



The University of the State of New York

The State Education Department

State Review Officer

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No. 24-585

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

Appearances:

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

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

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from a decision of an impartial hearing officer (IHO) which ordered respondent (the district) to fund the costs of her son's private services delivered by LEAD Remedial Services (LEAD) for the 2024-25 school year at a reduced rate. The district cross-appeals, arguing that the IHO erred by not addressing whether the parent's unilateral placement was appropriate and by awarding relief to the parent. The appeal must be sustained in part. The cross-appeal must be sustained in part.

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, 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 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]-[j]).

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

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

III. Facts and Procedural History

The parties' familiarity with this matter is presumed, and, therefore, the facts and procedural history of this case and the IHO decision will not be recited in detail. Briefly, a committee on preschool special education (CPSE) convened on May 11, 2017, and found the student eligible for special education as a preschool student with a disability (Parent Ex. B at pp. 17,19). The May 2017 CPSE recommended the student receive 10 hours per week of individual, direct special education itinerant teacher (SEIT) services, three 30-minute sessions per week of individual speech-language therapy, three 30-minute sessions per week of individual occupational therapy (OT), and two 30-minute sessions per week of individual physical therapy (PT) (*id.* at p. 28).¹ The May 2017 CPSE also recommended the student receive services on a 12-month basis (*id.* at p. 29).

The hearing record indicates that a CSE convened in February 2023 and the parent challenged the February 2023 IEP in a due process complaint notice dated July 5, 2023 (Parent Ex. B at pp. 2-5, 11).

A CSE next convened on September 14, 2023, and found the student eligible for special education as a student with a speech or language impairment and developed an IESP for the student (Parent Ex. D at p. 1).^{2, 3} The September 2023 CSE recommended the student receive: six periods per week of direct group special education teacher support services (SETSS) delivered in Yiddish; three 30-minute sessions per week of individual OT, delivered in English; one 30-minute session per week of individual PT, delivered in English; three 30-minute sessions of speech-language therapy (two individual sessions and one group session per week), delivered in Yiddish; and one 30-minute session of counseling services, delivered in Yiddish (*id.* at pp. 12-13).⁴ The September 2023 CSE did not recommend 12-month services for the student (*see id.*).

¹ State law defines SEIT services (or, as referenced in State regulation, "Special Education Itinerant Services" [SEIS]) as "an approved program provided by a certified special education teacher . . . , at a site . . . , including but not limited to an approved or licensed prekindergarten or head start program; the child's home; . . . or a child care location" (Educ. Law § 4410[1][k]; 8 NYCRR 200.16[i][3][ii]; *see* "[SEIS] for Preschool Children with Disabilities," Office of Special Educ. Field Advisory [Oct. 2015], available at <https://www.nysed.gov/special-education/special-education-itinerant-services-preschool-children-disabilities>). A list of New York State approved special education programs, including SEIS programs, can be accessed at <https://www.nysed.gov/special-education/approved-preschool-special-education-programs>. SEIT services are "for the purpose of providing specialized individual or group instruction and/or indirect services to preschool students with disabilities" (8 NYCRR 200.16[i][3][ii]; *see* Educ. Law § 4410[1][k]).

² The student's eligibility for special education as a student with a speech or language impairment is not in dispute (*see* 34 CFR 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

³ The hearing record includes a district exhibit for the September 2023 IESP; however, the page numbering does not correspond to the parent exhibit of the same IESP due to formatting (*compare* Parent Ex. D, with Dist. Ex. 2). For the remainder of the decision, only Parent Exhibit D will be cited in relation to the September 2023 IESP.

⁴ 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.

In an IHO decision, dated November 16, 2023, addressing the parent's July 2023 due process complaint notice challenging the February 2023 IEP, the IHO presiding over that matter found that the district conceded that it failed to offer the student a free appropriate public education (FAPE) for the 2023-24 school year and that the last agreed upon program was the May 2017 preschool IEP, and ordered the district to continue to provide the student with the services recommended in the May 2017 preschool IEP, at enhanced rates, on a 12-month basis, until the district could develop an appropriate IESP for the student (Parent Ex. B at pp. 7-10).

A. Due Process Complaint Notice

In a due process complaint notice dated July 5, 2024, the parent challenged the September 2023 IESP alleging that the district failed to recommend an appropriate placement for the student, improperly reduced the recommended SETSS from 10 periods per week of individual SETSS to 6 periods per week of group SETSS, and erroneously removed the student's 12-month services (Parent Ex. A at pp. 2-3). Additionally, the parent alleged that she was unable to locate a district affiliated provider on her own, and that the district had failed to implement the program ordered in the November 16, 2023 IHO decision (id. at p. 3). The parent alleged that she was able to locate appropriate SETSS and related services providers independently for the 12-month 2024-25 school year (id.).

The parent requested an order: finding that the district failed to recommend sufficient services or an appropriate placement, resulting in a denial of FAPE for the 2024-25 school year; directing the district to fund the relief granted in the November 16, 2023 IHO decision at the provider's contracted for rate for the 2024-25 school year; and directing the district to fund a bank of compensatory education for any services not provided during the 2024-25 school year (Parent Ex. A at pp. 4-5).

B. Impartial Hearing Officer Decision

An impartial hearing convened before the Office of Administrative Trials and Hearings (OATH) on August 19, 2024 (Tr. pp. 1-20). In a decision dated October 22, 2024, the IHO determined that the district had failed to provide the student a FAPE on an equitable basis for the 2024-25 school year (IHO Decision at pp. 2-3). The IHO then determined that although the hearing record was unclear as to what related services the student received during the school year at issue, the student was entitled to payment for the services recommended in the September 2023 IESP (id. at p. 3).⁵ However, the IHO found that the rates charged by LEAD for SETSS and other related services were excessive because there was no evidence in the hearing record to establish why the agency rates were between \$50 and \$95 above the rates that were paid to the individual providers (id. at p. 3).

Regarding the issue of pendency, the IHO recognized that the parent disagreed with the September 2023 IESP and instead argued that pendency should lie in the unappealed November 2023 IHO decision and May 2017 IEP; however, he found that pendency should be based on the September 2023 IESP, not the November 2023 IHO decision or the May 2017 IEP because the

⁵ The IHO did not conduct any analysis with respect to the appropriateness of the parent's privately-obtained services (see id. at pp. 1-4).

September 2023 IESP was most relevant to the student's current educational needs noting that "[i]t [wa]s unrealistic to rely on an IEP from six years ago when [the] [s]tudent was in pre-school" (IHO Decision at p. 3).⁶ The IHO further noted that the November 2023 IHO decision did not consider the September 2023 IESP (*id.*). The IHO ordered the district to fund the following services delivered by LEAD during the 2024-25 10-month school year: six periods per week of SETSS, delivered in Yiddish at a rate of up to \$175; three 30-minute sessions per week of individual OT, delivered in English at a rate of up to \$175;; one 30-minute session per week of individual speech-language therapy, delivered in Yiddish at a rate of up to \$175; and two 30-minute sessions per week of group speech-language therapy, delivered in Yiddish at a rate of up to \$175 (IHO Decision at p. 5). The IHO also ordered that the district fund one 30-minute session per week of individual counseling services and one 30-minute session per week of individual PT, delivered in English, delivered in English by a provider of the parent's choosing at a reasonable market rate set by the district's implementation unit (*id.*).

IV. Appeal for State-Level Review

The parent appeals and alleges that the IHO erred in finding that the September 2023 IESP established the student's pendency program and that pendency should be based on the November 2023 IHO decision, that the parent met her burden of proving the appropriateness of her unilateral placement of the student including 12-month services, and that the IHO erred by improperly reducing the rate of the awarded services.

The district submits an answer and cross-appeal, in which the district argues that the IHO erred in awarding relief after declining to rule on whether the unilaterally-obtained services were appropriate for the student. Additionally, the district alleges that the IHO properly reduced the rates for services. With respect to pendency, the district contends that the student's pendency program should be based on the May 2017 preschool IEP.

In an answer to the cross appeal, the parent raises allegations regarding pendency, the student's need for 10 hours per week of SETSS, and the district's assertions regarding the rates charged by LEAD for the services provided.

In a reply to the answer to the cross-appeal, the district argues that the parent's answer to the cross-appeal should be rejected because it lacked the required verification.⁷

⁶ The IHO noted that "[i]t is unrealistic to rely on an IEP from six years ago when [the] [s]tudent was in pre-school" (IHO Decision at p. 3).

⁷ While the parent submitted a notarized verification of the request for review, the answer to the cross-appeal did not include a notarized verification. Instead, the parent submitted a document titled "Affirmation of Truth" in which the parent affirmed, under penalty of perjury, that the contents of the answer were true to her knowledge. Having considered the arguments presented by the parties' and the circumstances presented, outright dismissal of the parent's answer to the cross-appeal is not warranted and the arguments contained therein are considered as part of this matter.

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]).⁸ "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 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.)."⁹ 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 §

⁸ 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]).

⁹ 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 (Questions and Answers), VESID Mem. [Sept. 2007], available at <https://www.nysed.gov/special-education/guidance-parentally-placed-nonpublic-elementary-and-secondary-school-students>). 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.). The guidance has recently been reorganized on the State's web site and the paginated pdf versions of the documents previously available do not currently appear there, having been updated with web based versions.

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

The IHO's finding that the district failed to provide the student with a FAPE on an equitable basis for the 2024-25 school year is not appealed by either party. Accordingly, this finding has become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

A. Legal Standard

As an initial matter, the district in its cross-appeal asserts that the IHO erred by failing to apply the Burlington-Carter test to determine whether the services unilaterally obtained by the parent for the 2024-25 school year were appropriate for the student. In this matter, the student has been parentally placed in a nonpublic school and the parent does not seek tuition reimbursement for the costs of the student's attendance. Instead, the parent challenges the district's failure to develop an appropriate IESP for the student or to implement the May 2017 preschool IEP and, as a self-help remedy, she has unilaterally obtained private services from LEAD for the student without the consent of school district officials, and then commenced due process to obtain remuneration for the costs thereof.

Accordingly, the issue in this matter is whether the parent is entitled to public funding of the costs of the private services. "Parents who are dissatisfied with their child's education can unilaterally change their child's placement . . . and can, for example, pay for private services, including private schooling. They do so, however, at their own financial risk. They can obtain retroactive reimbursement from the school district after the [IESP] dispute is resolved, if they satisfy a three-part test that has come to be known as the Burlington-Carter test" (Ventura de Paulino 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."]).

The parent's request for district funding of privately-obtained services must be assessed under this Burlington-Carter framework. Thus, a board of education may be required to reimburse parents for their expenditures for private educational services they obtained for a student 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).

Accordingly, the district is correct that, prior to considering relief, the IHO should have applied the Burlington-Carter analysis to determine: (1) whether the district met its burden to prove that it offered the student a FAPE for the 2024-25 school year; and (2) whether the parent met her burden to prove that the services provided by LEAD were appropriate to meet the student's unique needs. In its cross-appeal, the district does not challenge the IHO's finding that it failed to offer the student a FAPE for the 2024-25 school year, so as previously stated that issue is final and not before me. However, as the IHO failed to analyze the hearing record to determine whether the parent met her burden under Burlington-Carter that the unilaterally-obtained services provided by LEAD were appropriate, I now turn to the district's challenge to the appropriateness of the unilaterally-obtained services.

B. 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; see Rowley, 458 U.S. at 203-04; Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see also 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 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., 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). 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

While not in dispute, a discussion of the student's needs is necessary to provide context for determining whether the services provided to the student by LEAD during the 2024-25 school year were specially designed to address those needs.

The May 2017 preschool IEP, developed when the student was two years old, reflected that he was a bilingual Yiddish speaker who presented with cognitive, communication, social/emotional, and behavioral deficits, as well as expressive/receptive language and motor delays (Parent Ex. B at pp. 18-22). The IEP reflected that the student was then-able to follow the routine of the classroom, but his "inhibition and excessive social anxiety" prevented him from developing peer relationships and social skills (id. at p. 22).

As noted above, there is little information in the hearing record as to what occurred between May 2017 and the 2023-24 school year. During the 2023-24 school year, the parent challenged a February 2023 IEP and placed the student in a "'mainstream' parochial school combined with the special education supports and services provided through pendency" (Parent Ex. B at p. 8). The IHO in the matter relating to the 2023-24 school year determined there was insufficient basis to find that placement appropriate, noting that "despite receiving a high level of one-to-one support over a period of years, the student [wa]s functioning at least two years below grade level" (id.).

According to the September 2023 IESP, a December 2022 administration of the Wechsler Intelligence Scale-Fifth Edition (WISC-V) to the student yielded a full-scale IQ in the low average range of intelligence (Parent Ex. D at p. 1). The IESP indicated that the student's verbal functioning was in the extremely low range and significantly lower than his scores in other domains (id.). For

example, during testing, the student had difficulty when asked to provide explanations for social situations such as "what to do if you see thick smoke coming from the window of your neighbor's house," "why most schools do not allow students to bring cell phones to class," or "why one should close lights when no one is using them" (id. at p. 2).

The IESP also indicated that, as measured by the Woodcock-Johnson III Normative Update-Tests of Achievement (WJ-III NU Tests of Achievement), the student's decoding skills were in the low average range, while his reading comprehension skills, mathematic reasoning ability, and ability to perform calculations were in the low range (id. at p. 2). In addition, based on the administration of the WJ-III NU Tests of Achievement the student's writing skills were poor and his spelling ability was in the low range (id.). According to the IESP, the student's speech and language development was delayed and school records indicated the student had difficulty with auditory processing and expressive language skills (id.).

The September 2023 IESP reflected the contents of a September 13, 2023 SETSS progress report (Parent Ex. D at p. 3). Based on the progress report, the IESP noted the student was reading at an approximate second-grade level according to Fountas and Pinnell reading levels (id.). The IESP described the student as being able to read simple CVC words, but noted he displayed significant delays with regard to his decoding skills, and while his reading had become more accurate, it was not yet fluent (id.). The September 2023 IESP indicated that the student could acquire a reading skill "on some level" but needed constant and consistent practice in order to master it, and while he knew many skills in isolation, he struggled to generalize this knowledge and read accurately in text (id.). The IESP included information from the SETSS progress report that indicated the student's poor decoding skills affected his ability to comprehend what he was reading and he struggled to understand the deeper or inferential meaning of a text on his own (id.). The IESP indicated the student had a "very simplistic understanding of the world" which hindered his comprehension (id.). As recorded in the IESP, the student's SETSS provider used "leveled readers" when working with the student, as well as visual aids to teach phonics and targeted questions to help the student find the answer in a text (id. at p. 2). The IESP also included information from the student's teacher, indicating the student had difficulty with long and short vowels and consonant and vowel blends and difficulty reading new words (id. at p. 4).

As reported by the student's SETSS provider, the September 2023 IESP noted the student's math skills were at a second-grade level, with "support and constant review" (Parent Ex. D at p 3). The student demonstrated good number sense, could count from 1-100, add and subtract single digit numbers, and made improvements with double digit numbers but still struggled with regrouping (id. at pp. 3-4). The SETSS progress report, as reflected in the September 2023 IESP, indicated the student struggled with many grade level math concepts, including solving two-step word problems, and he struggled to use mental strategies to add, had difficulty retaining math skills that had been taught, and required reteaching of math skills multiple times for mastery of information (id.). Based on the SETSS progress report, the IESP stated that the student's SETSS provider used manipulatives, visual aids, modeling, and feedback to address the student's needs (id.).

The September 2023 IESP reflected that the student's handwriting was "sloppy" and he struggled to formulate letters, did not stay on the line, and did not produce letters of the same size (Parent Ex. D at pp. 3, 5). The IESP cited the SETSS progress report which indicated that the

student's hands tired easily and it took him a long time to write a few sentences (id. at p. 3). With regard to written expression, the IESP stated that, with teacher assistance, the student had learned to begin writing assignments using an idea web and then formulating sentences with proper structure, punctuation, and spelling (id.).

With regard to communication skills, the September 2023 IESP reflected information from the SETSS progress report that indicated the student's vocabulary was below grade-level, and he often had difficulty with word retrieval when retelling an experience or responding to a question (Parent Ex. D at p. 3). The IESP indicated the student "had a hard time relating to the use and function of words and attending to verbal instruction" (id.). Based on teacher report, the IESP indicated the student stuttered when trying to express himself and had difficulty getting his message across (id. at p. 4). According to the IESP, the parent reported that the student was being seen privately for speech-language therapy and had made progress but continued to benefit from speech-language therapy (id.).

Additional information from the SETSS progress report indicated that the student was well-meaning and wanted to do well but his poor self-awareness skills and distractibility often got in the way of his success (Parent Ex. D at p. 4). The September 2023 IESP also noted that the student was respectful of teachers and peers, well-liked, and his play was socially appropriate (id.). However, the IESP reflected that the student struggled with exercising self-confidence, feelings of self-worth, and reducing tension, anxiousness, and nervousness (id. at pp. 4-5). According to the teacher, the student often got agitated with peers and struggled with proper wording to express himself (id. at p. 5). The student's teacher indicated that the student had difficulty understanding social norms, issues with personal space, inappropriate social behaviors at home, and a lack of social concerns (id.).

Physically, the September 2023 IESP noted that, based on parent report, the student was in good physical health, wore glasses, and had previously received vision therapy (Parent Ex. D at p. 5). The IESP reflected that the student needed reminders to complete age-appropriate dressing skills (id.).

The September 2023 CSE identified the modifications and resources needed to address the student's management needs including: small group instruction with written and visual expression strategies; time management skills for classwork assignments (stop watch, timer, countdown); one-on-one check-ins (during small group work or independent driven tasks); proximity to teacher during whole-class and small-group instruction; prompting and comprehension checks to remain on task; a positive learning environment; praise and positive reinforcement; use of media such as video and short films for math; hands-on activities; use of manipulatives in math; use of mnemonics; and, adaptive writing utensils for writing (Parent Ex. D at p. 6).

2. LEAD Remedial Services

According to the director of LEAD, the agency provided the student with SETSS, speech-language therapy, and OT for the 12-month 2024-25 school year and "possibly the year before as well" (Parent Ex. L ¶ 11; Tr. p. 13).¹⁰ She testified that the student's services began in July 2024

¹⁰ Although the November 2023 IHO decision, relating to the 2023-24 school year, did not identify the name of

(Tr. p. 13). She testified by written affidavit that the providers of those services were State certified and that both the student's SETSS provider and speech-language pathologist were bilingual in Yiddish (Parent Ex. L ¶¶ 12-14). The director indicated that the student's progress was measured through quarterly assessments, consistent meetings with the providers and support staff, and session notes (id. ¶ 19). She further testified that the student was making progress, he required continuation of the services, and the services were provided at the student's mainstream school, typically outside the classroom (id. ¶¶ 18, 20).

An August 2024 SETSS progress report documented that the student continued to have challenges in math, reading, and writing (Parent Ex. G at pp. 1-4). The August 2024 report indicated that the student was at the end of fourth grade and that his math skills were at a third-grade level with "support and constant review" (id. at p. 1). The SETSS provider reported that the student had "good number sense," was able to add and subtract easily with single digit numbers, and "do doubles by rote after learning through visual mnemonics" (id.). In addition, the student was able to add double- or triple-digit numbers applying regrouping skills but needed "teacher prompting or visual prompts to remember the steps involved and to do it correctly" (id.). The 2024 SETSS progress report noted that the student had "great trouble" solving two- or three- step word problems involving addition and subtraction due to his difficulty identifying key vocabulary terms that would help him determine the math strategy required (id.). According to the progress report, the student was "slowly" learning multiplication facts and had learned some fact families (id.). The SETSS provider guided the student to use "sketching of math word problems and computation facts to help him achieve better results" (id.). The August 2023 SETSS progress report described the student as benefitting greatly from positive reinforcement and clear schedules, both of which helped keep the student motivated to learn, see the predictability of lessons, and maintain focus (id.). While the August 2024 progress report included then-current information regarding the student's math needs and skills, it also reflected information carried over from the student's September 2023 IESP (compare Parent Ex. G at p. 1 with Parent Ex. D at p. 3). Additionally, two of the three math goals listed in the SETSS progress report were carried over from the September 2023 IESP (compare Parent Ex. G at p. 1 with Parent Ex. D at p. 7).

In reading, the August 2024 SETSS progress report indicated that the student was performing at a Fountas and Pinnell level L but did not identify the grade level at which the student was performing (Parent Ex. G at p. 3). The progress report reflected that the student had learned and increased his sight word vocabulary and could recognize and read the sight words in isolation (id. at p. 2). The SETSS provider carried over information from the student's September 2023 IESP regarding his reading fluency, distractibility, and his need for constant and consistent practice to help generalize his reading skills (compare Parent Ex. G at p. 2 with Parent Ex. D at p. 3). The SETSS provider indicated that the student had shown some progress in his overall comprehension, and had learned new vocabulary and how to identify new words and their meaning. (Parent Ex. G

the agency that provided the student with services during the 2023-24 school year by name, the exhibit list annexed to the November 2023 IHO decision shows that the same person who testified as the director of LEAD in this matter submitted an affidavit as part of the parent's evidence in the prior matter (see Parent Exs. B at p. 11; L). Additionally, it is worth noting that although the parent asserts that the November 2023 IHO decision "determined that the services delivered by the same company, in the same amounts were appropriate" (Answer to Cross-Appeal at p. 2 n. 1); the IHO explicitly found that there was not a sufficient basis to find that the parental placement met the student's special education needs (Parent Ex. B at p. 8).

at p. 2). The SETSS progress report reflected that with the implementation of the "Visualizing and Verbalizing methodology," the student had learned to "visualize and then sketch text/ stories read" (id.). In addition, the student had been taught to retell a story or text "using Story Grammar Marker/Braidy methodology" (id.). The SETSS provider also indicated that the student's reading skills were "taught and addressed through []exposure [to] leveled readers with many genres, Orton Gillingham and Wilson Reading programs," visual aids, and the incorporation of educational games (id.).

In writing, the August 2024 SETSS progress report reflected that the student still struggled with organization, letter formation, and development of writing (Parent Ex. G at p. 3). The student continued to exhibit overall weak letter formation, weak word placement and tired easily when writing (id.). The SETSS provider indicated that the student was "very unmotivated to do writing assignments," and was easily frustrated and distracted when doing writing tasks (id.).

The hearing record includes a July 2024 speech-language progress report, written by a speech-language pathologist, which indicated that the student presented with "significant" receptive, expressive, and pragmatic language deficits" evidenced in his "difficulty in reading/auditory comprehension skills, reasoning skills, predicting outcomes, abstract thinking, and problem-solving skills," and his struggle with metacognitive skills (Parent Ex. H at p. 1). The speech-language pathologist stated that the student was "extremely" literal and had difficulty comprehending and using information expressed in a more abstract manner and struggled with controlling his impulsivity (id.). The student was described as tending to make careless mistakes and answer questions abruptly (id.). Further, the student had difficulty with perspective-taking skills, cause and effect, and social problem-solving (id.). The speech-language pathologist reported the student also had difficulty maintaining the topic of conversations while showing interest and sharing thoughts when conversing with others (id.). The 2024 speech-language progress report noted that the student had difficulties in dealing with and regulating his feelings and tended to ignore and withdraw from any emotional encounter (id.). Further, the student had difficulty expressing his feelings and "often [felt] confused when dealing with any emotions" (id.). The speech-language pathologist described the student as "highly motivated to succeed" and noted that he had shown progress in his ability to regulate himself through self-talk and problem-solving (id. at p. 1). The student's self-esteem and confidence were reported to have greatly increased due to an "increase in thinking/reasoning skills and organizational skills" (id. at p. 1). The speech-language pathologist created annual goals for the student that focused on: improving his expressive language and semantic skills; increasing his auditory comprehension skills; increasing his problem-solving and reasoning skills; and, improving his social cognitive skills (id. at p. 2).

A July 2024 OT progress report indicated that the student presented with sensory, behavioral, and developmental delays (Parent Ex. I at p. 1). The progress report reflected that the student demonstrated poor body awareness, sensory processing, and at times, stumbled over objects, and was inattentive while walking (id.). The student was described as "very fidgety in [the] classroom," had difficulty sitting for long periods, and displayed poor proprioception and balance (id.). The 2024 OT report indicated that the student had poor focus and attention in the classroom and poor awareness or ability to adequately respond appropriately to his environment (id.). He demonstrated poor ability to regulate himself and his emotions and struggled with understanding social cues and conversational skills (id.). The occupational therapist reported that the student presented with "active (non-integrated) reflexes" which the therapist indicated directly

impacted the student's learning and behaviors, and a retained Moro reflex resulted in a hyper-startle response to stimuli that resulted in "excessive tantrums, [the student's] stiff posture, and hi[s] constant[]feeling [of being] overwhelmed in his environment" (id.). As a result, the student stiffened up and was "unable to function freely with ease and flow" and to be "playful with his environment" (id.). The OT progress report indicated that the student's handwriting deficits included size, spacing of letters, decreased speed when writing, and grasp, all of which impacted his ability to write even for short periods (id.). The 2024 OT report reflected that the student displayed motor planning difficulties such as "coordinating and terminating movements during motor tasks" (id.). When performing rhythmic activities, the student's movements were said to appear "jerky, irregular and asymmetrical" (id.). To address the student's deficits, the occupational therapist's interventions included: rhythmic movement training and "muscatova reflex program" to integrate the Moro reflex, symmetrical tonic neck reflex, and asymmetrical tonic neck reflex; sensory integration; handwriting practice; "Brain gym"; midline processing activities; visual motor activities; visual perception activities; "cranio-sacral therapy"; and acupuncture therapy (id. at p. 2). The OT provider created annual goals for the student that focused on: dribbling a ball between right and left hand; crossing midline when appropriate; performing sensory regulatory strategies when prompted; forming all upper and lower-case letters appropriately; maintaining standing position when shifted off balance; and sustaining a gross motor activity for five minutes (id. at pp. 2-3).

As detailed above, the July and August 2024 progress reports described the student's needs as observed by the providers who worked with him during summer 2024 as well as an overview of some of the strategies and supports they used to address his needs. However, the parent's evidence demonstrated several deficiencies that were also noted in the November 2023 IHO decision regarding the evidence presented for the 2023-24 school year. For instance, in the November 2023 IHO decision, the IHO indicated that "no information was presented regarding the student's 'mainstream school', which is at the center of the student's educational program; and how the student's many unique needs are supported in that school" (Parent Ex. B at p. 8). Further, the IHO found that despite receiving a high level of one-to-one support over a period of years, the student was functioning at least two years below grade level (id.). During the impartial hearing at issue here, the parent did not submit any invoices, a student schedule, attendance records, or, again, any information regarding the general education school placement the student attended during the school year at issue.

Particularly concerning is the fact that there is no evidence the student received PT and, as described above, the July 2024 OT progress report noted the student's deficits related to reflex integration, balance, motor planning and ability to sustain gross motor activities which impacted his learning and behaviors. Further, in 2023, the student's IESP indicated that the student was demonstrating deficits with exercising self-confidence and presented with a "feeling of being worthless or inferior to other children" and needed to reduce tension, anxiousness, nervousness (see Parent Ex. D at p. 5). In 2024, the student's speech-language provider stated that the student continued to have difficulty regulating his feelings, withdrew from "any emotional encounter," and had difficulty expressing his feelings; yet, there is no evidence that the student is receiving counseling or another special education service to adequately address these identified needs (Parent Ex. H at p. 1).

Further, the parent's due process complaint notice indicated that her disagreement with the September 2023 IESP was not with the student's present levels of performance or recommended related services; instead, the parent disagreed with the reduction of SETSS from ten periods per week to six periods per week and the removal of extended school year programming (Parent Ex. A at pp. 2-3). In this case, the parent's contract with LEAD indicates that the parent was requesting LEAD to deliver services "to whatever extent possible" and that LEAD would "make every effort to implement the recommended services (SEIT [SETSS], OT, PT and speech-language therapy) with suitable qualified providers" for the 2024-25 school year, which is not a guarantee that the services would continue or that the student would receive some set minimum level of services (Parent Ex. F at p. 1). The contract with LEAD did not contain counseling, and it also cannot be determined at this time, based on the hearing record, whether the services the student received during the summer also continued during the 2024-25 10-month school year.

Accordingly, I find that the parent has not met her burden under of proving that the July and August 2024 services delivered by LEAD were sufficient to meet the student's unique special education needs. Further, the hearing record does not contain any evidence after September 2024 of the services being delivered to the student and, therefore, they cannot be deemed appropriate for purposes of direct funding by the district. Under the totality of the circumstances, the parent failed to demonstrate that the services being provided by LEAD were sufficient to meet the student's special education needs.

C. Pendency

I next turn to the parent's assertion that the student's services should be funded under pendency. The IDEA and the New York State Education Law require that a student remain in his or her then current educational placement, unless the student's parents and the board of education otherwise agree, during the pendency of any proceedings relating to the identification, evaluation or placement of the student (20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; see Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 531 [2d Cir. 2020]; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 170-71 [2d Cir. 2014]; Mackey v. Bd. of Educ. for Arlington Cent. Sch. Dist., 386 F.3d 158, 163 [2d Cir. 2004], citing Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]; M.G. v. New York City Dep't of Educ., 982 F. Supp. 2d 240, 246-47 [S.D.N.Y. 2013]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *20 [E.D.N.Y. Oct. 30, 2008]; Bd. of Educ. of Poughkeepsie City Sch. Dist. v. O'Shea, 353 F. Supp. 2d 449, 455-56 [S.D.N.Y. 2005]).¹¹ Pendency has the effect of an automatic injunction, and the party requesting it need not meet the requirements for injunctive relief such as irreparable harm, likelihood of success on the merits, and a balancing of the hardships (Zvi D., 694 F.2d at 906; see Wagner v. Bd. of Educ. of Montgomery County, 335 F.3d 297, 301 [4th Cir. 2003]; Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 [3d Cir. 1996]). The purpose of the pendency provision is to provide stability and consistency in the education of a student with a disability and "strip schools of the unilateral authority they had traditionally employed to exclude disabled students . . . from school" (Honig v. Doe, 484 U.S. 305, 323 [1987] [emphasis in original]; Evans v. Bd. of Educ. of Rhinebeck Cent. Sch. Dist., 921 F. Supp. 1184, 1187 [S.D.N.Y. 1996], citing Bd. of Educ. of City

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

of New York v. Ambach, 612 F. Supp. 230, 233 [E.D.N.Y. 1985]). A student's placement pursuant to the pendency provision of the IDEA is evaluated independently from the appropriateness of the program offered the student by the CSE (Mackey, 386 F.3d at 160-61; Zvi D., 694 F.2d at 906; O'Shea, 353 F. Supp. 2d at 459 [noting that "pendency placement and appropriate placement are separate and distinct concepts"]). The pendency provision does not require that a student remain in a particular site or location (Ventura de Paulino, 959 F.3d at 532; T.M., 752 F.3d at 170-71; Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 753, 756 [2d Cir. 1980]; see Child's Status During Proceedings, 71 Fed. Reg. 46,709 [Aug. 14, 2006] [noting that the "current placement is generally not considered to be location-specific"]), or at a particular grade level (Application of a Child with a Disability, Appeal No. 03-032; Application of a Child with a Disability, Appeal No. 95-16).

Under the IDEA, the pendency inquiry focuses on identifying the student's then-current educational placement (Ventura de Paulino, 959 F.3d at 532; Mackey, 386 F.3d at 163, citing Zvi D., 694 F.2d at 906). Although not defined by statute, the phrase "then current placement" has been found to mean either: (1) the placement described in the student's most recently implemented IEP; (2) the operative placement actually functioning at the time when the due process proceeding was commenced; or (3) the placement at the time of the previously implemented IEP (Dervishi v. Stamford Bd. of Educ., 653 Fed. App'x 55, 57-58 [2d Cir. June 27, 2016], quoting Mackey, 386 F.3d at 163; T.M., 752 F.3d at 170-71 [holding that the pendency provision "requires a school district to continue funding whatever educational placement was last agreed upon for the child"]; see Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 452 [2d Cir. 2015] [holding that a student's entitlement to stay-put arises when a due process complaint notice is filed]; Susquenita Sch. Dist. v. Raelle, 96 F.3d 78, 83 [3d Cir. 1996]; Letter to Baugh, 211 IDELR 481 [OSEP 1987]). Furthermore, the Second Circuit has stated that educational placement means "the general type of educational program in which the child is placed" (Concerned Parents, 629 F.2d at 753, 756), and that "the pendency provision does not guarantee a disabled child the right to remain in the exact same school with the exact same service providers" (T.M., 752 F.3d at 171). However, if there is an agreement between the parties on the student's educational placement during the due process proceedings, it need not be reduced to a new IEP, and the agreement can supersede the prior unchallenged IEP as the student's then-current educational placement (see Bd. of Educ. of Pawling Cent. Sch. Dist. v. Schutz, 290 F.3d 476, 483-84 [2d Cir. 2002]; Evans, 921 F. Supp. at 1189 n.3; Murphy v. Arlington Central School District Board of Education, 86 F. Supp. 2d 354, 366 [S.D.N.Y. 2000], *aff'd*, 297 F.3d 195 [2d Cir. 2002]; see also Letter to Hampden, 49 IDELR 197 [OSEP 2007]). Moreover, a prior unappealed IHO decision may establish a student's current educational placement for purposes of pendency (Student X, 2008 WL 4890440, at *23; Letter to Hampden, 49 IDELR 197).

The parties agree that the IHO erred in finding that the student's placement during the pendency of this matter is based on the September 2023 IESP.

The parent argues that pendency should be found in the November 2023 IHO decision, while the district argues that pendency cannot lie in the November 2023 IHO decision because the IHO in that case did not make a determination regarding whether the services obtained during the 2023-24 school year were appropriate. Thus, according to the district, pendency would lie in the student's May 2017 preschool IEP. However, it should be noted that substantively the parent agrees with the district in terms of the student's educational placement during the pendency of this

proceeding in that the November 2023 IHO decision ordered the district to provide the services which were recommended in the November 17, 2017 IEP, albeit without finding that those services were appropriate. Accordingly, the difference between the parties' positions is not about the student's educational program; rather, the dispute centers around who funds the program and at what rates the student's providers are paid.

In order for the parent's position as to funding of the services at the contracted for rates to be successful, the November 2023 IHO decision would have to be considered as establishing the student's pendency program. However, review of that decision indicates that it set the student's pendency services in that proceeding and continued them through development of an appropriate IESP. A pendency decision in one proceeding may not serve as the basis for pendency in a future proceeding because, in order to represent an agreement between the parties, the unappealed decision upon which pendency may be based must be a decision on the merits, including a determination of the appropriateness of the unilateral placement (see 34 CFR 300.518[d]; 8 NYCRR 200.5[m][2]; see also *Ventura de Paulino*, 2020 WL 2516650, at *9; *Schutz*, 290 F.3d at 484-85; *Letter to Hampden*, 49 IDELR 197). The November 2023 IHO decision ordered that the district fund 10 hours of individual services of a special education teacher per week, three 30-minute sessions of individual speech-language therapy, three 30-minute sessions of individual OT, and two 30-minute sessions of individual PT (Parent Ex. B at pp. 9-10). However, the IHO in the November 2023 IHO decision did not make a determination regarding the appropriateness of the parent's unilateral placement but rather ordered that the district provide the above services bilingually in Yiddish, on a 12-month basis, at the requested rate, until such time as it developed an appropriate IESP (*id.* at p. 9). Thus, because the November 2023 IHO decision did not include a determination on the merits that the private services obtained by the parent were appropriate and instead appears to have ordered that the student's pendency services, as set forth in that proceeding, continue through the development of an appropriate IESP, that decision was not a pendency setting event and it does not form the basis for pendency in this proceeding.

Therefore, the basis for the student's pendency in this proceeding is the student's May 2017 preschool IEP which was the last agreed upon IEP for the student. Accordingly, the district is responsible for the provision of the student's services according to the May 2017 IESP for the duration of this proceeding.

VII. Conclusion

As discussed above, the IHO erred by failing to conduct an analysis of the appropriateness of the unilaterally obtained services during the 2024-25 school year. Having conducted that review on appeal, under the totality of the circumstances, the parent failed to meet her burden to prove the appropriateness of the SETSS and related services delivered by LEAD to the student during the 2024-25 school year, without provision of either PT or counseling services. The IHO also erred in finding that pendency was based on the September 14, 2023 IESP and the student's placement for the pendency for this matter is based on the May 2017 preschool IEP.

I have considered the parties' remaining contentions and find that I need not address them in light of my determinations above.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO decision dated October 22, 2024, is modified by reversing the portion which held that pendency should be based on the September 14, 2023 IESP and ordering that the basis for pendency in this matter is the May 2017 preschool IEP.

Dated: **Albany, New York**
 May 12, 2025

STEVEN KROLAK
STATE REVIEW OFFICER