used "drawings and hand gestures to explain" herself (id. at p. 2).

According to the weekly session notes, the speech-language therapist worked on the concepts of true and false, "wh-" questions, categorical connections, personal narratives, use of logic and reasoning, dividing words into prefixes and roots, spelling, definition of words, understanding action words, following directions, advocating for herself, retelling stories, and generating sentences (Dist. Ex. 12 at pp. 1-3). The final available speech-language therapy session notes were for the week of December 25, 2022 through December 31, 2022 (id. at p. 3).

The speech-language therapist indicated in her progress report that therapy "focused on building [the student's] functional language skills" (Parent Ex. G at p. 1). The speech-language therapist indicated the student had made progress, including her ability to "identify the main idea in a sentence," "self-generate 'who, what, where, when' questions," and "follow [two]-step

directions" (id.). In addition, the student "generate[d] basic categorical connections between [two] picture cards" (id.).

The speech-language therapist recommended the student receive five sessions of speech-language therapy per week and included four goals for the student to achieve (Parent Ex. G at p. 2). The goals included the ability to "answer 'wh-' questions," "tell simple personal narratives," "follow [two]-step directions," and "increase her intelligibility" (id.). However, while the evidence shows that the speech language therapist from Benchmark provided information regarding the intense level of the student's needs related to language and communication skills, Benchmark ultimately did not provide speech language therapy at a level that even approached the daily services offered in the proposed IEP or the daily therapy recommended by the private expert. Instead, Benchmark provided speech language therapy for eight weeks from November to December 2022, with some sessions provided back-to-back and, for the other portions of the school year, the student received none at all (Dist. Ex. 11 at p.1). This evidence falls far short of what the student required and does not weigh in favor of a finding that Benchmark provided appropriate special education services to the student.

According to progress reports and weekly session notes, the SETSS and speech-language providers used a variety of strategies to address the student's needs including picture cues/visual aids, step-by-step directions, "constant repetition and clarification," extra time to process information, "visual and tactile modalities," use of "manipulatives, group work, partner work, differentiated classwork, repeated directions, [] preferential seating," the FM unit, prompts, comprehension check-ins, self-talk, reinforcement, praise, modeling, role-playing, brainstorming, and social skills games (Parent Exs. F at pp. 1-2; G at p. 1; Dist. Ex. 12 at pp. 1-29).

The Benchmark supervisor also testified that the student demonstrated some difficulty with focus, but that "she trie[d] to concentrate" to the best of her ability (Tr. pp. 119-20). The Benchmark supervisor testified that the student demonstrated more success when there were fewer distractions around her, which was why pull-out sessions were important (Tr. p. 120).

The Benchmark supervisor testified that the student was "personable" and had friends at school, but because each had difficulty understanding the other, it was difficult for her to communicate with them (Tr. pp. 110-11). The weekly session notes indicated that the SETSS providers addressed skills such as talking, socializing, and playing with peers (Dist. Ex. 12 at pp. 5, 15-17, 22-23, 25-29).

The Benchmark supervisor testified that the student made progress through the use of modifications, repetition, and multi-modal teaching strategies (Tr. pp. 113-14). In math, the Benchmark supervisor testified that the student made progress learning multiplication and division, although the student had not yet "grasped the concept that division [was] the opposite of multiplication" (Tr. p. 115). The Benchmark supervisor testified that the student made progress with spelling using short vowels, but that reading and writing progress was "harder" than it was for math (Tr. pp. 115-16). The Benchmark supervisor testified that the student demonstrated progress with social skills in that she had friends at school and participated in activities at recess, despite the frustration of two-way communication (Tr. p. 116). The Benchmark supervisor testified that she supervised the SETSS providers and worked with them throughout the year to ensure the student "function[ed] to the best of her ability" (Tr. pp. 102-03, 127).

Although there is information regarding the unilaterally-obtained SETSS and the limited speech-language therapy services from Benchmark during the 2022-23 school year, the hearing record did not contain information about the student's general education classroom, or any strategies or modifications used within the classroom, outside of SETSS, to address the student's learning needs. In this matter, the parent selected services to support the student in a general education classroom in a private school but did not show how the unilaterally-obtained SETSS and speech-language therapy services supported the student in the classroom. It is unclear from the hearing record as to if, or how, any of the strategies used by the student's SETSS providers or speech-language therapist may have been incorporated into the student's school day outside of the pull-out sessions. There was testimony that the Benchmark supervisor collaborated with the speech-language therapy supervisor, who had experience working with students with hearing impairments, to determine "a more effective way" to teach the student reading (Tr. pp. 117, 224-25). The Benchmark supervisor then communicated that information to one of the student's SETSS providers (Tr. p. 117). The Benchmark supervisor also testified that she collaborated with the student's speech-language providers to ensure that they "work[ed] as a team" (Tr. p. 127). However, there is no testimony or evidence that the student's general education teacher was also a part of the collaboration or was advised that Benchmark providers were using a new way to teach the student that they believed was "more effective" (see Tr. pp. 117, 224-25).

The parent argues that the IHO erred in considering the parent's decision to place the student in a general education classroom in the nonpublic school among the factors when weighing whether the programming she obtained for the student was appropriate, stating that "[e]very parent can choose to place her child in a private school setting of her choice, and the CSE remains responsible to provide special education support under state law, " and the parent goes on to argue in mitigation that she is not seeking funding for the general education setting in the nonpublic school. But the purpose of providing special education services in a nonpublic school setting is to support the student's meaningful access to the general education curriculum and setting in a way that is reasonable under the circumstances. Thus, the IHO was correct to take the totality of the circumstances into account,⁸ including the environment in which the student attended school and the degree to which Benchmark designed and provided its special education services to support the student there. In this case, the evidence shows that Benchmark's approach was severely lacking with respect to addressing the student's deficits.

In another example of how the totality of the student's private school placement with unilaterally obtained services was inappropriate was the Benchmark supervisor testified that "extraneous noise [was] hard for [the student]" and that she had difficulty with attention, yet the hearing record is silent as to how this was managed within the general education classroom (Tr. p. 120). Further, as noted previously, the student has hearing loss for which she was fitted with bilateral cochlear implants and has been diagnosed with apraxia (Parent Ex. B at p. 5). According to the SETSS teacher, the student "struggle[d] with auditory processing and c[ould] not understand basic directions or concepts in the classroom" (Parent Ex. F at p. 1), but again, the hearing record is silent as to how this was supported by Benchmark within the general education classroom, if at all. Instead, the Benchmark supervisor testified on cross-examination that the SETSS provided

⁸ Although unclear, this may have been an aspect of the IHO's reasoning, namely, that consideration of one portion of an educational program cannot be easily excised from consideration of another, especially when it is designed to support a student in a general education program.

pull-out services to the student (Tr. p. 128) and there is no evidence that the approach used by the SETSS teachers were implemented in the general education classroom or if such strategies/methodologies would even be appropriate in that setting. The hearing record contained limited information about the student's progress in SETSS and speech-language therapy and was silent regarding the student's participation within the general education classroom.

The parent's position with regard to the adequacy of the Benchmark services and the exercise of her prerogative to place the student in a general education setting is difficult to reconcile with the magnitude of hearing loss, language and communication deficits, and resultant weaknesses in her academic skills. Even the parent herself alleged in her due process complaint notice a similar intensity of the student's deficits and delays, that the student needs various forms of smaller staff to student ratios in order to make progress, and requires a variety of related and supportive services. That stance bears considerable similarities to the parties' view of the student and their arguments in Application of a Student with a Disability, Appeal No. 23-167 in which both the district and Pathway staff took the position that the student required intensive services, even if they did not agree on the details. But in this case, Benchmark provided services of questionable utility that were scaled back considerably without any justification, and I find they were not appropriate for the student in light of her needs.

The parent points to the April 2023 IESP developed by the CSE to justify the Benchmark services she obtained at the nonpublic school (Dist. Ex. 7). However, the adequacy of that plan, which was developed long after the unilateral placement and due process complaint notice in this proceeding, is not before me and appears to be the subject or related to another, subsequent due process proceeding that involves aspects of the 2023-24 school year (IHO Interim Decision dated May 1, 2023). Without delving into that matter, I note only that the IESP provides for a full-time oral interpreter, hearing education services and daily speech language services, little to none of which was provided by Benchmark in this case. Accordingly, I do not find the parent's argument persuasive.

B. Compensatory Education

Turning to the cross-appeal, the district argues that the IHO's decision to award the student compensatory education services should be downwardly modified, essentially arguing that the IHO should have calculated them from the date of the April 2023 IESP through the conclusion of the 2022-23 school year. The parent opposes the district's position and argues it was appropriate to order compensatory education from the beginning of the 2022-23 school year through the date of the IESP in April 2023. Both positions are flawed. 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]). Compensatory education relief may be awarded to a student with a disability who remains eligible for instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). The purpose of an award of compensatory education is to provide an appropriate remedy for a denial of a FAPE (see E.M. v. New York City Dep't of Educ., 758 F.3d 442, 451 & n.12 [2d Cir. 2014]; Newington, 546 F.3d at 123 [holding that compensatory education is a remedy designed to "make up for" a denial of a FAPE]; see also Doe v. E. Lyme, 790 F.3d 440, 456 [2d Cir. 2015]; Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005] [holding that, in fashioning an appropriate compensatory education remedy, "the inquiry must be fact-specific, and to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would

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

Generally, compensatory services are not designed for the purpose of maximizing a student's potential or to guarantee that the student achieves a particular grade-level in the student's areas of need (see Application of a Student with a Disability, Appeal No. 16-033; cf. Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Rather, an award of compensatory education should place the student in the position that he would have been in had the district acted properly (see Parents of Student W., 31 F.3d at 1497 [holding that "[a]ppropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the IDEA" and finding "[t]here is no obligation to provide a day-for-day compensation for time missed"])).

Moreover, an IHO generally has broad authority to fashion appropriate equitable relief (see, e.g., Mr. and Mrs. A v. New York City Dep't of Educ., 769 F. Supp. 2d 403, 422-23, 427-30 [S.D.N.Y. 2011]; see Forest Grove v. T.A., 129 S.Ct. 2484 [2009]).

Notwithstanding the fact that the district convened and amended the student's IEP in July 2022 to add 12-month services to the student's program, the parent is correct that the district appeared at the impartial hearing and conceded it failed to offer the student a FAPE during the 2022-23 school year (see Tr. pp. 30, 407, 446). But by mid-September 2022,⁹ the parent had placed the student in a nonpublic school and engaged Benchmark as a self-help remedy, which services began in November 2022 and she challenged the July 2022 IEP in the due process complaint notice. In its cross-appeal, the district challenges the IHO's equitable relief of compensatory services arguing that the award should have been calculated from April 25, 2023 until the end of the school year and based on the April 2023 IESP; however, the period of time in which the district would have been required to implement an appropriate IEP in this proceeding would have been when the IEP was developed up until the time the parent removed the student from the public school. As noted previously, the April 2023 IESP referenced in this proceeding postdated the due process complaint and is the subject of another proceeding. On the other hand, the parent appears to have confined the argument to hearing education services, OT, speech

⁹ The precise date is not in the hearing record, and I will err slightly in the parent's favor with respect to computing the compensatory award based on a date of September 30, 2022.

language services, and hearing assistive technology, and she is correct that district did not provide evidence that it implemented the services set forth in the July 2022 IEP.

In view of the forgoing dispute between the parties over the proper time period for the compensatory education services, I will direct the district to remediate the lack of hearing education services, OT, and speech-language services for the time period between July 27, 2022 and September 30, 2022, which comprised approximately seven weeks in the 12-month school year that school was in session. Relying on the weekly amounts from the IEP as listed by the IHO, this results in compensatory education services consisting of 14 hours of hearing education services, 3.5 hours of OT and 17.5 hours of speech language therapy. However, because the parent thereafter removed the student from the public school and privately obtained a self-help remedy, I will not require the continuation of the assistive technology device as a part of this proceeding.¹⁰

VII. Conclusion

Having determined that the evidence in the hearing record supports the IHO's determination that the services provided by Benchmark were inappropriate to address the student's needs, the necessary inquiry is at an end and there is no need to reach the issue of whether equitable considerations weighed in favor of the parent's request for relief. The student is entitled to several areas of compensatory education as described above.

I have considered the remaining contentions and find it is unnecessary to address them in light of my determinations above.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision, dated January 16, 2024, is modified to provide the compensatory education services listed in the body of this decision within one year from the date of this decision.

Dated: **Albany, New York**
 May 9, 2024

JUSTYN P. BATES
STATE REVIEW OFFICER

¹⁰ Furthermore, such relief may be duplicative at this juncture, as the FM unit was later made part of the student's April 2023 IESP (Dist. Ex. 7 at p. 15).